

SOUTH AFRICA / JUDGMENT

ABSA Bank Limited v Mosima and Another (15820/2022) [2023] ZAGPPHC 682 (17 August 2023)

[2023] ZAGPPHC 682

COURT

North Gauteng High Court, Pretoria

BEFORE

Millar

CASE / FILE NUMBER

15820/2022

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IN THE HIGH COURT
OF SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)
Case No. 15820/2022

REPORTABLE: YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO
REVISED

DATE: 17 AUGUST 2023
In

the matter between: ABSA
BANK LIMITED
APPLICANT
And
MOSIMA,
J
FIRST
RESPONDENT
MOSIMA,
NL
SECOND
RESPONDENT

Coram:	Millar J Heard on: 26 July 2023
Delivered:	17 August 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 17 August 2023.
Summary:	Application in terms of Rule 30A and exception heard together – Rule 30A predicated on a misunderstanding of Rule 25 – exception – failure to make out a cause of action – inclusion of reference to non-existent paragraphs – exception upheld.

JUDGMENT

MILLAR J

- [1] This judgment concerns two applications – one in terms of rule 30A[1] of the Uniform Rules of Court and the second an exception. The former is brought by the cited defendants and the latter by the plaintiff. For convenience I intend to refer to the parties in this manner.

BACKGROUND

- [2] On 15 March 2022 the plaintiff instituted action against the defendants claiming that they were in default of their obligations to the plaintiff in respect of a loan agreement that the parties had entered into on 13 November 2017.
- [3] Initially, after service, the matter was held in abeyance when the parties attempted to mediate. Inexplicably, the mediation was unsuccessful.
- [4] It is inexplicable because once the plaintiff put the defendants on terms to file a plea on 28 November 2022, they did so and lo and behold put up as a defence a written settlement agreement entered into between the parties on 13 November 2017 in respect of the same loan, and which had been entered into when action had previously been instituted against the defendants. Apparently neither were aware of this for the months that mediation was underway.
- [5] Now aggrieved, the defendants filed, together with their plea on 9 December 2022, counterclaims for inter alia[2] damages arising out of what was said to be inuria suffered by them in consequence of the plaintiff's failure to comply with the settlement agreement.

- [6] The plaintiff decided to withdraw its action against the defendants and tender costs – this occurred on 21 December 2022 . When the plaintiff withdrew its claim, there ceased to be any lis between the parties on the grounds set out in the plaintiffs’ particulars of claim. All that was left before the court is the defendants’ counterclaims. For all intents and purposes and notwithstanding the citation of the parties, the defendants were now the plaintiffs and the plaintiff the defendant.
- [7] The 20-day time period for the delivery of the plaintiff’s plea to the counterclaims commenced reckoning from 12 December
2022. Having regard to the dies non[3] between 16 December 2022 and 15 January 2023, the last day for the filing of the plaintiff’s plea would have been 6 February 2023.
- [8] In the meantime, on 28 January 2023 the defendants delivered a notice of intention to amend their counterclaims. The amendment was not opposed and was subsequently effected on 9 February 2023.
- [9] The plaintiffs had in the meantime delivered, quite unnecessarily, a notice of intention to defend the counterclaims on 6 February 2023, labouring under the mistaken belief that as it had withdrawn its action, notice of opposition to the counterclaims needed to be given.
- [10] On 9 February 2023 and at the same time that the amendment was effected, the defendants delivered a notice in terms of Rule 30A in which it was claimed that the delivery of the notice of intention to defend was an irregular step. This was then followed by the plaintiff with a notice in terms of rule 30A in which it was claimed that the defendant’s failure to attach the written contract upon which the first counterclaim was premised also constituted an irregular step. Neither of these were pursued.
- [11] Once the amendment of the counterclaims was effected, there were now 3 such claims that the plaintiff was faced with. On 17 February 2023 the plaintiff delivered a notice to remove cause of complaint[4] in terms of Rule 23(1) to the defendant’s claims for iniuria and afforded the defendant’s 15 days within which to remove the cause of complaint.
- [12] There was no response from the defendants and so an exception was taken on 27 March 2023. The exception was subsequently set down for hearing. It was followed on 30 June 2023 with an application in terms of Rule 30A by the defendants.
- [13] It is convenient to deal firstly with the Rule 30A application and then the exception.

THE RULE 30A APPLICATION

- [14] The rule 30A application was advanced on the following basis:

“1 . That the Respondent's said Exception, be and is hereby declared to be an improper or irregular step on account of same not being compliant with the provisions of Rules 23(1), 25 and 26, read with Sections 34 and 171 of the Constitution of the Republic of South Africa Act 1 and the Superior Courts Act2.

2. That the Respondent's said Exception be set aside and/or struck out.
3. Alternatively, that the Respondent comply with the Applicants' Rule 30A Notice, within an appropriate time period to be set by the Court in its order in terms hereof."

[15] The crux of the argument advanced by the defendants is that the plaintiff's plea to the counterclaims is not a plea in the ordinary sense as provided for in rule 22 of the rules of court but rather something different.

[16] It was argued that it is "another pleading" as referred to in rule 25. On this argument, it was not necessary for it to comply with the requirements of rule 22, particularly

insofar as it had to be delivered within 20 days. Furthermore, rule 26 which requires the delivery of a notice of bar after the 20 day period, before the defaulting party is ipso facto barred from delivering a plea was also argued to find no application.

[17] The defendant also argued that the plaintiff was barred from pleading on 6 February 2023. This date was calculated based on the plaintiff having 15 days from the date on which the counterclaim was delivered, excluding the dies non. It was also argued that the delivery of the notice of intention to amend the counterclaim on 28 January 2023 was of no moment and that because the plaintiff's reply fell within what was termed "another pleading" in rule 25, that once the 15-day period referred to in that rule had passed, the plaintiff was ipso facto barred.

[18] This somewhat convoluted argument had as its conclusion the relief sought by the defendants in the rule 30A application. The effect of the relief sought is to have the delivery of the exception when it was, declared an irregular step and in so doing either to have it set aside or to put the plaintiff to the effort of bringing an application for condonation.

[19] The argument advanced by the defendants is predicated on a misunderstanding of the provisions of rule 25(1) which provides:

"Within 15 days after the service upon him of a plea and subject to subrule

(2) hereof, the plaintiff shall where necessary deliver a replication to the plea and a plea to any claim in reconvention, which plea shall comply with rule 22." [my underlining]

[20] The interpretation that the defendants cast upon rule 25(1) is that the 15-day period refers to both a replication as well as a plea in reconvention. The way in which the rule is cast however, is that a distinction is drawn between a replication, to which the 15-day period applies and a plea in reconvention which "shall comply with rule 22". The last clause of the rule contains this qualification and is to be read disjunctively from the clause preceding it.

[21] Rule 22(1) specifically provides that a party who is required to deliver a plea, whether in convention or in reconvention, as in the present case, is only obligated to do so within a period of 20 days.

[22] Furthermore, rule 26 provides that:

“Any party who fails to deliver a replication or subsequent pleading within the time stated in rule 25 shall be ipso facto barred. If any party fails to deliver any other pleading within the time laid down in these Rules or within any extended time allowed in terms thereof, any other party may by notice served upon him require him to deliver such pleading within five days after the day upon which the notice is delivered. Any party failing to deliver the pleading referred to in the notice within the time therein required or within such further period as may be agreed between the parties, shall be in default of filing such pleading, and ipso facto barred: Provided that for the purposes of this rule the days between 16 December and 15 January, both inclusive shall not be counted in the time allowed for the delivery of any pleading.”

[23] So, having regard to the provisions of rules 22, 25 and rule 26, insofar as a plea in reconvention is concerned, the plea in reconvention is a plea, and once the time period for the filing of that plea has elapsed, it is only upon the service of a notice of bar in terms of rule 26 and failure to comply within the 5 days referred to in that notice, that the party would be ipso facto barred.

[24] A plea in reconvention is neither a replication nor a “subsequent pleading” and accordingly there is no automatic bar as the defendants argue.

“The object of the rules is to secure the inexpensive and expeditious completion of litigation before the courts: they are not an end in themselves. Consequently, the rules should be interpreted and applied in a spirit that will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive manner as possible” [5]

[25] The interpretation that the defendants argue for, would as a consequence, if it were to be accepted, create a parallel and more onerous process for parties required to plead in reconvention. This is untenable and not consonant with the overall scheme and purpose of the rules.

[26] Since it is common cause that there was no notice of bar served by the defendants on the plaintiff, either before or after the effecting of the amendment, both the notice in terms of rule 23(1) and the subsequently delivered exception were timeous.

[27] It follows that since the plaintiff has complied with the rules, the application in terms of rule 30A must fail.

THE EXCEPTION

[28] The plaintiff excepted to two of the three counterclaims made by the defendants. The grounds upon which the exceptions were brought were the following:

“In respect of Counterclaim B:-

1.1 Counterclaim B, constitutes a claim of “INJURIA”, which is ostensibly premised on either a breach of contract or the

provisions of Sections 110, 111, 112, 129 and/or 3 of the National Credit Act, 34 of 2005.

1.2 Insofar as breach of contract is relied upon, the Plaintiffs have failed to plead the basis upon which the conduct of breach constitutes a wrongful omission for purposes of sustained a delictual claim.

1.3 The Plaintiffs have failed to plead the basis to sustain the conclusion that the provisions of Sections 3, 110, 111, 112 or 129 of

the National Credit Act, 34 of 2005 (hereinafter “the Act”), provides a statutory basis to sustain a claim for in that a statutory duty of care is imposed for purposes of sustaining a delictual claim, especially one premised on the action iniuriarum. Without detracting from the generality hereof and in addition hereto:-

1.3.1 Respectively Sections 3, 112 and 129 of the Act do not contain any right of action;

1.3.2 Section 110 of the Act presupposes that a request for statements was made on part of the Plaintiffs, no allegation in this respect is pleaded; and

1.3.3 Section 111 of the Act presupposes that the Plaintiffs have disputed an account entry, no allegation in this respect is pleaded.

1.4 The Plaintiffs have failed to plead the impairment of the relevant aspect of personality relied upon. Specifically, the Plaintiffs have failed to plead whether the impairment pertain to person or dignity or reputation, under circumstances where the claim is not divisible and therefore multiple claims premised on the same alleged wrongful act cannot be sustained.

1.5 Insofar as the impairment sought to be relied upon pertain to reputation, the Plaintiffs have failed to plead any publication.

Moreover, the Plaintiffs cannot plead publication in light thereof that the conduct relied upon constitutes an omission instead of a positive act.

1.6 The Plaintiffs have failed to plead the basis for the calculation of the quantum of the claim with sufficient particularity to enable the Defendant to plead thereto. Additionally, the Plaintiffs have failed to plead the basis upon which the Defendants have respective claims for damages.

In respect of Counterclaim C:-

2.1 The Plaintiffs have failed to allege and plead facts in substantiation of the relevant intent (*animo iniuriandi*) in the institution of process that will sustain an action iniuriarum for institution of malicious proceedings.

2.2 The allegation that the proceedings were withdrawn does not factually sustain the legal conclusion pleaded that the proceedings were terminated in the Plaintiffs' favour.

2.3 Insofar as the damages sought to be recovered in terms of Counterclaim C relate to special damages relating to legal costs, this constitutes special damages which has not been particularized, under circumstances where the Plaintiffs' costs were tendered in the notice of withdrawal attached to the counterclaim as annexure "JM6".

2.4 The Plaintiffs have failed to plead facts that sustains a causal link between the conduct of the Defendant and the damages allegedly suffered.

2.5 The Plaintiffs have failed to plead the basis upon which the Defendants have respective claims for damages."

[29] Both claims to which the plaintiff has excepted are claims for iniuria. This cause of action is for relief for an impairment of the person, dignity, or reputation which impairment is committed wrongfully and intentionally.[6]

[30] In *Dendy v University of the Witwatersrand and Others* [7] the three essential requirements to establish such an action were held to be:

"(i) An intention on the part of the offender to produce the effect of his act;

(ii) An overt act which the person doing it is not legally competent to do; and which at the same time is;

(iii) An aggression upon the right of another, by which aggression the other is aggrieved and which constitutes an impairment of the person, dignity or reputation of the other."

[31] It is trite that when considering an exception, this must be done within the confines of the case as pleaded and that all the averments contained in the pleading are accepted as being correct.[8] Relevant to the determination of the present exception[9], is whether or not on the case as pleaded by the defendants, there is a cause of action. The test to be applied is set out in *H v Fetal Assessment Centre*[10] where it was held:

"[10] In the high court the matter was decided on exception. Exceptions provide a useful mechanism "to weed out cases without legal merit," as Harms JA said in Telematrix. The test on exception is whether on all possible readings of the facts no cause of action may be made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts". [my emphasis]

[32] It was argued on the part of the plaintiff that properly construed, claim B does not disclose a cause of action. It was argued that since there was no overt act pleaded and relied upon, there was no cause of action. Furthermore, even if a cause of action was found, the pleading did not disclose the impairment of the relevant aspect of personality relied upon.

[33] The high-water mark of the defendants pleading in this regard was paragraph 25 of claim B in which it was stated:

“The Defendants further aver that the Plaintiff’s conduct aforesaid, as well as the Plaintiff’s conduct set out in paragraphs 17 to 39 and 41 to 46 above, amounted to and constituted an unfair and degrading treatment against them, particularly when regard is had to the provisions of Section 3 of the NCA”

[34] A number of issues arise from this paragraph. Firstly, the reference to paragraphs 17 onward includes claim A which refers to the loan agreement entered into and its terms and the plaintiff’s breach of the agreement. This reference insofar as it does, only goes as far as paragraph 22. Claim B is set out from paragraph 23 to 28 and claim C from 29 to 41. Paragraph is the allegation of demand. So besides there being no overt act pleaded, there is in the plea reference to

non-existent paragraphs.

[35] In *Le Roux and Others v Dey; Freedom of Expression Institute and Another as Amici Curiae*[11] it was held that it was necessary to plead specifically whether the impairment pertained to person or dignity or reputation as such a claim was not divisible and for this reason multiple claims premised on the same alleged wrongful act were unsustainable.

[36] The final argument advanced in respect of the exception in respect of claim B was that the defendants had failed to plead the basis for the calculation of the quantum. It is accepted that since the “purpose of the *actio iniuriarum* is to recover sentimental damages. It is not necessary to quantify them for the purposes of pleading”. [12] Nothing more need be said in this regard.

[37] On consideration of claim B as framed, it is readily apparent that no overt act has been pleaded and similarly there is no allegation in regard to the specific impairment alleged to have been suffered. This is clear on any reading of claim B. For these reasons the exception in respect of claim B should be upheld.

[38] In regard to claim C, which is a claim in respect of the institution of malicious proceedings, it was argued that while the overt act upon which the action was premised had been pleaded, the defendants had failed to allege and plead facts in order to substantiate the intention (*malice* or *animo iniuriarum*) [13] on the part of the plaintiff.

[39] Additionally, it was argued that in respect of claim C, the damages sought were special damages relating to legal costs [14] but these were not particularized.

[40] For their part, the defendant’s argued that the plaintiff’s exception lacked merit on the basis that the defendant’s counterclaims were not founded on any agreement or contract between the parties. This was beside the point.

[41] It was also argued, without much conviction, that in any event the appropriate time for the plaintiff to have objected, in particular to claim C, was when the defendants sought its introduction through the notice of intention to amend on 28 January 2023. It was argued that the failure to object to the proposed amendment divested the plaintiff from the right to

deliver a notice to remove cause of complaint or to except to the claim as formulated. There is no merit to this argument – it disregards the provisions of rule 28(8)[15] which specifically provides that after an amendment has been effected, the other party may make consequential adjustments to any

documents filed by it and “may also take the steps contemplated in rules 23 and 30.”

[42] For the reasons set out above, the exception in respect of claim C should be upheld.

COSTS

[43] Both parties sought orders for punitive costs against the other. I am not persuaded that punitive costs are warranted and, in the circumstances, intend to make an ordinary order for costs which will follow the result in each of the applications.

ORDER

[44] In the circumstances, I make the following orders:

[44.1] The application in terms of rule 30A is dismissed with costs.

[44.2] The exceptions to claims B and C are upheld with costs.

[44.3] The defendants are granted leave to amend claims B and C within a period of 20 (twenty) days from the granting of this order.

A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON: 26 JULY 2023

JUDGMENT

DELIVERED ON: 17 AUGUST 2023 COUNSEL FOR THE APPLICANT: ADV. C MARKRAM-JOOSTE
INSTRUCTED BY: VZLR INC REFERENCE: MAT175152/E NIEMAND/RK COUNSEL FOR THE
RESPONDENTS: ADV. G SHAKOANE SC ADV. D MOSOMA INSTRUCTED BY: MPYANE ATTORNEYS
REFERENCE: MPYANE/MJ/CIV133/2012

[1] For non-compliance with the Uniform Rules.

[2] There were 3 counterclaims – the first is for a declarator that the plaintiff is in breach of the settlement agreement and for a mandamus to compel compliance. The second and third claims are for iniuria.

[3] Rule 26 of the Uniform Rules – the period between 16 December and 15 January of each year is excluded from the calculation of time for the delivery of pleadings.

- [4] Titled as an Exception but compliant with rule 23(1) and furthermore affording the plaintiff's a period of 15 days within which to address the cause of complaint.
- [5] Erasmus Superior Court Practice, Volume 2 at page D1-7 and to the footnotes referred to therein.
- [6] Amler's Precedents of Pleadings, LTC Harms, 7th Edition, Lexis Nexis, 2007 at p 223.
- [7] 2007 (5) SA 382 (SCA) at para [5].
- [8] Marney v Watson and Another 1978 (4) SA 140 (C) at 144F-G.
- [9] See Living Hands (Pty) Ltd and Another v Ditz and Others 2013 (2) SA 368 (GSJ) at para [15] for a discussion of the general principles relating to exceptions.
- [10] 2015 (2) SA 193 (CC) at para [10]. See also Children's Resource Centre Trust v Pioneer Food (Pty) Ltd 2013 (2) SA 213 (SCA) at para [36].
- [11] 2011 (6) BCLR 577 (CC).
- [12] Ibid. Amler's Page 225 see especially Tarloff v Olivier
- [2004] 1 ALL SA 563 (C); Minister of Safety and Security v Seymour 2006 (6) SA 320 (SCA).
- [13] Relyant Trading (Pty) Ltd v Shongwe and Another
- [2007] 1 ALL SA 375 (SCA).
- [14] Sutter v Brown 1926 AD 155 at 171.
- [15] Rule 28(8) provides: "Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30."

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