

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Makiwane and Others (94888/2016) [2018] ZAGPPHC 689 (7 September 2018) [2018] ZAGPPHC 689

COURT

North Gauteng High Court, Pretoria

BEFORE

Modisa

CASE / FILE NUMBER

94888/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH

AFRICA

GAUTENG DIVISION, PRETORIA

In

the matter between:

CASE NO: 94888/2016

7/9/2018

ABSA

BANK

LIMITED

Applicant

(REG

NO. 1986/004794/06)

and

ROSE RUTH NTOMBI MAKIWANE

ID

:[...]

First

Respondent

MVELASEE

MVUYO NDZIBA
ID
NO.
:[...]
Second
Respondent
NOBANTU
LINDELWA NDZIBA
ID
NO.
[...]
Third Respondent
DEBORAH
LOVELL HARDING (SILVER)
ID
NO.:
[...]
Fourth
Respondent

JUDGMENT

MODISA AJ:

[1] This is an application in terms Rule 30 of the Uniform Rules of Court which has been launched by the Applicant against the Respondent's

plea to the simple summons;

[2] The Applicant's complaint is that the Respondent committed an irregular step by pleading to the Applicant's[1] simple summons and not to the declaration dated 02nd July 2015;

[3] The Applicant delivered a notice in terms of Rule 30(2) (b) to the First to Third Respondents[2] dated 17 November 2015 which was served on 19 November 2015[3] ;

[4] The Applicant's attorneys of record transmitted an e-mail after the notice in terms of Rule 30(2) (b) was issued which email was

transmitted through a letter dated 26 January 2016[4]. It is clear that the Respondents were given an opportunity to remove the cause of complaint within a period of 10 (ten) days after service of the notice failing which an application to strike out the plea will be launched;

[5] The Applicant sought compliance in or before 03 February 2016 and unfortunately the First to Third Respondents chose to ignore the

notice which prompted the Applicant to launch the Rule 30 application on 14 March 2016;

[6] The application in terms of Rule 30 is opposed and the Respondents delivered their opposing affidavit during April 2016;

[7] The Respondents[5] submitted that the declaration was delivered after a lapse of some 13 (thirteen) months and there was a pending summary judgment

application and consequently the declaration was supposed to be filed in terms of Rule 32(8A);

[8] The Respondents persist with the opposition of the Rule 30 application on the following basis:

8.1 That it was improper for the Applicant's attorneys to transmit correspondence to grant leave to defend to the summary judgment without a Court order;

8.2 That the declaration was pleading to the entire action and it raised a special plea comprising of a technical defence;

8.3 That it is not an irregularity to plead to a simple summons;

8.4 That the Applicant should have compelled the Respondents to plead to the declaration;

8.5 That condonation was required in respect of the replying affidavit in the Rule 30 application which was filed after 5(five) months and therefore the replying affidavit is not properly before Court;

8.6 That the Rules 30 application is not the proper way of enforcing compliance and the Applicant should have simply proceeded with the Rule 30 A notice;

8.7 That the Applicant did not inform the Respondents that they have an option to object.

[9] All the grounds upon which the Respondents rely upon in opposing this Rule 30 application are without substance;

[10] It is common cause that the Respondents erstwhile attorneys, Koster Attorneys transmitted an email to the Applicant's attorneys on 14 May 2014 wherein they confirmed that their client has been granted leave to defend and that the notice of removal may be served via email[6]. In my view, there is no pending summary judgment application as same has been resolved between the parties by agreement;

[11] The contention by the Respondents to the effect that it is not an irregularity to plead to a simple summons and the Applicant should have compelled the Respondent to plead to the declaration is entirely incorrect;

[12] The Respondents committed an irregularity or took an irregular step by pleading to the simple summons prior to the delivery of the declaration;

[13] Nothing turns on the late filing of the replying affidavit and the late filing of the Rule 30 application. In any event, the Court has the inherent power to protect and regulate its own process having regard to the Respondents' failure to object to the late filing of the replying affidavit and/or the Rule 30 application itself;

- [14] In the circumstances , the replying affidavit is properly before Court as well as the Rule 30 application;
- [15] I disagree with the proposition by Counsel for the Respondents to the effect that the Applicant should have compelled the Respondents to plead to the declaration. This does not justify the irregular step taken by the Respondents in pleading to the simple summons;
- [16] I also disagree with Counsel for the Respondents with the submission to the effect that the Rule 30 application is not the correct way of enforcing compliance but rather they should have proceeded with Rule 30 A. It is striking that the Respondents did not issue any Rule 30 A notice in objecting to the replying affidavit because Rule 30 A *stricto sensu* deals with non-compliance with the Rules of Court and it would have been applicable because the replying affidavit is due within a period of 10 (ten) days after the answering affidavit has been delivered and any replying affidavit filed out of time is a subject of non-compliance with the rules and a party is entitled to invoke the provisions of Rule 30 A under those circumstances;
- [17] The argument by the Counsel for the Respondents to the effect that the provisions of Rule 32 were not complied with in particular subrule 32 (8A) thereof is not sustainable;
- [18] The argument is without merit because the summary judgment application was disposed of and the declaration was delivered pursuant to the provisions of Rule 20 (1) of the Uniform Rules of Court having regard to the fact that the summary judgment between the parties did not serve before Court when it reached the final stages i.e. when leave to defend was granted by the Applicant. In any event, on the supposition that the provisions of Rule 32 (8A) were applicable, the declaration would have been due for delivery within 20 (twenty) days of the granting of leave to defend by the Court and it would have been prudent for the Respondents to issue a notice of bar rather than to complain that the declaration was filed after a period of 13 (thirteen) months. The Applicant was not debarred to deliver a declaration for a mere fact that same was issued after the lapse of 13(thirteen) months because the Respondents waived their right to object either by failing to issue a notice in terms of Rule 30A and/or by failing to invoke the provisions of Rule 26;
- [19] I also disagree with the contention by Counsel for the Respondents that the Applicant should have withdrawn the summary judgment and tendered costs if they were of the view that there existed a bona fide defence. It is customary to grant a Defendant leave defend and normally costs are costs in the cause;
- [20] It is irrelevant whether the Respondents have a defence on the merits of the main action because what has to be adjudicated in *casu* is the Rule 30 application. I will therefore refrain from dealing with the defence of the Respondents as it is contained in their special plea and the plea filed off record.
- [21] The fact of the matter is that it is common cause that the Respondents pleaded to the simple summons prior to the delivery of the declaration;

[22] The argument by Counsel for the Respondents that the Applicant should have filed an exception to the plea after having realised that they have pleaded to the simple summons is also without merit. I agree with Counsel for the Applicant that the exception is on the content of the pleading itself. This matter is simply about whether the First to Third Respondents took an irregular step or not.

[23] In the premises the following order is made:

1. The First, Second and Third Respondents defence is struck out due to the failure to comply with the Applicant's notice in terms of the provisions of Rule 30 (2)(b) of the Uniform Rules of Court;
2. The First, Second and Third Respondents , jointly and severally the one paying the other to be absolved are ordered to pay the costs of this application on a party and party scale;

MODISA AJ

HIGH COURT OF SOUTH AFRICA

DATE OF HEARING:

28 AUGUST 2018

DATE OF JUDGMENT:

APPLICANT'S COUNSEL:

ADV A.A. BASSON

APPLICANT'S ATTORNEY:

TIM DU TOIT Co. INC

FIRST, SECOND AND THIRD

RESPONDENTS' COUNSEL : ADV M. NDZIBA

RESPONDENTS' ATTORNEYS CJ MOKHAVELE INC

[1] The Plaintiff in the main action

[2] First to Third Defendants in the main action;

[3] Annexure AE1; pp 10 to 13

[4] Annexure AE2 and AE3; pp 14 and 15

[5] Reference will be made to the First, Second and Third Respondents as ' Respondents' to the exclusion of the Fourth Respondent which is not a party to the Rule 30 proceedings

[6] Annexure REP2; pp56 - 60

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Prepared on 10 October 2026 · Esheria