

SOUTH AFRICA / JUDGMENT

Firststrand Bank Limited v Erasmus :In re: Erasmus v Firststrand Bank Limited (2017/27120) [2022] ZAGPJHC 395 (10 June 2022) [2022] ZAGPJHC 395

COURT

South Gauteng High Court, Johannesburg

BEFORE

Siwendu

CASE / FILE NUMBER

2017/27120

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

NO: 2017/27120

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

NO

10

June 2022

In

the matter between: FIRST
 RAND BANK LIMITED
 t/a
 inter alia RMB PRIVATE BANK
 and
 Applicant
 and
 NICOLETTE
 ERASMUS
 Respondent
 In
 re
 ERASMUS,
 NICOLETTE
 and
 Applicant
 FIRSTRAND
 BANK LIMITED
 trading,
 inter alia, as RMB PRIVATE BANK and as FNB
 Respondent
 In
 re
 CASE NO: 2022/00401
 and
 Applicant

JUDGMENT

[Second Interlocutory Applications]

SIWENDU J

Introduction

[¹] On 29 April 2022, the Commercial Court considered two interlocutory applications brought by Ms Erasmus, namely:

[1.1] an application for the amendment of a counter- application (in the main application) pending before the Commercial Court; and

[1.2] an application for consolidation of the action proceedings under case number 2022/401 with the Main Application pending under case number 27120/2017 (pending before the Commercial Court).

[2] This judgment and interlocutory applications must be read together with the court's judgment of 20 November 2020. The judgment dealt with the history of the dispute between the parties as well as two interlocutory applications[1] primarily arising from Ms Erasmus' approach to the litigation.

[3] The material point was that Ms Erasmus was granted leave to "supplement" her counter-claim to include the facts she allegedly obtained from old pleadings in the first action instituted by the bank against her in 2009. For clarity, it will be recalled that Ms Erasmus considered the pleadings relevant and supportive of her case as set out in the counter claim against the First Rand Bank. Given the complaints raised against the bank, and the fact that Ms Erasmus is self - representing, the court considered it in the interests of justice to allow her time to supplement her

counter- claim and to set out her case fully. As is evident from the judgment, portions of the affidavit were struck out because they contained vexatious material.

[4] I pause to mention that First Rand Bank did not pursue that action proceedings. It is not disputed that the action had lapsed. Furthermore, the current attorneys were not the attorneys of record in the matter. The application for amendment follows the above events.

[5] At a case management meeting held on 30 July 2021, due to other judicial commitments, I advised the parties that the matters could only be heard in February 2022. I had nevertheless directed the respondent to file her heads of argument, in the pending application for leave to amend, by 17 September 2021, and the applicant would thereafter file heads by 8 October 2021. The longer time lead was to accommodate Ms Erasmus.

[6] Ms Erasmus did not file her heads of argument as directed. She was placed on terms by First Rand Bank who followed with a request to convene a hearing to adjudicate an application to compel the filing of the Heads. However, she served these on 20 January 2022. As already alluded to, the amendment application has now been interposed by the application for consolidation.

Request for Direction

[7] Faced with the additional interlocutory application for consolidation, the attorneys representing First Rand Bank legitimately sought directions from the court on how the applications should proceed taking into account:

[7.1] the jurisdiction or authority of the Commercial Court to hear the consolidation application;

[7.2] Whether the consolidation application should be heard on the date allocated for the hearing of the Amendment Application on 29 April 2022,

[7.3.] the ripeness of the hearing of the consolidation application; and

[7.3.] the order in which the matters should be heard between (1) the amendment application and (2) the consolidation application.

- [8] Ms Erasmus took issue with what she refers to as "extra-judicial representations" by First Rand Bank attorneys. This caused them to file a substantive affidavit on 14 April 2022.
- [9] Ms. Erasmus filed an affidavit opposing the request. In addition to her complaint about the "extra-judicial" and irregular representations, she charges that there is no evidence that Ms Radlovic is authorised by First Rand Bank to represent them, nor does she annex a confirmatory affidavit from First Rand Bank confirming that. As I understand it, her view is that Ms Radlovic is taking up the cudgels personally even though she is not a litigant in these matters. Ms Erasmus also fingers Ms Radlovic for delaying progress in the matter and ratcheting up legal costs to her detriment.
- [10] I need not repeat every allegation at this stage, save to state that the Court admonished Ms Erasmus for the tone and the manner in which she does so.

The amendment Application

- [11] On 14 May 2021 Ms. Erasmus delivered her notice of intention to amend her counter-application. The notice of application shows marked up and tracked changes. First Rand Bank objects to the amendment. Rule 28 (4) states that:
- "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."*
- [12] On 1 June 2021 Ms. Erasmus delivered a notice of motion seeking the leave to of the court to amend her counter- application in terms of Rule 28(4). There is no discretion in the manner or form of the application for amendment. Rule includes a definition of 'application' viz a proceeding commenced by notice of motion or other forms of applications provided for by rule 6 (11)[2].
- [13] The application for amendment is not supported by a founding affidavit. Ms Erasmus impermissibly makes her case through her heads of argument. First Rand Bank justifiably complains that it has not had an opportunity to properly consider nor object to the second amendment.
- [14] Accordingly, there is no application for amendment before the court and the purported applications falls to be dismissed.

Consolidation Application

- [15] Ms Erasmus issued summons on 10 January 2022 under case number 2022/401. She seeks leave to consolidate the combined summons under case number 2022/401 with the Main Application before the Commercial Court under case number 27120/2017 dealt with above. She claims that:
- [15.1] the points of contention in each case are so closely related to each other and
- [15.2] should be decided in one action to avoid the multiplicity of actions

- [16] Ms Erasmus claims that the application was launched to interrupt prescription due to the protracted delay and the “war of attrition against her.” As a result of First Rand Bank's five-year delay in the prosecution of the Main Application, it was necessary to issue summons against First Rand Bank on the same facts in order to interrupt prescription.
- [17] First Rand Bank has excepted to the summons and, on 23 March 2022, delivered substantial exceptions. On 27 March 2022, Ms. Erasmus delivered a notice in terms of Rule 30/30A in respect of First Rand Bank's complaints to the summons.
- [18] A point taken by First Rand Bank is that the action has not been referred to the Commercial Court of the Johannesburg High Court. Only the main application and the counter-application were referred to the Commercial Court, and after certification, allocated to the Court. I have also considered the application against the requirements of Rule
11. The rule does not make provision for the consolidation of issues, but only of trials. Ms Erasmus impermissibly seeks to consolidate application proceedings with action proceedings. The application must fail on this ground alone.
- [18] It is nevertheless necessary to say something about the other material components of which are:
- (1) convenience and (2) no substantial prejudice to the other party. Evidently as in this matter, Ms Erasmus launched a Rule 30/30A application in response to the exception to the summons. Apart from it being an impermissible application, there is no convenience in hearing the matter.
- [19] Furthermore, a party requesting the consolidation bears the onus of showing that the consolidation will not cause substantial prejudice to other parties. A court may refuse the application even though the balance of convenience would favour it, if the prejudice to the other party is “substantial.”
- [20] Ms. Erasmus has once more not filed a founding affidavit and has therefore failed to substantiate the application. The particulars of claim in the action comprises approximately than 74 pages, and with annexures totals 165 pages.
- [21] First Rand Bank deals comprehensively and substantially with its complaints. I need not traverse all of them here. Significantly, the point made is that the effect of the "consolidation" sought is to introduce new grounds for the counter- application to help Ms Erasmus bolster the counterclaims, through a "consolidation", rather than through an amendment process (while there is a separate amendment application already pending before the court i.e. there are

in effect two mutually inconsistent interdependent applications). The Commercial Court had already struck out various elements of Ms Erasmus supplementary affidavit as referred to above.

[22] Apart from there being no substantial application as required by the rules, the new matter was not one certified by the Commercial Court in terms of the Commercial Court Directive. Even if there was a valid application, a consolidation of issues is impermissible under the rules. Above all, it would be prejudicial to First Rand Bank if Ms Erasmus were permitted to reintroduce new grounds to the counter application to include those that have been struck out by the court.

Strike Out Application

[23] This is the second application to strike out averments made by Ms Erasmus. As already alluded to above, Ms. Erasmus filed an affidavit in response to an affidavit filed by First Rand Bank seeking directions from the court. In this instance, she particularly singles out Ms Radlovic. Other than the lack of authority, amongst the allegations she makes is that Ms Radlovic:

[23.1] Has Personally investing herself in her client's litigation which biases her allegations;

[23.2] Is pursuing directions from the Commercial Court and I or litigation in her own name;

[23.3] Is delaying the progress of the matter;

[23.4] Ratcheting up costs;

[23.5]. Omitting material information from the affidavit;

[23.6] Conduct contrary to the provisions of the attorneys' code of Conduct;

[23.7] Being a witness in First Rand Bank's case;

[23.8] Seeking to turn simple interlocutory applications into full blown applications;

[23.9]. Circumventing the Rules of this Honourable Court in order to thwart the process and to cause inordinate delays, apparently with the intention of prejudicing Ms. Erasmus financially, procedurally, time wise and emotionally;

[23.10]. Drowning the Commercial Court in paper;

[23.11]. Being untruthful; and

[23.12] Mistaken.

[24] The application to strike out averments made by Ms Erasmus was deposed to by Mr Dante Pio Fogolin a Manager at First Rand Bank's Commercial Recoveries. I have considered the complaints. Even though when questioned by the court at the hearing, Ms Erasmus stated that "much went on in the background" not known to the court, these averments cannot be allowed to stand. The background material is not in the affidavit. I find the averments made baseless and an inappropriate personal attack on an officer of the court. It is acceptable practice for the attorney seized with a matter to bring an interlocutory application as the issues pertain to procedure.

- [25] In particular, it is not correct that Ms Radlovic is responsible for the delay in prosecuting the matter. Apart from the period when the Court was not available, and on the contrary, Ms Erasmus is responsible for the delays. She was travelling to a conference overseas and could not file her papers. She failed to comply with directions by the court. She delayed the filing of her Heads until she had to be compelled. She has persistently followed unhelpful procedures not in compliance with rules.
- [26] The interlocutory applications served to delay the finalisation of the matter further to the prejudice of First Rand Bank and to Ms Erasmus' detriment. They are irregular and to not comply with the Rules.
- [27] The Commercial Court will not entertain further interlocutory applications in this matter as such will be inconsistent with the purpose of the Commercial Court Practice Directive and an abuse the Court process.
- [28] Accordingly, I make the following order:
- a. The application for amendment is dismissed,
 - b. The application for consolidation is dismissed.
 - c. The following paragraphs of Ms Erasmus's "Answer to Affidavit/ Request for Directions" are struck out on the basis that they contain averments which are scandalous, vexatious and irrelevant; namely:

Paragraph 7, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 28, 34, 49, 52, 53, 56, 57, 65, 67.1, 67.2, 67.5, 67.6, 67.10, 67.11, 67.18, 67.28, 67.29, 67.31, 67.32, 67.33, 67.38.
 - d. Ms. Erasmus is to pay the costs of the applications in order a. b. and c.
 - e. The scale of the costs of the Striking out Application in paragraph c above will be costs on the scale as between attorney and own client;

T SIWENDU

JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 10 June 2022.

Heard on:

29 April 2022

Delivered on: 10 June 2022

Counsel for the Applicant: Adv R Shepstone

Instructed by:

A D Hertzberg Attorneys

Counsel for the Respondent: In Person

Instructed by: N/A

[1] These concerned a Rule 30(1) Application and an Application to Strike Out

[2] See Erasmus Superior Court Practice

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