

SOUTH AFRICA / JUDGMENT

ABSA Bank v Van Zyl (M644/2022)

[2023] ZANWHC 152 (29 August 2023)

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COURT

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

M644/2022

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

CASE NUMBER: M644/2022

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates:

YES/NO

Circulate to Regional Magistrates: YES/NO

ABSA BANK

APPLICANT

and

PIETER VAN ZYL

RESPONDENT

Delivered: The reasons for judgment (order) were handed down by way of e-mail to the parties' legal representatives. The date and time of hand down is deemed to be at 10h00pm on 29 August 2023. A hard copy has been placed in the pigeonholes of the legal representatives of the parties.

REASONS

FOR ORDER

REDDY AJ

Introduction

[1] This application served before me in the Unopposed Court on 11 May

2023. On 25 July 2023, I handed down an order striking the application from the roll with the applicant to pay the costs. The applicant's legal representatives requested reasons for the order of 25 July 2023, which request was filed with the Registrar on 11 August 2023 and served before me on 21 August 2023.

[2] At issue in this judgment is an order granted on 23 February 2023 and the subsequent step taken in the proceedings by the applicant by enrolling the application on 11 May 2023, contrary to the terms of the order of 23 February 2023, which was granted in the following terms:

“HAVING HEARD MR WESSELS on behalf of the Applicant and having read the Notice of Motion and other documents filed of record:

1. THAT: The matter be and is postponed to 08 day of September 2023 on the opposed motion roll;
2. THAT: Costs are costs in the application.”

Background

- [3] The applicant, Absa Bank Limited (“ABSA”), is a public company and credit provider duly registered and incorporated with limited liability in accordance with the Company Laws of the Republic of South African and in terms of the National Credit Act 34 of 2005, with its principal place of business situated at, 1[...] T[...] Street, Johannesburg.
- [4] The respondent Mr Pieter Van Zyl, is an adult male, with full legal capacity, residing at 1[...] [...] H[...] Street, Bloemhof, being his chosen domicilium citandi ex executandi address.
- [5] ABSA represented by a duly authorized representative and the respondent entered into two Instalment Sale Agreements under account numbers 9[...] and 9[...], on or about 21 January 2021. An Instalment Sale Agreement was also entered into on about 2 June 2020, under account number 9[...]. These Instalment Sale Agreements (“the Agreements”) encompassed specified relevant legal terms. The precise legal terms are not relevant to the issue under consideration.

- [6] ABSA contends that it duly complied with its obligations in terms of the Agreements, by extending the loans to the respondent, by payment of the amounts due to the supplier of the assets, the respondent was placed in possession and took delivery of the assets and respondent has had use and enjoyment of the assets.
- [7] The respondent partially complied with the Agreements by accepting the assets and making certain payments pursuant to the Agreements, preceding the alleged breach/repudiation. As of 24 October 2022, the respondent was in arrears with payments in terms of the Agreements in the following amounts:
- (i) Account 9[...]
 - R653 824. 32
 - (ii) Account 9[...]
 - R228 396. 51
 - (iii) Account 9[...] - R307.32
- [8] ABSA commenced legal proceedings by taking all preliminary steps to institute legal proceedings. ABSA asserts that the assets are the only form of real security in respect of debt by the respondent to ABSA. As the lawful owner of the assets and whilst the assets are in possession of the respondent, ABSA is unable to protect the value of the assets which it reasonably believes will ultimately increase the financial exposure of the respondent, due to the market value being

less than the value for which the assets can be sold.

- [9] The aforesaid factual background culminated in the relief sought by ABSA in the application which came before me on 11 May 2023, in the following terms:

“That the respondent and/or whomever may be in possession of:

1.1.1 1 X KRONE 1290 HDP BIGPAK with engine/chassis number

T[...].

1.1.2 1 X 7200R JOHN DEERE TRACTOR with engine/ chassis numbers P[...].

1.1.3 1X TOYOTA FORTUNER 2.8 GD-6 4X4 with engine/chassis numbers 1[...];

(hereafter referred to as “the assets”) are hereby ordered and directed to return and deliver to the applicant the assets.

2. In the event of the Respondent and/or whosoever may be in possession of assets failing to comply with the Order in terms of prayer 1 above, the sheriff or his deputy be and is hereby ordered and directed to forthwith take possession of the said assets and thereafter deliver same to the applicant.

3. The applicant is granted leave to approach Court, on the same papers duly supplemented and amended, as may be necessary, in support of the relief claimed in part B of this application.
4. The relief sought in part B is postponed sine die, in order to afford the applicant an opportunity to value, and sell the assets, to determine the quantum of its claim/s against the respondent, to be dealt with in Part B of the application.
5. The costs of this application.
6. Such further and/or alternative relief as may just and equitable, be granted to the applicant.

PART B

TAKE NOTICE FURTHER THAT the applicant intends making an application to the above Honourable Court on a date and time allocated by the registrar for an order for judgment against the respondent for:

1. Payment of an amount to be determined upon the valuation and sale of the assets, to ascertain the difference between the value of the assets and amounts owing in terms of the agreements.
2. Costs of suit on the scale as between attorney and client.

Further and/or alternative relief or both.”

[10] The application was served on the sister of the respondent at the domicilium address on 18 January 2023. In terms of the Notice of Motion the respondent was afforded ten (10) days from the date of service of the application to file a Notice of Intention to Oppose. The respondent was also informed of the date of set down for the application being 23 February 2023.

[11] A Notice of Intention to Oppose was to be filed by 10 February

2023. It was however, only served on the erstwhile attorneys record of ABSA on 16 February 2023 at 09h56am. On 23 February 2023, Mr Wessels appeared for ABSA, but there is no indication on the face of the Court Order, whether the respondent was legally represented.

Rule 30/30A Notice

[12] In the hiatus between 23 February 2023 and 8 September 2023, ABSA delivered a Notice of Setdown on the respondent for 11 May 2023, on the basis that the respondent had not delivered an answering affidavit in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court.

[13] On 4 May 2023 the respondent delivered a notice in terms of Rule 30 and 30A of the Uniform Rules of Court, complaining that the setting down of the application on the unopposed motion roll of 11 May 2023, was an irregular step. The irregular step complained reads as follows:

- (i) This was contrary to the Court Order dated 23 February 2023 in terms of which the application was postponed to 8 September 2023.
- (ii) The set down did not comply with the provisions of Uniform Rule 6(5)(f) of the Rules of Court which provides that the applicant, in the present circumstances, had to apply to the Registrar to allocate a date for the hearing of the application. The applicant failed to do so.
- [14] ABSA was afforded ten (10) days, in terms of Rule 30(2)(b) to remove the cause of complaint, failing which, on the expiration of the ten (10) days and ABSA failing to remove the irregularity, the procedural remedy in Rule 30A would be invoked. The cause of complaint was not removed by ABSA and the matter was consequently argued before me.

The submissions of ABSA

- [15] Mr Wessels for ABSA contends that although the order postponing the application to the opposed roll, on account of a Notice of Intention to Oppose it did not prescribe any timelines for the filing of an answering affidavit and that the delivery of an answering affidavit was implied.
- [16] To reinforce this submission, Mr Wessels relies on the provisions of Rule 6(5)(d), contending that within fifteen (15) days of notifying the applicant of the intention to oppose the application, deliver such answering affidavit, if any, accompanied by any relevant documents. If a question of law was to be raised, a notice to that effect must be delivered within the stated time.
- [17] The submission is further made, that given the respondent's failure to act within the purview of Rule 6(5)(d), it would be foolhardy for the respondent simply to appear on 8 September 2023, merely to shoot from the proverbial hip, without having filed any "papers." This it is said would be contrary to the trite motion process and would have the inexorable result of application proceedings by ambush.
- [18] Mr Wessels further submits that, motion proceedings are not axiomatically opposed by the filing of a Notice of Intention to Oppose. Motion proceedings are deemed opposed on the filing of an answering affidavit or the taking of a legal point as envisaged in Rule 6(5)(d)(iii). Consequently, as a result of the legal inaction of the respondent, ABSA made an informed decision to set down the application on the unopposed roll of 11 May 2023 and gave the respondent "...a generous 12 court day notice in terms of set down and yet did not react thereto at all."
- [19] In defence of enrolling the application, Mr Wessels relies on Rule 6(5)(f)(i) which provides that:
- "(f)(i) Where no answering affidavit or notice in terms of sub-paragraph 9(iii) of paragraph (d), is delivered within the period referred to in sub-paragraph (ii) of (d) the applicant may within five days expiry thereof apply to the registrar to allocate a date for the hearing of the application."*

[20] Mr Wessels therefore contends that ABSA did not act irregularly by enrolling the application on the unopposed roll, as suggested in the Rule 30 notice. Mr Wessels contends that, on the contrary, the respondent should be called upon to explain the failure to file an answering affidavit, which as at 11 May 2023 was forty (40) days out time.

[21] Concerning costs, Mr Wessels submits that:

“27. The costs of the application aside, the costs of enrolling the application on the unopposed motion roll as well as the costs of 11 May 2023 together with the costs of these heads of argument should be borne by the Respondent as the Respondent has no conceivable reason to escape such costs.”

The respondent’s

submissions

[22] Mr Labuschagne for the respondent submits that the arbitrary enrolling of the application is contrary to the existing Court Order of 23 February 2023, which postponed the application to the opposed motion court roll of 8 September 2023. The submission is essentially that the order of 23 February 2023 has not been rescinded or varied, nor is there an application to amend the substance of the said order. On this alone, the submission is that an intentional deviation from an existing Court Order, is an abuse of process and the application, on this ground alone stands to be struck from the roll with costs.

[23] The submission further goes that ABSA took an irregular step and/or failed to conform with the Rules of Court. Put differently, the respondent avers that the Rule 30/30A was not finalized, which led to the legally untenable position for ABSA in that the “unopposed motion” could not be considered by the Court preceding the adjudication of the Rule 30 and Rule 30A notice.

[24] The respondent further contends that ABSA failed to follow the procedure set out in Rule 6(5) (f) of the Rules of Court by applying for a date to enrol the application from the Office of the Registrar. In respect of the respondent’s failure to file an answering affidavit, the respondent relies on a judgment cited as Anthony Johnson Contractors (Pty) and Several Other Matters 1998 (3) SA 531 (T) at 532 D-G. The citation is incorrect. The reference to 1998 (3) SA 531 (T) is to the judgment of Nordberg Inc and Another v ATQN Services CC and Another and Several Other Matters. The quotation below, relied on by the respondent is from Anthony Johnson Contractors (Pty) Ltd v D’Oliviera and Others 1999

(4) SA 728 (C) at 732 D-G. Mr Labuschagne clearly confused the citation and references for the two cases. The Nordberg judgment on my reading is relevant to this matter and is dealt later in these reasons. In Anthony Johnson Contractors the following was said:

“Mr Barnard’s argument proceeds on a premise which is not correct. There is no obligation on a respondent to file either an answering affidavit or a notice [Rule 6(5)(d)(iii)]. The only obligation imposed on a respondent, should he wish to file such documents is that he must do so within the 15 day period. There is no reason for the Legislator to prefer only a respondent who wishes to file opposing affidavits or a notice to a respondent who wishes to file opposing affidavits or a notice to a respondent who might elect to file only a notice of opposition and argue the matter on the applicant’s papers

alone.”

(my emphasis)

The law (court orders)

[25] In *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (Pheko II), it was stated at paragraphs

[1] – [2]:

“[t]he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced. Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.”

[26] As Madlanga J explained in *Moodley v Kenmont School and Others*

[2019] ZACC 37; 2020 (1) SA 410 (CC); 2020 BCLR 74 (CC). (Paragraph 36):

‘I cannot but again refer to section 165(5) of the Constitution which provides that “[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies”. This is of singular

importance under our constitutional dispensation, which is founded on, amongst others, the rule of law. The judicial authority of the Republic vests in the courts. Thus, courts are final arbiters on all legal disputes, including constitutional disputes. If their orders were to be obeyed at will, that would not only be “a recipe for a constitutional crisis of great magnitude”, “[i]t [would] strike at the very foundations of the rule of law” and of our constitutional democracy’.

Discussion

[27] To my mind, stripping aside the submissions on the Rules of Court, the crisp question is the alleged non-compliance with the court order of 23 February 2023 in terms of which the application was postponed to 8 September 2023. The trite legal principle is that an order granted in terms of Rule 41 of the Rules of Court (dealing with postponements) is valid until set aside by a competent court. The order of 23 February 2023 was not set aside by this Court prior to the enrolment of the application on 11 May 2023. ABSA does not address this very important aspect and how Rule 41 can simply be discounted. Further, ABSA provides no plausible explanation on the implications of Rule 41, considering that the order of 23 February 2023 has not been recanted by mutual consent.

[28] It cannot be overlooked that ABSA was duly represented on 23 February 2023 when the application was postponed to 8 September 2023. No issue was taken with the fact that the duration of the postponement was a lengthy period. No further ancillary orders were sought to be incorporated in the order of 23 February 2023 pertaining to the timelines for the filing of answering and replying affidavits.

[29] Lastly, the sentiments expressed in *Nordberg Inc and Another v ATQN Services CC* in respect of Rule 6(5)(f) are apposite:

“Rule 6(5)(f) contains a similar, and mandatory, provision. The Rule cannot simply be ignored; no excuse such as a shortage of staff is acceptable. No one taking part in the administration of justice may treat the Rule as pro non scripto. The opposite is also true. No motion Court should be at the beck and call of a litigant or his legal representatives. Adherence to the Rule would lead to the proper and orderly administration of justice in the motion Courts and the present chaos would be greatly reduced, if not eliminated.”

Conclusion

[30] The enrolment of the application on the roll of 11 May 2023 in the face and content of the order of 23 February 2023, having due regard to Rule 41, accordingly cannot be countenanced.

Costs

[31] Costs follow the result. There is no reason to deviate from the normal practice as regards costs.

Order

[32] These constitute the reasons for the order which was handed down on 25 July 2023 in the following terms:

(i) The application is struck from the roll.

(ii) The applicant is to pay the costs.

A REDDY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

FOR THE PLAINTIFF: Mr M Wessels Instructed by: Marianne Pretorius Attorney C/O Minchin and Kelly Inc 9 Proctor Avenue MAHIKENG FOR THE DEFENDANT: Mr G G Labuschagne Instructed by: Labuschagne Attorneys 19 Constantia Drive MAHIKENG

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