

SOUTH AFRICA / JUDGMENT

Du Plooy v Absa Bank Limited; In Re Absa Bank Limited v Du Plooy (5791/2020) [2020] ZAFSHC 151 (31 August 2020) [2020] ZAFSHC 151

COURT

Free State High Court, Bloemfontein

BEFORE

Molitssoane

CASE / FILE NUMBER

5791/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Case

No: 5791/2020

In

the matter between: -

PIETER

WILLEM DU

PLOOY APPLICANT

and

ABSA

BANK LIMITED

RESPONDENT

In

re:

ABSA

BANK

LIMITED APPLICANT

PIETER

WILLEM DU

PLOOY RESPONDENT

JUDGMENT

BY: MOLITSOANE, J

HEARD ON: 30 JULY 2020

DELIVERED: 31 AUGUST 2020

- [1] In this interlocutory application the Applicant seeks an order that the Respondent be compelled to furnish him with certain documentation as a result of the alleged fact that the Respondent's claims against the Applicant had prescribed.
- [2] At the beginning of these proceedings, the Respondent sought leave to file a further affidavit in terms of Uniform Rule 6(5) (e). The application was not resisted and I granted such leave.
- [3] On 13 December 2019 the Respondent instituted sequestration proceedings (the Main Application) against the Applicant under the

same case number as the one before me. That application is opposed. The sequestration proceedings relate to two overdraft facilities and seven credit agreement accounts granted by the Respondent in favour of the Applicant. The Applicant contends that all those nine accounts forming the subject matter of the sequestration proceedings have prescribed.

- [4] On 21 May 2020 the Applicant sent letters addressed to the Respondent's attorneys informing them that the Respondent's

claims had prescribed and demanding, certain information and documentation. When such were not delivered, the Applicant launched

these proceedings.

- [5] The Respondent resists the application on two pertinent grounds. Firstly, that there are pending proceedings on the same issues raised in this application in another forum. Secondly, that the claims have not prescribed.
- [6] Properly interpreted the relief sought by the Applicant pivots on the contention that the nine claims of the Respondent in the

sequestration proceedings had prescribed and as a result thereof he is entitled to the relief as set out in the Notice of Motion. In my view, the plea of *lis alibi pendens* as raised is dispositive of this matter. For the reasons I set out below I decline to adjudicate the second defence relating to prescription.

- [7] A party who wishes to raise a plea of *lis pendens* must prove the following requirements:

- a) That there is a pending litigation;
- b) Between the same parties;

- c) On the same cause of action;
- d) In respect of the same subject matter.

[8] The onus of proving the above requisites is on the party raising the defence. (See *Dreyer v Tuckers Land and Development Corporation (Pty) Ltd* 1981(1) SA 1291(T) 1231.)

[9] The Respondent launched sequestration proceedings against the Applicant. Those proceedings, although launched under the same case number as this application are not before me. The file pertaining to the said proceedings was made available to me. The Respondent also refers liberally in the answering affidavit in this case to illustrate that the issue of prescription is also central in the

sequestration proceedings.

[10] As a starting point it is apt to indicate that the Applicant confirmed only in the replying affidavit, when the issue of sequestration proceedings were raised for the first time by Respondent in the answering affidavit that such proceedings were indeed pending.

[11] In resisting the sequestration proceedings the Applicant proffers the same defence of prescription on which the relief sought in this application is based. The basis for making this finding appears clearly from the Applicant's answering affidavit in the sequestration application. He pleads in those proceedings, inter alia, as follows:

"AD PARAGRAPH 4

The contents of this paragraph is denied. I contend that the Applicant has no valid claim as all his claims prescribed in either 2017 or 2018, which was before this action was instituted, as will be more fully explained in later paragraphs in this affidavit.

AD PARAGRAPH 5

The contents of this paragraph is denied. I contend that the last time payments were made on any of the claims was in the years 2014 and 2015 and therefore all claims fell due thereafter from which the application had a period of 3 (THREE) years to recover any losses it might have suffered. Which is why I contend that it prescribed as per paragraph 11 below.

AD PARAGRAPH 6

In light of the above I wish to confirm that firstly, no notice was received from the application, secondly no service of Summons and other pleadings took place and thirdly, no judgement was obtained against me for any of the claims herein. I therefore contend that the Applicant's claim has prescribed in terms of the Prescription Act, Act 68 of 1969."

[12] Having regard to the defence raised in the sequestration proceedings and the basis upon which this interlocutory application is instituted I am of the considered view that the above requisites have been established. It is pertinently clear that in both these two applications, prescription is raised as a defence for the same causes of action pending relating to the

same subject matter. However, once the requisites have been established, a factual presumption arises that the second proceedings are prima facie vexatious. (See Amler's Precepts of Pleadings, 9th ed by LTC Harms page 251). The onus then shifts to the party who instituted the second proceedings to convince the court that despite the fact that all the requisites having been established, the balance of convenience and equity favours allowing the second case to proceed. (See Geldenhuys v Kotze 1964(2) SA 167 (O)).

- [13] It is not the pleaded case for the Applicant that the balance of convenience and equity are in favour of allowing this court to proceed with this case. When I raised this issue with Counsel for the Applicant, he submitted that he had agreed with the attorney for the Respondent that the issue of prescription may be disposed of aside of the sequestration proceedings. Counsel for the Respondent had no such instructions. It is inconceivable how this can be done. The high water mark of the defence raised in the sequestration proceedings is that the claims of the Respondent had prescribed. That is his central defence which must be adjudicated upon by the court seized with the sequestration proceedings. After the Applicant dispatched the letters on 21 May 2020 as indicated above, the attorney for the Respondent replied on 27 May 2020 and said, inter alia, the following:

"5. At the outset we record that our client shall not litigate by way of correspondence.

6. Your client, in the pending sequestration proceedings, has raised the 'defence' of prescription and the merits (or demerits for that matter) of that defence are still the subject of pending judicial consideration and adjudication."

(my emphasis)

- [14] Clearly the court which is seized with the sequestration application is going to be called upon to adjudicate the defence of prescription proffered by the Applicant. In this case, seeing that in order to compel the Respondent to furnish the requested documents I have to make a finding on the defence of prescription first, this would yield untenable results. "The policy underpinning it [the defence of lis pendens] is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions."- Caesarstone Sdot- Yam v The World of Marble and Granite CC (741/12[2013] ZASCA 129(26 September 2013) In exercising my discretion whether to allow the second case to proceed I am guided by Geldenhuys and Kotze (supra). It appears from the Geldenhuys decision that another important factor for consideration of whether or not to allow the application to proceed, is to consider whether the Applicants have a proper defence to the action. As indicated, that finding would best be dealt with by the court seized with the main application, that way this court will obviate making a decision differing from the court seized with the main application. I am of the view that the Applicant has not shown that the balance of convenience and equity demand that I should proceed with this matter. In view of the fact that the parties are at odds on the issue of prescription, it is my view that the

proper order would be to stay these proceedings.

[15] I am not persuaded that a punitive costs order would be appropriate although I am of the view that costs should follow the cause. I accordingly make the following order:-

ORDER

1. The present application is stayed pending the final determination of the sequestration application between the parties instituted in this Court on 13 December 2019.
2. The Applicant is ordered to pay the costs of this application on party and party scale.

P.E. MOLITSOANE, J

On behalf of the Applicant: Mr JJ BekkerVan Rensburg

Instructed by:

Bekker Attorneys

BLOEMFONTEIN

On behalf of the Respondent: Adv. S Tsangarakis

Syminton and de Kok Attorneys

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2020/151.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/du-plooy-v-absa-unknown-topic-afshc-2020>

Prepared on 11 October 2026 · Esheria