**IN THE HIGH COURT OF SWAZILAND**

Case No. 1513/14

In the matter between:

**PHEYO INVESTMENTS (PTY) Ltd** **Plaintiff**

**VS**

**LIDWALA INSURANCE COMPANY** **Defendant**

**Neutral citation:** ***Pheyo Investments Pty Ltd Vs Lidwala Insurance Company (1513/14) [2016] SZHC 94 (20 June 2016)***

**Coram:** **FAKUDZE, J**

**Heard:** **21 April 2016**

**Delivered:** **20 June 2016**

**Summary**: ***Civil Procedure: Application to strike out on basis that new facts have been alleged in a replication – determination as to whether or not facts are new or just an expansion of what was pleaded in the***

***particulars of claim – In a contract, sufficient for a Plaintiff to plead that he or she has fulfilled all the terms and conditions of the contract – Defendant duty bound to establish breach of a term or terms. Where a party has filed a replication there is nothing that can stop the filing of further or subsequent pleadings prior to the pleadings being closed or deemed to be closed. Rule 25 (5) of the High Court Rules provides for that. Application dismissed with costs including costs of counsel.***

## JUDGMENT

[1] For purposes of this Application, Applicant is Defendant in the main action and Respondent is the Plaintiff. I shall refer to the Parties as Applicant/Defendant and Respondent/Plaintiff.

[2] This is an Application to strike out certain allegations in the Plaintiff's Replication based on the fact that these allegations contain new facts.

[3] The background to this Application is that:-

(a) The Applicant/Defendant repudiated an insurance claim submitted by the Respondent/Plaintiff on the basis that the latter had breached the warranty clause applicable to the insurance policy pertaining to a sprinkler system.

(b) Pursuant to the repudiation the Respondent/Plaintiff sued out summons against the Applicant/Defendant on 6th November, 2014. A request for further particulars was made and replied to. The Applicant/Defendant then filed its Plea. The Respondent/Plaintiff then amended its particulars of claim and the Applicant/Defendant filed an amended Plea.

(c) Subsequently, the Respondent/Plaintiff then filed a replication on 1st June, 2015. The Applicant/Defendant raised two objections to the replication. The first objection related to paragraphs 4,5,6,7 and 8 of the replication and the basis for the objection was that the plaintiff was seeking to withdraw an admission that it had made in the particulars of claim. In its particulars of claim, the plaintiff had admitted that the sprinkler warranty formed part of the policy and that it had complied with the policy and was now purporting to withdraw that admission. The second objection related to paragraphs 10, 11, 12, 13, and 14 of the replication and the basis was that the plaintiff was introducing new averments in a replication that ought to have been contained or pleaded in the particulars of claim. In particular, the plaintiff was now contending that it was a tenant on the premises and operated on a limited portion of the premises and that it was not in control of the sprinkler system and therefore not in a position to maintain it as required in the warranty. The plaintiff conceded the first objection and proceeded to file an amended replication which effectively deleted paragraphs 4,5,6,7 and 8 of the replication. However, plaintiff maintained paragraphs 10,11,12,13 and 14 of the original replication, albeit now numbered paragraphs 5,6,7,8,9 and 10.

[4] The Applicant/Defendant has accordingly filed this Application to strike out the aforementioned paragraphs on the basis that they constitute new allegations.

**APPLICANT'S/DEFENDANT'S CASE**

[5] The Applicant's/Defendant's case is that a party may not introduce a new matter by way of a replication. It must confine itself to the matters that were pleaded in the particulars of claim.

[6] The issue for determination is whether the averments complained of in the replication now travel further than the allegations made in the declaration. In the declaration, the plaintiff stated in paragraph 7 of its particulars of claim that "it had fully or duly complied with its obligations in terms of the insurance agreement and had paid premiums due under the contract."

[7] In support of his proposition, the Applicant/Defendant cites **Herbstein and Van Winsen Fifth Edition** at page 662 where the Learned authors state that:-

> "***If new allegations made in a replication have the effect of widening the scope of the action as set out in the combined summons or declaration, the replication is excipiable on the ground of variance between it and the combined summons or declaration as the case may be. Such a variation is referred to as a departure."***

[8] The Applicant/ Defendant further argues that new matters may not be pleaded by way of a replication and that the scope thereof cannot be widened by referring this court to the case of **Butler V Swan 1960 (1) SA** 527 at 528 where the Learned Judge said:-

> ***"It is a well known rule that a plaintiff cannot increase the ambit of his claim by making allegations in the replication that travel further than the allegations he has made in the declaration; to the extent that they do travel further, such allegations can, I think, be struck out."***

[9] The Applicant/Defendant buttresses his argument by saying that if the Respondent/Plaintiff wanted to point out that he was not responsible for the maintenance of the sprinkler system by virtue of being a tenant, then that should have been pleaded in the particulars of claim. The Applicant/Defendant would then have been in a position to respond to that in his Plea.

[10] The Applicant/Defendant argues that the new allegations are to the effect that Respondent/Plaintiff did not comply with some of the terms and conditions of the insurance policy because it was a tenant and therefore did not have control over the sprinkler system. The plaintiff highlights the fact that the policy required that the sprinkler installation and other fire fighting equipment in so far as they were under the control of the insured were kept in proper working condition and service worthy. The other effect is that the Plaintiff could not maintain the sprinkler system because it was not under its control.

[11] The Applicant/Defendant finally argues that since the replication has been filed, he will have no opportunity to respond to the new issues that have been raised in the replication. The only available remedy is to have the objectionable material struck out.

**RESPONDENT'S/PLAINTIFF'S CASE**

[12] The Respondent's/Plaintiff's cause of action is based on a written Agreement of Insurance entered into on 28 December 2010 which was renewed from time to time. In paragraph 7 of the particulars of claim, the Respondent/Plaintiff alleges that it had duly complied with its obligations in terms of the Agreement.

[13] The Respondent/Plaintiff contends that Plaintiff's plant and machinery were damaged by a fire at the premises insured under the fire section of the Agreement. The Respondent/Plaintiff suffered loss of income and claim for such loss and damage constitutes the Respondent's/Plaintiff's claim.

[14] In pleading to paragraph 7 of the particulars of claim, the Applicant/Defendant denied that Respondent/Plaintiff complied with its obligations under the Agreement and alleged that it had breached the sprinkler warranty because the sprinkler, under its control were not kept in proper working order or serviced regularly.

[15] The Respondent/Plaintiff further contends that paragraphs 5 to 10 of the amended replication pleaded to paragraph 5 of the Applicant's/Defendant's Plea in which the insurer relied on a "breach," are therefore necessary and appropriate to the Applicant's/Defendant's denial that plaintiff had complied with the agreement.

[16] The Applicant/Defendant specified in what respect it alleged that Respondent/Plaintiff had breached the warranty and paragraphs 5 to 10 deal with those allegations. In short, the Respondent/Plaintiff argues that the replication therefore deals with an issue raised by the Applicant/Defendant and is relevant to an issue in the action. To support his proposition that it suffices for the Respondent/ Plaintiff to plead compliance with all the obligations under the contract, the Respondent/Plaintiff referred this court to the wise words of **Hoexter JA in Resisto Dairy V Auto Protection Insurance Company 1963 (1) SA** 632 at 645 where the Learned Judge says:-

> ***"There are many cases in our reports in which it has been held or assumed that if an insurer denies liability in a policy on the ground of a breach, by the insured of one of the terms of the policy, the onus is on the insurer to plead and to prove such a breach."***

Reference has also been made to Gordan and Getz, **The South African Law of Insurance** 4th Edition.

[17] The Respondent/Plaintiff submits that after it has alleged compliance in its Particular of Claim, the onus is accordingly on the Applicant/Defendant to plead and prove a breach of the sprinkler warranty.

[18] The Respondent/Plaintiff further submits that the Applicant/Defendant argues that Respondent/Plaintiff should have specifically pleaded why it was unable to comply with the warranty, an argument this Honourable termed as the pleading of a qualified compliance. The Respondent/Plaintiff respectfully submits that the Applicant's/Defendant's argument entirely misinterprets the replication in that it is not the pleading of qualified compliance. It is a denial that there was any breach of the specific terms of the warranty. This is because the warranty relates only to the sprinkler installations and equipment under the plaintiff's control.

[19] The Respondent/Plaintiff alleges that the actual provisions of the warranty was that "all sprinkler installation and other firefighting equipment such as…… in so far as they are under control of the insured be kept in proper working condition and serviced regularly……." The Respondent/Plaintiff submits that it is essential to consider and have regard to the extent and ambit of the alleged warranty. It is therefore entirely correct for the plaintiff to merely allege compliance with the agreement as it stands and for defendant to plead a breach. It was accordingly also entirely for the Plaintiff to replicate and rely on the exact terms of the warranty in the agreement and plead facts in support therefore which deal with the defence alleged in the Plea.

[20] On the issue that since a replication has been filed, Applicant/Defendant will have no opportunity to address the issues raised in the replication, the Respondent/Plaintiff states that there is provision for rejoinder. The South African and Swaziland Rule 25 (5) provides that further pleadings may be delivered by the respective parties within a time limit after/of the previous pleading delivered by the opposite party. Both the South African and the Swaziland Rule 25 (5) say that "such pleadings shall be designated by the names by which they are customarily known."

[21] The Respondent/Plaintiff finally argues that while further pleadings may seldom be required in practice they clearly exist in terms of the High Court Rules. It is irrelevant that the terms "rejoinder" is not specifically used in both Swaziland and South Africa as there clearly is a provision for further pleadings and the names for such pleadings and in particular a "rejoinder" are well established in civil

procedure in Swaziland and South Africa. The filing of a further pleading cannot constitute an "irregular step."

**APPLICANT'S/DEFENDANT'S REPLY**

[22] Applicant's/Defendant's reply to what has been raised by the Respondent/Plaintiff is that:-

(i) There is no general rule relating to pleading in insurance matters and the general proposition is that all pleadings and in particular declarations, must comply with Rules 18 and 20 of the High Court.

(ii) The Particulars of claim must contain a clear and concise statement of the material facts upon which the plaintiff intends to rely. He must set out his cause of action. **Imprefered (Pty) Ltd V National Transport Commission 1993 (3) SA 94 (A)** is in support of this proposition;

(iii) The Plaintiff was under an obligation to place all facts within his knowledge in order to prove that he had complied with the provision of the insurance contract. His failure to do so cannot be remedied through a replication;

(iv) The Plaintiff was required to prove that it had complied with the provisions of insurance contract with no exception. If an exception existed, then it needed to set out those facts as part of the cause of action;

(v) The crisp issue is whether the plaintiff had discharged its obligation, then it was obliged to plead that fact. If however it had a qualification to the discharge of its obligation, then it was obliged to plead that qualification;

(vi) Rejoinder, surrender, rebutter and surrebutter are not provided for in our Rules of Court or Practice Directives. The Plaintiff is effectively requiring this court to introduce a new rule of practice;

(vii) The courts should be slow in accepting a rule of practice or form of pleadings that is not provided for in the Rules as that may give rise to uncertainty and confusion; and

(viii) Our Rules provide for furnishing of further particulars for purposes of pleadings and accordingly, the court must take into cognisance that there are avenues for a party to deal with a deficiency in its pleadings which is either by way of amendment or by way of further particulars.

**COURT'S OBSERVATIONS AND CONCLUSION**

[23] In its observation, the court will basically consider three issues in this matter. I will first and foremost address the issue of particularity in respect of pleadings. Secondly, I will address the issue of replication. The question is should the alleged new averments have been contained in the particulars of claim so as to avoid the widening of the scope of the action or it suffices if they are in the replication? The third and final issue is whether there is provision for further pleadings after the filing of the replication. In other words, do the Rules of the High Court allow for the filing of further pleadings before the pleadings can be considered closed. Let us now address the three issues in the order in which they are mentioned in this part of the judgment.

**(a) Particularity of pleadings**

[24] For purposes of this judgment our focus will be on Rule 18 (4) and (5) of the High Court Rules. These sub rules provide that:

***"(4) Every pleading shall contain a clear and concise statement of the material fact upon which the pleader relies for his claim, defence***

***or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.***

***(5) When in any pleading a party denies an allegation of fact in the previous pleading of the opposite party, he shall not do so evasively but shall answer the point of substance."***

[25] Giving further insight on this principle of material facts being pleaded, the Full Court observed in the case of **Buchner V Johannesburg Consolidated Investment Co. Ltd 1995 (1) SA** 215 (T) at 216 as follows:

***"The Necessity to plead material facts does not have its origin in this rule. It is fundamental to the judicial process that the facts have to be established. The court on the established facts, then applies the rule of law and draws conclusions as regard the rights and obligations of the parties and gives judgment. A summons which propounds the plaintiff's own conclusions and opinions instead of the material facts is defective. Such a summons does not set out a cause of action. It would be wrong if a court were to endorse a plaintiff's opinion by elevating it to a judgment without first scrutinising the facts upon which the opinion is based."***

[26] The Applicant's/Defendant's argument (as stated in its Papers and in the Heads of Argument as supplemented) is that the Respondent/Plaintiff was under an obligation to place all the facts within his knowledge in order to prove that he had complied with the provision of the insurance contract. He further argues that the Plaintiff was supposed to do so with no exception. If an exception existed, then it needed to set out these facts as part of the cause of action. The gist of the submission is whether the Respondent/Plaintiff had discharged its obligations, and if it had, then it was obliged to plead that fact. If, however, it had a qualification to the discharge of its obligation, then it was obliged to plead that qualification.

[27] The Respondent's/Plaintiff's argument (as stated in its Papers and in the Heads of Argument as supplemented) is that what has been pleaded in paragraph 7 of the Particulars of Claim says it all. It is Respondent's/Plaintiff's case that the words

that " the Plaintiff has duly complied with its obligations in terms of the Agreement and has paid the premiums due under the contract" is a material fact that has been pleaded in accordance with the requirement of particularity with respect to pleadings. In other words, Respondent/Plaintiff has complied with all its obligations and in the event there are some obligations that have been not complied with, it is for the Applicant/Defendant to establish that when filing its Plea.

[28] It is Respondent's/Plaintiff's further assertion that once it is alleged that there is full compliance with the terms and conditions of the contract, the onus is on the Applicant to disprove that.

[29] It is this court's view that Respondent's/Plaintiff's contention on particularity of his Particulars of claim (paragraph 7) is correct and holds a lot of water. Support for this proposition is found in **Herbstein and Van Winsen: the Practice of the High Court of South Africa, Fifth Edition Vol 1** at pages 565 to 566 where the learned Authors state that:-

> ***"If a party relies on a fact and will fail in the claim or defence unless at the trial that fact is proved, that fact will be a material fact. A plaintiff acts in breach of this requirement when the particulars of claim include extensive extracts from and references to other documents and sources, or when, despite the particulars containing concise statements are not material to any clearly disclosed cause of action."***

[30] Brevity is the way to go when it comes to the drafting of pleadings. The court is therefore inclined to hold the view as expressed in **Resisto Dairy** case (Supra) that "If an insurer denies liability in a policy on the ground of a breach by the insured of one of the terms of the policy, the onus is on the insurer to plead and to prove such breach." Respondent/Plaintiff has said enough and it is now Applicant's/Defendant's time to prove the breach.

**(b) <u>Replication raising new issues</u>**

[31] The general principles governing the filing of a replication is that a plaintiff may not use a replication as a means to introduce a new cause of action or to increase the ambit of his claim or to supplement deficiencies in his declaration. New allegations are permissible where these are required to respond to issues raised in a Plea. The replication must answer the point of substance in the plea and not be evasive.

[32] In the case of **Butler V Swan 1960 (1) SA 527 at 528** it was stated that :

> "***It is a well known rule that a plaintiff cannot increase the ambit of his claim by making allegations in the replication that travel further than the allegations he has made in the declaration; to the extent that they do travel further such allegations can, I think, be struck out."***

**Herbstein and Van Winsen** (Supra) capture a similar thought in page 662 when the Authors say:-

> ***"If new allegations made in a replication have the effect of widening the scope of the action as set out in the combined summons or declaration, the replication is excipiable on the grounds of variance between it and the combined summons or declaration, as the case may be."***

[33] The Applicant/Defendant contends that the Respondent has violated the fundamental principles relating to replication, and has sought to widen the scope of the action, by introducing new averments that ought to have been contained in the declaration and as a corollary, according to the Applicant/Defendant an opportunity to plead to such averments.

[34] The Applicant/Defendant further contends that the Respondent/Plaintiff has, in paragraph 5 to 10 of the replication, sought to introduce new facts which are entirely inconsistent with the original cause of action. In its particulars of claim the Respondent/Plaintiff alleged that it had complied with the conditions of the

policy and now seeks to change the contention. According to the Applicant/Defendant the net effect of these allegations is that the Respondent/Plaintiff did not comply with some of the terms of the insurance policy because it was a tenant and therefore did not have control over the sprinkler system. The Respondent/Plaintiff highlights the fact that the policy required that the sprinkler installation and other fighting equipment in so far as they were under the control of the insured were kept in proper working condition and service worthy. The Respondent/Plaintiff could not maintain the sprinkler system because it was not under its control.

[35] The Respondent/Plaintiff argues to the contrary by saying that Paragraphs 5 to 10 of the amended replication pleaded, was in response to paragraph 5 of the Defendant's Plaintiff's Plea in which the insurer relied on a "breach" of the warranty. These paragraphs are therefore an appropriate and necessary response to the Applicant's/Defendant's denial that Respondent/Plaintiff had complied with the agreement. The Applicant/Defendant specified in which respect it alleged that the Respondent/Plaintiff had breached the warranty and paragraphs 5 to 10 deal with those allegations. In short, the replication therefore deals with an issue raised by the Applicant/Defendant and is relevant to the issue in the action.

[36] The Respondent/Plaintiff further contends that the warranty in the insurance policy refers to all sprinkler installation and other fire fighting equipment under its control and the Respondent/Plaintiff was therefore correct to simply allege compliance with the agreement in its particulars of claim as compliance was only relevant to installations and equipment under its control.

[37] It is Respondent's/Plaintiff's contention that as long as the averments in the replication are replies to matters raised in the Plea there can be no objection to them. New allegations are clearly permissible where they deal with statements in the Plea. There is no variance in the replication which still avers that the Respondent/Plaintiff complied with its obligations. Respondent/Plaintiff therefore submits that a plaintiff cannot be expected to anticipate a defence in its Particulars

of Claim and plead facts relevant to compliance in advance of the Plea. This is precisely what the Applicant/Defendant is seeking to impose on the Respondent/Plaintiff by its challenge to the replication.

[38] Having heard Counsel for both parties on this point this, court is also equally inclined to agree with the Respondent's/Plaintiff's Counsel. This is premised on the fact that a Plaintiff has the right to reply to issues raised in a Plea. This is what we call a replication. **Herbstein and Van Winsen, the Civil Practice of the Superior Courts in South Africa, 3rd Edition** has this to say at page 347:-

> ***"The replication is the plaintiff's reply to the defendant's plea and where a replication is required it must be delivered within……"***

[39] The other consideration the Court has taken into account in arriving at the decision that the Respondent's/Plaintiff's contention is correct is the fact that the replication that has been filed serves the purpose of responding to an issue that has been raised on the pleadings, particularly the Plea. In its Plea, the Applicant/Defendant had stated that the Respondent/Plaintiff had breached the term pertaining to the sprinkler systems. The Respondent/Plaintiff responded by saying that it only occupied a portion of the building and that the sprinkler system for the whole building was not therefore under <u>its control</u> and that it was therefore not in breach of the warranty. It alleges that it complied with its obligations by maintain <u>the equipment under its control</u> (my emphasis).

[40] All that the Respondent/Plaintiff is doing according to this court's view, is to allege compliance with this obligation under the agreement. It cannot therefore be required to plead matters which may be raised in a defence as part of the Particulars of claim. Since the Applicant/Defendant has pleaded its defence in its Plea, the Respondent/Plaintiff is accordingly entitled to raise an issue in respect of that alleged breach and he does so by means of a replication. In short, the replication can be viewed as an amplification or a further clarification to the issue raised in paragraph 7 of the Particulars of Claim where the Respondent/Plaintiff had stated that it had complied with its obligation under the agreement. After the Applicant/Defendant has raised the issue of breach in its Plea, the

Respondent/Plaintiff is responding by saying that all sprinkler system under its control and not under the control of the owner of the premises, were in a working condition when the fire on the premises occurred.

[41] It is also the court's considered view that a party is entitled to introduce new allegations where these are called for by the Plea, but the plaintiff may not in his replication introduce a fresh claim or a new cause of action or increase the amount claim. **Herbstein and Van Winsen** (Supra) demonstrate this point so ably when the Authors say:-

> ***"New allegations would usually be required in a replication where the Plea is in the nature of a confession and avoidance. If the defendant in a defamation action were to admit to the use of words but claim that they were uttered upon a privileged occasion, it would be open to plaintiff in his replication to allege that the defendant was actuated by malice. This would be a new allegation called upon by the nature of the statements in the Plea and as long as the averments are in the nature of replies to matters raised in the Plea, they are in order***." Page 347.

[42] This court holds the view that the matters that have been raised by the Respondent/Plaintiff by way of a replication fall into the category of matters that are a reply to the matters raised in the Plea and are therefore in order. They are not meant to raise new issues and to widen the scope of the action as set out in the summons or declaration. In my view there is no variance between the replication and the summons or declaration.

**(c) Further pleadings after replication**

[43] The Applicant/Defendant argues that he is unable to deal with the issues raised in the replication and the court should therefore strike out the offensive paragraphs. He augments this point by saying that Rejoinder, surrejoinder, rebutter and surrebutter are not provided for in our Rules of Court or practice directive. Effectively, the Respondent/Plaintiff is requiring this court to introduce a new

Rule. He cautions that courts should be slow in accepting a Rule of practice or form of pleadings as that may give rise to uncertainty and confusion.

[44] The Respondent's/Plaintiff's take on this point is that in the main argument on the Defendant's/Applicant's behalf, it was argued that it could not respond to the replication and was prejudiced. That is when Respondent's/Plaintiff's argument that the Applicant/Defendant was entitled to file a rejoinder emerged. Respondent's/Plaintiff's argument is that there is no legal merit to what Applicant/Defendant is saying. Other than the time for filing further pleadings, there is no difference in the South African and Swaziland Rule 25 (5). Both provide that further pleadings may be delivered by the respective parties within a time limit after the previous pleading has been delivered by the opposite party.

[45] The Respondent/Plaintiff finally contends that while the further pleadings may seldom be required in practice they clear exist in terms of the High Court Rules. It is irrelevant that the term "rejoinder" is not specifically used in both Swaziland and South Africa as there is a clear provision for further pleadings and names for such pleadings and in particular a "rejoinder" are well established in civil procedure in Swaziland and South Africa.

[46] The court's view on this point of further pleadings after the replication is that the legal position articulated by the Respondent/Plaintiff is not only persuasive, but correct. This court is therefore inclined to agree with the Respondent/Plaintiff. Rule 25 (5) is the basis upon which this court finds itself ruling in favor of Respondent/Plaintiff.

The Swaziland Rule states that:-

> ***"(5) Further pleadings, may, subject to the provisions mutatis mutandis of sub-rule (2), be delivered by the respective parties within eight days of the previous pleading delivered by the opposite party. Such pleadings shall be designated by the names by which they are customarily known."***

[47] The South African Rule is also crafted in a similar fashion and it says:

> ***"(5) Further pleadings may, subject to the provisions mutatis mutandis of sub-rule (2), be delivered by the opposite party within ten days after the previous pleading delivered by the opposite party. Such pleadings shall be designated by the names by which they are customarily known."***

See B1-167 **of Erasmus on the Superior Court Practice,** JUTA and CO.

[48] Respondent/Plaintiff does admit, though, that the pleadings referred to in Rule 25 (5) are rarely used in practice, but nevertheless they clearly exist in terms of the High Court Rules. The customary names by which they are known are mentioned **Erasmus** (Supra) as Rejoinder, Surrejoinder, Rebutter and Surrebutter.

[49] Flowing from all that has been observed by this court above, this court has come to the noble conclusion that there is no need for Respondent's/Plaintiff's replication to be struck out or excepted to. This Application is therefore dismissed with costs including costs of Counsel in terms of Rule 68 (2).

[50] May I express this court's appreciation for the illuminating and thought provoking arguments that have been marshalled by both counsel for the parties in this case. Their tireless effort in ensuring that the work of the court is made much easier is worth mentioning and I therefore commend both counsel for a job well done.

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FAKUDZE J.

JUDGE OF THE HIGH COURT

For: Applicant: Z. Jele

For Respondent: Advocate P.E. Flynn

Instructed by Henwood and Company