

SOUTH AFRICA / JUDGMENT

ABSA Bank v Murray (EL 1130/2013)

[2025] ZAECELLC 2 (4 February 2025)

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COURT

Eastern Cape High Court, East London Local Court

BEFORE

B Hartle

CASE / FILE NUMBER

EL 1130/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, EAST LONDON CIRCUIT COURT)

NOT

REPORTABLE

CASE

NO. EL 1130/2013

In

the matter between:

ABSA

BANK

Applicant/Plaintiff

and

GARY

MURRAY

Respondent/Defendant

And

INTUITIVE

PDA (PTY) LTD

Third party

JUDGMENT

IN RESPECT OF APPLICATION

IN TERMS OF RULE 30 (1)

HARTLE J

[1] The plaintiff (applicant in the interlocutory application) applies in terms of uniform rule 30 (1) to set aside as an irregular or improper step the defendant's delivery of an amendment to his plea by reason of the fact that the defendant filed it without complying with the provisions of Uniform Rule 28, and by further reason that it purports to withdraw admissions made in his initial plea and in pre-trial procedures without any explanation therefor. That is the offence and claimed prejudice to the plaintiff.

[2] The defendant's delivery of the amended plea dated 20 September 2023, without compliance with the provisions of the rule or any application asking for the amendment vouched for by an affidavit

explaining the withdrawal of prior admissions, prompted the plaintiff's resort to the present interlocutory application.

[3] The defendant denies that the step taken was improper or irregular, justifying it instead with reference to an order of this court issued on the occasion of the set down of the action for trial on 31 August

2023 ("the Order") pursuant to an application contemporaneously initiated at his instance for a postponement of the hearing on that date.

[4] The Order reads as follows:

"1. The matter is postponed to 29th and 30th November 2023.

2. The Defendant is to effect any amendments by no later than 20 September 2023.

3. Any response or consequential amendments are to be filed within 20 (twenty) days thereafter.

4. The Defendant is ordered to pay the costs occasioned by the postponement on a scale as between attorney and client." [1]

[5] It is useful to begin with an excerpt from the provisions of Rule 28 that prescribe how amendments to pleadings and documents ought in the ordinary course to be brought about:

"28 Amendments to pleadings and documents

- (1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
 - (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
 - (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
 - (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
 - (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).
 - (6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.
 - (7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
 - (8) 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.
 - (9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.
 - (10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.”
- [6] It is also necessary to advert to a related principle especially relied upon by the plaintiff which is that an application for an amendment seeking to withdraw an admission ought to be supported by an affidavit.[2] The principle however qualifies the form that a Rule 28 (4) application will take once an objection is delivered and the

requirement is only necessary in my view at the stage at which a party seeking to make an amendment lodges an application for it on the basis contemplated by Rule 28 (4).

- [7] It is common cause that the defendant did not utilise the machinery of the Rule to give notice of his intention to amend his plea, did not indicate the nature of the proposed amendment he desired to make, neither did he invite the plaintiff's objection. He simply delivered his amended plea which, in its introduction, is prefaced with the qualification that it was filed "in accordance with the order ... dated 31 August 2023".
- [8] When it was brought to his attention by way of service of a notice in terms of Rule 30 (2)
- (b) that his failure to have followed the ordinary route was objectionable to the plaintiff and he was advised to remove the cause of complaint,[3] the defendant adopted the stance that the Order constituted his authorisation for the delivery of the amendment according to the method adopted by him. Otherwise put, he asserted that the procedure which he had followed, instead of the steps directed by Rule 28, was wholly consistent with the terms of the Order.
- [9] Whilst acknowledging what is the norm, the defendant insisted in his opposition to the present application that the plaintiff agreed to a deviation of what is normally required by Rule 28 under the exigencies that applied at the time of the hearing of the application for postponement and that such variation was therefore valid and binding on the parties. Indeed the defendant asks this court to permit the amendment (despite the plaintiff's objection thereto) and to give leave to the plaintiff to make any consequential amendments to his amended plea which, so the defendant submits, it
- was in any event permitted to do in accordance with prayer 3 of the Order.
- [10] It is not in contention that the application before court at the expected commencement of the trial was not one for leave to amend but of a request by the defendant for a postponement, the eventuality of which in itself was not anticipated until the last minute before the trial was due to start.
- [11] I was informed that this was prompted under circumstances where the third party discovered late and because Nedbank had produced volumes of paperwork under a subpoena on the eve of the trial. The court at the time was advised that the defendant was at a disadvantage because his legal representatives had not had an opportunity to prepare adequately and significantly also because the pleadings did not properly reflect his case. How the defendant was going to remedy that was only vaguely intimated to the court hearing the application for the postponement.
- [12] The counterweight to the defendant's predicament (and need for a continuance) was that the plaintiff was manifestly prejudiced by its inability to have proceeded to finality with the trial despite it having been more than ready to run with it. This in essence was the backdrop against which the Order came to be made, in part consensually between the parties,[4] and otherwise driven by concerns which the court had raised during argument regarding the competing interests of the parties if the postponement was allowed versus if it was denied. It is abundantly plain, from a transcript of those proceedings that was put up by the plaintiff in

its answering affidavit to the present application, that the court - whilst identifying that a postponement was unavoidable, was mindful of finding a solution that both placated the prejudice to the plaintiff by the fact of the hearing being delayed and provided the defendant with an opportunity to correct his pleadings. The time frames and the manner in which the parties ostensibly agreed to remedy the fallout from the postponement are self-evidently made provision for in the Order. It is against this context that Mr. Smuts who appeared for the defendant invited this court to interpret the order to mean that a truncated procedure, rather than the one required by the prescripts of Rule 28, had purposefully been put in place in order to ensure that by the resumed date of the hearing (29 November 2023) the defendant's pleadings would be in order so that the trial could proceed without further ado.

[13] That may well be so, but since the defendant's anticipated amended was really only in the imagination of the defendant's legal representatives at the time, the plaintiff could hardly have foreseen how it was going to react to it once it had been formulated. I am further in no way persuaded that the plaintiff agreed to waive its right to object on any interpretation of the Order. The defendant submits that that eventuality, of the plaintiff not agreeing to the amendment, was especially catered for in prayer 3 of the Order, which stipulation it urged upon this court to hold the plaintiff to. Ironically though, if the plaintiff's objection to the proposed amendment recorded in its Rule 30 (2) (b) notice is taken as its "response" envisaged in prayer 3, the next logical thing for the defendant to have done would have been to lodge an application to amend regardless of the impending postponement date. This he did not do. Instead he asks this court to perfect an amendment which the plaintiff was within its rights to object to and in effect did complain about.

[14] It is a well-established principle that a party desiring an amendment must ask for it and that it is not for the court to make it without being asked.[5] Besides which, the application before me concerns the objection raised in the plaintiff's notice in terms of Rule 30 (2)(b)

rather than an application to amend. For this reason I informed the parties that I should not have to decide the merits of the implied objection to the amendment of the defendant's plea itself.

[15] A further anomaly has arisen concerning the issue between the parties as to whether or not the defendant purported to withdraw any admission previously made by him. In answer to this accusation the defendant retorted that he was just seeking to make sense of what the plaintiff's summons provided, in the absence of it having filed a declaration in the matter.

[16] It is perhaps apposite to advert to the explanation for his denial of the plaintiff's contention that the amended plea withdraws admissions:

"The suggestion that the amended plea withdraws admissions"

22. It will be more convenient to deal with specifics of this allegation in my seriatim response and I will do so below.

23. For the present purposes, however, I point out simply that the allegation is wrong. It is made without reference to the summons as it stands and fails to have regard to the amended plea, as a whole.
24. On this note I am advised that one of the cause of ambiguity in this case is the failure of Absa to follow the Uniform Rules by filing a declaration when its case on a simple summons was opposed.
25. The simple summons, presumably because of the brevity with which it has been prepared, is confusing and inaccurate.
26. For example, the allegations in paragraph 1.1 suggest that moneys were lent and advanced to me “on a mortgage bond account”. I am advised that this is inaccurate and that a loan is lent and advanced on the basis of a loan agreement. A loan arrangement is secured by a mortgage bond.
27. Moreover, the summons fails to set out the material terms of the agreement relied on or to indicate when they were concluded and who represented the parties. I am advised that the Uniform Rules require pleadings to contain this information because it enables a defendant to plead properly to the allegations made.
28. Another ambiguity evident from the summons is in paragraph 4.1 which refers to the “most recent mortgage bond” being attached as annexure “D1”. Not only is there no annexure “D1” to the summons but given that Absa appears to refer in the summons (paragraph 3.1) to three separate mortgage bonds it is difficult to identify exactly what is relied on or suggested by Absa.
29. The amendment to the plea has therefore required an attempt to work out what Absa’s case is with reference to the discovered documents and pre-trial minutes. Had Absa complied with the Uniform Rules in preparing its pleadings, I am advised that this may have been avoided.”
- [17] The defendant’s justification in this respect, coupled with his assertion that there was no declaration to plead to as one would expect in circumstances where the plaintiff commenced the action with a simple summons and the action became opposed, reveals that were are here concerned with the kind of scenario warned against by the authorities where an arrangement to amend before the amendment itself has been formulated has worked to the prejudice of a party. Here in fact it has worked to the prejudice of both parties.
- [18] Erasmus,[6] with reference to *Cross v Ferreira*,[7] states in this regard that:

“... in accordance with the general rule, a Court will not grant leave to amend until the amendment is formulated; Courts are adverse to the procedure of granting leave to amend within the limits laid down by an order, for the amendment when it is ultimately formulated may be found to be excipiable or may unduly restrict the applicant, or confer upon his amended pleading an immunity from exception that might work an injustice to the respondent.[8] If the particulars are not set out in the notice, a party receiving the notice may invoke the provisions of rule 30.”

- [19] A court in determining an application in terms of the provisions of Rule 30 (1) has a wide discretion if it forms the opinion that the proceeding or step is irregular or improper.
- [20] A Rule 30 application is intended to be facile procedure whereby a hindrance to the future conduct of the litigation, whether it is created by a non-observance of what the Rules of Court intended, “or otherwise”, is removed.[9]
- [21] I think it is fair to state that whatever good intentions the parties had in agreeing to expedite the hearing of the trial, both to some extent have been confounded by unexpected irregularities in form that have interposed themselves as clear hindrances to the matter proceeding.
- [22] For the plaintiff’s part it must have realised when confronted with the amended plea that it could not plead consequentially, hence its invocation of the remedy provided for in Rule 30, albeit not to object to the proposed amendment itself but rather the form of it.[10]
- [23] There can be no question in my mind that the plaintiff did not waive its entitlement to object to the anticipated amendment. To the contrary, as I have emphasized before, when it agreed to the terms of the Order, no amendment was by then in contemplation.
- [24] For the defendant’s part, his legal representatives realised when confronted with the obligation to formulate his amendment to the plea in the hurried circumstances that he had agreed to, that it was difficult to plead to the simple summons in the absence of the plaintiff having filed a declaration, but instead of raising that as a hindrance, he forged ahead. Once it became evident that there was no declaration to plead to, however, the filing of a plea should have been recognized as an exercise in futility. Also, any present contest concerning its delivery, import, or impact is rather a moot one.
- [25] In terms of Rule 20 (1) the plaintiff was obliged to deliver a declaration once it became plain that the defendant had delivered a notice of intention to defend. Until such a declaration has been filed, the delivery of any plea at all is to my mind premature.
- [26] The best place to start again in my view would be for the declaration to be filed and even before that, if the parties are so advised, for the plaintiff to ask that the case management order issued by me during the Bhisho/East London pilot case management project pursuant to which inactive cases were being archived, be uplifted.[11]

- [27] In the result I find that the delivery of the amendment is irregular, albeit for a different reason than that suggested by the plaintiff and should be set aside. This would naturally result in the defendant's earlier plea becoming superfluous and every argument against or for it, entirely academic.
- [28] As for the issue of costs, the plaintiff ought to have foreseen that its pleadings were not regular to start with or at least have recognized the encumbrance to the defendant when he qualified in his plea that "the defendant files this amended plea to the plaintiff's simple summons (sic), the plaintiff having failed to file a declaration in the matter".
- [29] The defendant however is also not blameless. Once the realisation dawned on his legal representatives that no declaration had been filed, he ought to have invited the plaintiff to correct the anomaly.
- [30] The plaintiff was notionally right to insist that it was entitled to object to the delivery of the putative amended plea, upon which eventuality the defendant should not have persisted in failing to withdraw it especially with the knowledge that the declaration was absent and because the plaintiff had by then also impliedly objected to the amendment itself.[12]
- [31] Litigants should try to remove hindrances to matters proceeding by their own endeavours before asking the court to intervene. This is after all the objective of the notice required by Rule 30 (2)(b) before resorting to the remedy provided for by sub-rule (1).
- [32] In the circumstances of the matter I am not inclined to reward either of the parties with the costs of the application.
- [33] I issue the following order:
1. The delivery of the defendant's putative amended plea is set aside.
 2. The plaintiff is directed to take whatever steps it is advised to in accordance with the uniform rules of court to regularize its pleadings before the defendant is prevailed upon to plead his defence.
 3. Each party is to pay their own costs of the application.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING

: 8 AUGUST 2024

DATE OF JUDGMENT : 4 FEBRUARY 2025

Appearances:

For the Plaintiff : Mr. D Kotze instructed by Sandenbergh Nel Haggard c/o Bax Kaplan Russell Inc., East London (ref. Mr. Webb).

For the Defendant : Mr. I Smuts SC together Mr. G Brown, instructed by Changfoot Van Breda Attorneys, East London (ref. WC/ddb/MUR9/0001).

[1] The court did not involve itself in the details of the timeframes or minutiae of what was to ensue between the date of its order and the next trial date, which was agreed between the parties at its prompting, but was certainly inclined to order a postponement in principle for the various reasons suggested by the defendant in his application therefor. This was more than evident from the transcript of the proceedings of 31 August 2023 that was put up by the plaintiff in its answering affidavit. The costs order also followed in accordance with the defendant's tender.

[2] Swartz v Van der Walt t/a Sentraten 1998

(1) SA 53 (W) at 56 I – J and 57 A – C and G - J. Such an amendment is considered be a “more substantial” one (57 A – B) hence the requirement that an affidavit should accompany the notice of application to amend when such an

application is initiated upon delivery of an objection as provided for in Rule 28 (4).

[3] The notice was not included in the papers neither is it in the court file, but I was informed from the Bar of its import and assured that its being given prior to the launch of the present application was not in issue.

[4] See footnote 1.

[5] Bams Executors v Haupt (1891) 8 SC 253; The Master v Deedat 2000

(3) SA 1076 (N) at 1090 D – E and Keely v Heller 1904 TS 101 at 103.

[6] Erasmus : Superior Court Practice, Second Edition, Van Loggerenberg, D1 – 330A. See also Keely v Heller Supra at 103.

[7] 1950 (3) SA 443 (C).

[8] Supra at 452.

[9] SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO 1981

(4) SA 329 (O) at 333 G – H.

[10] Given the approach I have adopted herein it is unnecessary to decide the issue whether the plaintiff agreed to a variation of the procedure to amend as provided for in Rule 28 and/or how the terms of the order ought to be interpreted. The plaintiff could however notionally have used Rule 30 (as suggested by Rule 28 (8)) to have objected to the amendment itself. The defendant could then, again notionally, have filed an application to amend at the resumed hearing.

[11] If it remains of any concern and for legal certainty, an informal application to the case management judge would remove this

hindrance, which the defendant also drew attention to in his opposing papers.

[12] In the ordinary course, but for the fact that it came to light that there had been no declaration filed, the defendant ought to have taken the step of applying for the amendment (on his version of how the Order fell to be interpreted). There would in that event have been no obligation on him to tender the costs occasioned by the irregular step that existed in the plaintiff's perception. Those costs would have been costs in the main proceedings. This view is underpinned by two policy considerations, namely (i) that litigants who commit irregularities should be encouraged to cure them quickly and cheaply, without running the risk of an adverse costs order; and (ii) that the purpose of rule 30A is to avoid excessive formality and point-taking and to enable the parties to get on with the litigation by curing between themselves any prejudice caused by an irregularity. See *RVRN Crushing (Pty) Ltd v GDF Incorporated Consultants (Pty) Ltd* 2024 (1) SA 269 (GJ) at para 10 – 13.

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