

SOUTH AFRICA / JUDGMENT

ABSA Bank v Zwane (2024/052922) [2025] ZAGPJHC 603 (9 June 2025)

[2025] ZAGPJHC 603

COURT

South Gauteng High Court, Johannesburg

BEFORE

E Dreyer

CASE / FILE NUMBER

2024/052922

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2024-052922

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED:

In

the matter between:

ABSA

BANK (PTY) LTD

Excipient /

Defendant

And

NTOMBIFUTHI

ZWANE

Respondent /

Plaintiff

JUDGMENT**DREYER AJ:**

- [1] On or about 14 May 2024 the Respondent / Plaintiff instituted action against the Excipient / Defendant. For ease of reference the parties will be referred to as Respondent and Excipient respectively.
- [2] On 25 June 2024 the Excipient served a Notice of Exception via email on the Respondent on the ground that the Particulars of Claim lack the necessary averments to sustain a cause of action.
- [3] The crux of the exception raised by the Excipient is that the Respondent has failed to plead any basis in law, be it contract, delict, statute or otherwise, from which the relief claimed can be sustained, and furthermore failed to plead any legal basis for the Excipient's liability therefor.
- [4] The Respondent seek to claim damages in the amount of R150 000 000.00 from the Excipient.
- [5] The crux of the Respondent's claim, as set out in the Summons and Particulars of Claim, is that the Excipient failed to insert in the offer to purchase which was signed by the Respondent that should the Respondent fail to pay her mortgage bond the Excipient would repossess her house and evict her. The Excipient breached the offer to purchase by repossessing her house and evicting her from the house.
- [6] The relevant portions of the Summons and Particulars of Claim are the following:

Summons:

“4.

BE PLEASE TO TAKE NOTICE FURTHER THAT in terms of Rule 9 of the first schedule to the uniform rule 17(2) of court, the plaintiff hereby authorise the sheriff to inform the defendant that the plaintiff hereby institutes action against the defendant in which action the plaintiff claims as follows:

- (a) That the plaintiff was granted a loan by the defendant in the year 2012.
- (b) That the plaintiff bought a house with the loan granted by the defendant.
- (c) ...
- (d) That the plaintiff lost her job and failed to continue paying her loan monthly instalments.
- (e) ...

- (f) That the defendant omitted to insert a clause in the offer to purchase contract that should the plaintiff fail to pay her bond loan the defendant would evict her out of the house and her belongings thrown out of her house on to a public street.
- (g) That the defendant breached the offer to purchase contract by repossessing her and evicting the plaintiff out of her family loan onto a public street.
- (h) ...
- (i) ...”

Particulars of claim:

“2.

BE PLEASED TO TAKE NOTICE FURTHER THAT the plaintiff is lodging an application for reckless lending on a breach of contract in that the defendant omitted to insert a clause in the offer to purchase contract, initialled and signed by the plaintiff, that should the plaintiff fail to continue paying her bond account loan, the defendant would repossess her house and evict her onto a public street causing damages and losses to her furniture and personal possessions.

3.

...

4.

BE PLEASED TO TAKE NOTICE FURTHER THAT the plaintiff avers that in the year 2012 the plaintiff was offered a home bond account loan by the defendant to purchase a house situated at ERF 18884 BRAMFISCHER EXT 14 TOWNSHIP. The plaintiff accepted the offer and purchased the property being in occupation.

5.

BE PLEASED TO TAKE NOTICE FURTHER THAT the plaintiff avers further that during the conclusion of the initialled and signed offer to purchase the contract between the plaintiff and the defendant, the defendant omitted to inform the plaintiff, orally and in writing, as a special condition clause in the offer to purchase contract documentation, that one of the terms and conditions of the offer to purchase contract, is that the plaintiff is duty bound to pay her monthly home bond account instalments towards the defendant, and that in the event that the plaintiff is unable to continue paying her monthly bond account instalments for whatever reason, inter alia due to loss of employment, the defendant would repossess her house. Had the defendant informed the plaintiff that one of the special conditions in the initialled and signed offer to purchase contract agreement between the defendant and the plaintiff, is that in the event that the plaintiff is unable to continue paying her home bond account loan, the defendant would repossess and her house and order the plaintiff to be evicted out of the property, and her furniture and belongings thrown out, onto a public street by a court ordered sheriff, the plaintiff would have thought for a second time and never had taken the loan, as the plaintiff would have been

armed with knowledge of the pros and cons of the home loan bond account loan, and would have been aware that in the event of loss of income and being unable to continue paying her bond, the defendant the defendant would repossess her family home and eject her.

6.

7.

8.

BE PLEASED TO TAKE NOTICE FURTHER THAT the plaintiff avers that the defendant committed a breach of contract on the offer to purchase contract documentation, between the plaintiff and the defendant, in that the defendant enforced a non-existent clause in the offer to purchase contract, by repossessing the plaintiff's home and ejecting her and her children onto a public street, without such a clause in the offer to purchase contract documentation, initialled and signed agreement indicating as a warning prior acceptance to signing it by the plaintiff."

[7] The Respondent is apparently assisted herein by legal consultants, Collie and Beatties Legal Consultants. It is clear that the Respondent did not receive proper legal advice and that she was ill-advised in bringing the action. The manner in which the Summons and Particulars of Claim is drafted shows a lack of legal knowledge and skill. The said legal consultants did not appear on behalf of the Respondent, but appears to be giving the Respondent legal advice. The legal consultants do not appear to be legal practitioners as contemplated in terms of the Legal Practice Act 28 of 2014.

[8] The Respondent also served a document headed "PLAINTIFF'S SUPPORTING AFFIDAVIT". At the hearing of the matter Counsel for the Excipient indicated that this document can be deemed to be the Respondent's Heads of Argument in the matter.

[9] On the Respondent's own version her claim is based in contract, being the offer to purchase, and not in delict or statute. The Respondent seeks to claim damages resulting from an alleged breach of contract, i.e. the offer to purchase, by the Excipient.

[10] A party seeking to claim damages resulting from a breach of contract must allege and prove inter alia the following:

10.1 the contract; and

10.2 breach of the contract.

[11] Rule 18(6) of the Uniform Rules of Court provides that a party who in his or her pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

- [12] The Respondent did not attach a copy of the offer to purchase to the Particulars of Claim and avers she is not in a position to attach same as it was left in the possession of the Excipient and she wasn't provided with a copy.
- [13] Breach of contract means when a party to a formal agreement (contract) breaks a condition (term) of that contract.
- [14] In *McKensie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at page 23 the Appellate Division defined 'cause of action' to be "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."
- [15] In *Vermeulen v Goose Valley Investments (Pty Ltd)* 2001
- (3) SA 986 (SCA) at paragraph 7 it was held that "It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it can be shown that *ex facie* the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may) bad in law."
- [16] In *Living Hands (Pty) Ltd and Another v Ditz and Others* 2013 (2) SA 368 (GSJ) at paragraph 15 the applicable principles when considering exceptions were set out as follows:
- 16.1 In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by plaintiff to assess whether they disclose a cause of action.
- 16.2 The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion of thereof in an expeditious manner, or to protect oneself against embarrassment which is so serious as to merit the costs even of an exception.
- 16.3 The purpose an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.
- 16.4 An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.
- 16.5 An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.
- 16.6 Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.
- 16.7 Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars.

- [17] The Respondent has failed to establish a contractual link or nexus between the Excipient and the Respondent. In terms of Rule 18(6) of the Uniform Rules of Court as set out above, pleadings must state whether the contract was concluded by the parties themselves or by agents acting on their behalf. The Respondent does not set out who the parties to the offer to purchase was, what the terms of the said offer to purchase was or that the Excipient breached a term of the offer to purchase.
- [18] A party alleging a contract must also allege and prove the terms of the contract on which reliance is placed. The Respondent is not alleging that the Excipient breached a term of the offer to purchase and therefor the Excipient breached the offer to purchase. Instead, the Respondent alleges that the Excipient breached the offer to purchase by not inserting a term in the offer to purchase that should the Respondent fail to pay her mortgage bond, the Excipient would repossess her house and evict her, and then repossessing her house and evicting her from the house.
- [19] On a reading of the pleadings, it is evident that it does not disclose a cause of action. The Respondent's claim is bad in law.
- [20] A party whose pleading is struck down on exception is afforded an opportunity to amend the offending pleading as a matter of course, even if fatally defective by reason of the failure to disclose a cause of action (See *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs*
- [1993] ZASCA 4; 1993 (2) SA 593 (A) and *Constantaras v BCE Foodservice Equipment (Pty) Ltd* 2007 (6) SA 338 (SCA)).
- [21] However, in this matter the pleadings do not disclose a discernible or recognisable cause of action in law. The pleadings cannot be remedied by granting to leave to amend so as to disclose a discernible or recognisable cause of action in law.
- [22] I make the following order:
1. The exception is upheld.
 2. The Respondent's Particulars of Claim is struck out.
 3. A copy of this judgment is to be provided to the Legal Practice Council and the Legal Practice Council is ordered to conduct an investigation into Collie and Beatties Legal Consultants and report back to the attorneys of record for the Excipient with its findings within 30 (thirty) days of the date of this judgment.
 4. The Excipient is to pay the costs of the exception on an attorney and client scale.

E DREYER

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded

to CaseLines. The date for hand down is deemed to be 9 June 2025.

Appearances:

Appearance for Excipient / Defendant: Adv. R Scholtz

Instructed by:

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Appearance for Respondent / Plaintiff: In person

Assisted by

Collie and Beatties Legal Consultants

Email: luciazwane84@gmail.com

Date of hearing:

3 June 2025

Date of Judgment:

9 June 2025

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