

SOUTH AFRICA / JUDGMENT

Fourie N.O and Others v Land and Agricultural Development Bank of South Africa (1425/2020;1426/2020;1427/2020;1428/2020) [2022] ZANCHC 20 (8 April 2022)

[2022] ZANCHC 20

COURT

Northern Cape High Court, Kimberley

BEFORE

Lever

CASE / FILE NUMBER

1425/2020;1426/2020;1427/2020;1428/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION, KIMBERLEY)

Case

No: 1425/2020

Reportable:

NO

Circulate

to Judges: YES

Circulate

to Magistrates: NO

Circulate

to Regional Magistrates: NO

In

the matter between:

JAN
HENDRIK GERHARDUS FOURIE N.O.
1st Applicant
JOHANNA
ELIZABETH FOURIE N.O.
2nd Applicant
CHRISTIAAN
KLINDT
N.O.
3rd Applicant
(in
their capacities as trustees of the
Stukkievrede
Familie Trust)
and
THE
LAND AND AGRICULTURAL DEVELOPMENT
BANK
OF SOUTH
AFRICA
Respondent
Case
No: 1426/2020
JAN
HENDRIK GERHARDUS FOURIE
Applicant
Case
No: 1427/2020
JAN
HENDRIK GERHARDUS SAUNDERSON N.O.
1st Applicant
CHRISTIAAN
KLINDT N.O.
2nd Applicant
SUZANNE
SAUNDERSON N.O.
3rd Applicant
(in
their capacities as trustees of the Jannie
Saunderson
Familie Trust)
Case
No: 1428/2020
JAN
HENDRIK GERHARDUS SAUNDERSON
Applicant
Coram
Lever J.

JUDGMENT

LEVER J.

1. These four cases being case numbers 1425/2020, 1426/2020, 1427/2020 and 1428/2020 are dealt with in one judgment as both the respective applicants and the respondent agree that the issues in each matter are such that if one application goes one way the other 3, must of necessity, follow to the same conclusion.
2. Although the applicants launched 4 distinct applications the respondent answered all 4 applications with one answering affidavit. In doing so, the respondent relied on the contention that in all four applications the same issues and questions would be dealt with in each application. The respective applicants then filed a single replying affidavit dealing with the answering affidavit. Confirming in form and in substance that both respective sides indeed shared the view that a decision in one of the matters will of necessity mean the same result in the other three.
3. Furthermore, at the hearing of the matter both Mr Jankowitz for the respective applicants and Mr Tsangarakis for the respondent agreed that if one application succeeded then all must succeed and if one application were to fail then of necessity, they must all fail.
4. The present application is an interlocutory application under the provisions of Rule 30 of the Uniform Rules of Court (the Rule/s). The applicants' contention is that in the respective actions, the respondent has not complied with various provisions of Rule 18. The details of such omissions will be dealt with presently.
5. The respective applicants were placed under Notice of Bar on the 22 October 2020 in the various actions relevant to this matter. The notice contemplated by Rule 30(2)(b) was filed on the 30 October 2020 in each of the 4 matters relevant hereto.
6. In each of these Notices served and filed under the provisions of Rule 30(2)(b) it was alleged that in each of the relevant combined summonses commencing action, the following provisions of Rule 18 were not complied with: Firstly, failed to comply with Rule 18(1) in that the summons purported to have been signed by the attorney of the plaintiff in terms of s25(3) of Act 28 of 2014[1]; Secondly, Rule 18(4) in that it was alleged that the Particulars of Claim did not set out a clear and concise statement of fact in order to establish a cession that is a key element of respondent's respective claims; and Finally, Rule 18(6) in that the respondent did not attach a true copy of the written agreement by virtue of which respondent claims to have taken cession of the relevant claims.
7. The respondent chose not to respond to the notice under the

provisions of Rule 30(2)(b) and did not remove any of the alleged causes of complaint. By the time that the respective applicants filed their respective Notices of Motion in the respective applications, the objection under and in terms of Rule 18(4) had fallen away without any explanation and was not proceeded with.

8. Thus, in the present applications, the applicants only proceeded with the irregular proceedings in terms of Rule 30 in respect of the alleged failures in respect of Rule 18(1) and 18(6) as set out above.
9. At the hearing of this matter, Mr Jankowitz who appeared for the applicants in all four of the abovementioned matters sought to deal with the applications as having been brought under and in terms of Rule 30A as opposed to Rule 30. This despite the fact that the Notice of Motion in each of the respective cases was brought under the provisions of Rule 30.
10. Mr Tsangarakis, who appeared for the respondent in each of the four matters dealt with objected to this proposal on the basis that the respondent had been brought to court under the provisions of Rule 30

and had prepared for court on that basis. That the respondent in each case would be unduly prejudiced if the applicant were to be allowed to deal with the matter as if it had been brought under the provisions of Rule 30A as opposed to Rule 30.

11. In my view Mr Tsangarakis is correct the four matters were launched under Rule 30, and they shall proceed under the provisions of Rule
30. To do otherwise in these circumstances would prejudice the respondent as it had been brought to court under the provisions of Rule 30 and had prepared accordingly.
12. The applicants' objections to the Particulars of Claim filed by the respondents in each matter fall under the provisions of Rule 18(1) and 18(6). The said rules read as follows:

"18(1) A combined summons, and every other pleading except a summons, shall be signed by both an advocate and an attorney or, in the case of an attorney who, under section 4(2) of the Right of Appearance in Courts Act, 1995 (Act 62 of 1995), has the right of appearance in the Supreme Court, only by such attorney or, if a party sues or defends personally, by that party."

"18(6) A party who in his 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."

13. Whilst dealing with the provisions of the rules, it is convenient to also set out the provision of Rule 18(12), which read as follows:

"18(12) If a party fails to comply with any of the provisions of this rule, such pleading shall be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30."

14. Turning now to deal with the objection under Rule 18(1). In setting out their complaint in this regard, the applicants set out in their founding affidavit the following:

“4.4 The respondent failed to comply with Rule 18(1) in that the summons was purported to have been signed by the attorney of the Respondent in terms of Section 25(3) of Act 28 of 2014, whilst two names are listed with two different signatures, on the particulars of claim.”

15. In dealing with this aspect, the respondent sets out in its answering affidavit:

“18 The signatures that appear on all of the combined summons’ are my own (that of Mr Strydom the deponent to the affidavit quoted herein and the respondents’ attorney in these matters) as well as that of the Landbank’s local correspondent attorney of record, Mr Johannes Oosthuizen.

19 Although it is not pleaded that the signatories to the combined summons are attorneys with right of appearance in the Court in truth and in fact, and at the very least Mr Johannes Oosthuizen is such an attorney.

20 In support of this allegation, I attach hereto as annexure ‘AA1.1’, Mr Johan Oosthuizen’s certificate as confirmation of the above. I (Mr Strydom the deponent to the answering affidavit) also have the right of appearance as is evident from annexure ‘AA1.2’ hereto.”

16. At the hearing of this matter, Mr Jankowitz who appeared for the applicants in these matters took a different tack to the approach taken by the applicant in the replying affidavit. He indicated that he was not pursuing this aspect of the application with any great seriousness.
17. In my view, Mr Jankowitz was wise in adopting this approach. As is set out by Swain J in the matter of LIBERTY GROUP v SINGH[2] an attorney with right of appearance in the High Court has right of appearance in every division of the High Court and may sign pleadings in the capacity as an advocate in any such division, but may only fulfil his/her functions as an attorney, ie sign pleadings as an attorney, in the division in which he/she is admitted to practice as such.
18. The significance of this in the present proceedings is that Rule 18(1) requires every pleading except for a summons in the high court to be signed by both an attorney and an advocate. Mr Strydom, being an attorney with right of appearance from another division, has the capacity to sign the Particulars of Claim in his capacity as an advocate, but is not entitled to sign the Particulars of Claim as an attorney in this division. Mr Oosthuizen signed the particulars of claim in both places, ie as both an advocate and an attorney. Mr Oosthuizen is an admitted attorney in this division with the right of

appearance. These facts were not disputed by the applicant. In these circumstances there has been substantial compliance with the

requirements of Rule 18(1).

19. Mr Jankowitz did not argue that there was a need for a formal amendment to indicate in which capacity both Mr Strydom and Mr Oosthuizen

signed the Particulars of Claim. The fact that the respective practitioners did not explain the capacity in which the signed the

Particulars of Claim in these matters has been cured by their explanation in the answering affidavit in the present matter. In

these circumstances, I intend to adopt the pragmatic approach set out by my Brother Chwaro AJ in the matter of QUILL ASSOCIATES (PTY) LTD v DAWID KRUIPER LOCAL MUNICIPALITY[3].

20. In the circumstances, I rule that no formal amendment is required. Rule 18(1) has been complied with. The confusion in this matter could have been obviated by way of a collegial letter and response thereto

between the respective representatives of the parties. I will take into account that this aspect was only adequately explained in the answering affidavit when I come to consider the question of the costs of the present applications.

21. Turning now to the second aspect to be considered, namely the alleged non-compliance with Rule 18(6). The requirements of the rule have already been set out above. The respondent in the various Particulars of Claim relevant to this application has pleaded that the principal debtor obtained finance from a certain entity, who then entered into

a written contract of cession with the plaintiff/respondent to cede such debt to the plaintiff/respondent.

22. The provisions of Rule 18(6) were considered by Swain J in the matter of Moosa v Hassam[4] Where he referred to the matter of South African Railways and Harbours v Deal Enterprises (Pty) Ltd[5], Swain J notes that whilst the said South African Railways and Harbours case[6] dealt with the position before Rule 18(6) required true copies of written contracts or the excerpts relied upon had to be furnished, the reasoning of Botha J in the S.A. Railways and Harbours case[7] was still relevant and instructive. The relevant passage in the S.A. Railways and Harbours case reads as follows:

“He is accordingly obliged to furnish the particulars mentioned in Rule 18(6) whenever the contract forms a part of the cause of action put forward by him, irrespective of whether the contract can be described as the ‘basis’ of the claim or not.”[8]

23. In the Moosa case[9], Swain J in referring to the passage from S.A. Railways and Harbours set out above, reasons:

“[17] This I consider to be the crux of the present enquiry. Rule 18(6) speaks of a party who in his pleadings ‘relies’ on a contract or ‘part’ thereof. A party clearly ‘relies’ on a contract when he uses it as a ‘link in the chain of his cause of action’. (references omitted)

...

- [18] In the present case the respondents base their cause of action against the applicants upon the written agreements. The written agreement is a vital link in the chain of the respondents' cause of action against the applicants. In order for the respondents' cause of action to be properly pleaded, it is necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence of the written agreement the basis for the respondents' cause of action does not appear ex facie the pleadings.”[10]
24. Relating this approach to the facts of the present matter, the respondent, The Land and Agricultural Development Bank of S. A., relies on a cession in respect of the original rights in respect of the respective claims. This is clearly ‘a link in the chain’ of its respective claims. As such the provisions of Rule 18(6) are applicable and the relevant contracts or at least the relevant extracts need to be annexed to the Particulars of Claim in the respective matters.
25. The respondent in an annexure to the respective Particulars of Claim has annexed a document which is titled “RECORDAL”, in which the respondent and certain other entities have recorded a number of contracts, inter alia the sale of the relevant book debts and the cession of the relevant rights. In this document the respondent and the other signatories to such document record their understanding of the effect of the listed contracts and agree that the effect of the relevant contracts is a cession of the relevant book debts.
26. Whilst this “RECORDAL” might constitute evidence of the intention of the relevant parties in entering into the relevant contracts and in certain circumstances, it might even be determinative of the matter, it is still not the contract which the respondent relies on as a ‘link in the chain’ of its claim. In these circumstances Rule 18(6) has not been complied with.
27. In his oral address Mr Tsangarakis for the respondent referred me to a number of cases where it was alleged that a similar approach was pleaded and the relevant courts in each case accepted the manner of pleading. All of the cases referred to by Mr Tsangarakis were motion proceedings. The short answer to Mr Tsangarakis’ contention is that different rules apply to actions as opposed to motion proceedings. Respondent has brought an action in the matters relevant to the present application and in these circumstances, Rule 18(6) applies and has to be complied with.
28. Should I reach this finding the respondent filed an application under the provisions of Rule 27(3) to condone their failings in this regard. When the matter was argued before me, Mr Tsangarakis did not pursue this application for condonation. I believe Mr Tsangarakis was correct in not doing so because the respondent had not set out ‘good cause’ for this court to consider such an application for condonation. In the absence of ‘good cause’, I cannot consider or grant such condonation.

29. This leaves the question of costs to be considered. Mr Tsangarakis strongly motivated that if I were to grant the applicants the relief they sought, I should only award costs up to the stage of the filing

of the answering affidavit. Mr Tsangarakis argued that I should adopt this approach because in the answering affidavit respondent indicates that the applicants have indeed had access to the relevant contracts in an application to sequestrate the principal debtor. This is not disputed by the applicants in fact the deponent to the replying affidavit clearly uses such knowledge of the relevant contracts to make certain submissions.

30. At first, I was tempted to go along with Mr Tsangarakis' approach, however it occurred to me that a formal amendment would be required to insert the relevant agreements into the Particulars of Claim. If the respondent wanted to avoid the risk of an adverse cost order against it, it ought not to have continued in its opposition to

the present application, but effectively it ought to have removed the cause of complaint by effecting the required amendment in each case. In other words, what Rule 18(6) requires is not that the other party have knowledge and insight into the terms of the relevant agreements, but that written agreements or the relevant extracts must be annexed to the relevant pleading.

31. In relation to the Rule 18(1) objection, both parties at most gave this aspect cursory treatment. To treat this aspect separately would not materially affect the outcome. The applicants have been substantially successful. There is no reason not to follow the general rule that costs should follow the result.

In the circumstances, the following order is made in all four of the applications to which this judgment applies, THAT:

- 1) The respondent is directed, within 10 (ten) days of service of this order, to comply with Rule 18(6) of the Uniform Rules of Court.
- 2) In the event that respondent fails to comply with Order 1 set out above, the applicants may return to Court on the same papers, duly supplemented if required, for further relief, including an order to strike out the Summons and Particulars of Claim of the Respondent.
- 3) Respondent is to pay the costs of these applications.

Lawrence Lever

Judge

Northern Cape Division, Kimberley

Representation:

Applicants:

Adv DC Jankowitz oio Engelsman Magabane Inc.

Defendant: Adv S Tsangarakis oio PGMO Attorneys Inc.

Date of Hearing: 14 May 2021

Date of Judgment: 08 April 2022

- [1] The Legal Practice Act.
 - [2] 2012 (5) SA 526 (KZD) at 533 para [21]
 - [3] Unreported judgment handed down in this division on the 20 November 2020.
 - [4] 2010 (2) SA 410 (KZP) at 413D.
 - [5] 1975 (3) SA 944 (WLD)
 - [6] Above.
 - [7] Above.
 - [8] S. A. Railways and Harbours above at 953B.
 - [9] Above.
 - [10] Mossa case., above at 413C-F.
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