

SOUTH AFRICA / JUDGMENT

Kukard N.O and Others v ABSA Bank Limited and Others (Leave to appeal) (115284/2023) [2025] ZAGPPHC 146 (13 February 2025)

[2025] ZAGPPHC 146

COURT

North Gauteng High Court, Pretoria

BEFORE

N.P. Mali

CASE / FILE NUMBER

115284/2023

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

CASE NO: 115284/2023

DOH: 5 February 2025

(1) REPORTABLE: YES

/ NO

(2) OF INTEREST TO

OTHER JUDGES: YES/NO

(3) REVISED.

SIGNATURE

DATE: 13/2/2025

COLLEEN MICHELLE KUKARD

N.O.

First Applicant

HILLBROW INN (PTY)

LTD

Second Applicant

JOUBERT PARK MAXIME HOTEL (PTY)

LTD

Third Applicant

MAXIME HOTEL (PTY)

LTD

Fourth Applicant

NEW WORLD HOTELS (PTY)

LTD

Fifth Applicant

JESHCO (PTY)

LTD

Sixth Applicant

DREAM WEAVER TRADING 139 (PTY)

LTD

Seventh Applicant

WARWICK PAUL VAN DEN BERG

N.O.

Eighth Applicant

DARRYL HURWITZ

N.O.

Nineth Applicant

-and-

ABSA BANK

LIMITED

First Respondent

ACCESS BANK OF SOUTH AFRICA

LIMITED

Second Respondent

STANDARD BANK OF SOUTH AFRICA

LIMITED

Third Respondent

In re:

COLLEEN

MICHELLE KUKARD N.O.

First Plaintiff

HILLBROW

INN (PTY) LTD

Second Plaintiff

JOUBERT

PARK MAXIME HOTEL (PTY) LTD

Third Plaintiff

MAXIME

HOTEL (PTY) LTD

Fourth Plaintiff

NEW

WORLD HOTELS (PTY) LTD

Fifth Plaintiff

JESHCO

(PTY)

LTD

Sixth Plaintiff

DREAM

WEAVER TRADING 139 (PTY) LTD

Seventh Plaintiff

WARWICK
PAUL VAN DEN BERG N.O.
Eighth Plaintiff
DARRYL
HURWITZ N.O.
Nineth Plaintiff
JEFF
PILLAY
First Defendant
ABSA
BANK LIMITED
Second Defendant
ACCESS
BANK OF SOUTH AFRICA LIMITED
Third Defendant
STANDARD
BANK OF SOUTH AFRICA LIMITED
Fourth Defendant
REGISTRAR
OF DEEDS, POLOKWANE
Fifth Defendant
REGISTRAR
OF DEEDS, JOHANNESBURG
Sixth Defendant
REGISTRAR
OF DEEDS, CAPE TOWN
Seventh Defendant
This
Judgment was handed down electronically and by circulation to the
parties' legal representatives' by way of email
and shall
be uploaded on caselines. The date for hand down is deemed to be on
13 February 2025.

JUDGMENT

MALI J:

- [1] This is a two-pronged application. First it is an application for leave to appeal brought by the unsuccessful applicants a quo. The appeal is against the order of 23 October 2024 refusing application for postponement by the applicants and upholding the application for exception brought by second and third respondents.
- [2] The second application is an application for a variation of the order brought by the fourth respondent.

Leave to appeal

- [3] Section 17 of the Superior Courts Act 10 of 2013 ("the Superior Courts Act") provides:

“[1] ”17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that•-

(a)

(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration

[4] The grounds for leave to appeal are as follows:

4.1. “The applicants applied to the Court for the discretionary ruling that the exceptions should only be entertained after discovery by the first and second respondents and that the circumstances set out in its application render the circumstances of the case exceptional to such an extent that it would be in the interests of justice to order that early discovery should take place before a hearing of the exceptions of the 1st and 2nd respondents;

4.2. The Court erred in not considering the applications of the applicants. In doing so, the Court had misdirected itself that it would not be necessary to entertain the applications because of the applicants’ opportunity and right to amend their expiable particulars of claim;

4.3. The Court erred in finding that a concession was made that if the exceptions were found to be good in law, it would not be necessary to grant an order for early discovery, which with respect, was not the applicants’ case;

4.4. The Court erred in not finding the circumstances of the case to be exceptional and not finding that the first and second respondents should be ordered to discover in terms of Rule 35(1) before considering the exceptions taken by the first and second respondents; and

4.5. The Court erred in granting a cost order against the applicants on a scale of C in unopposed exception proceedings.”

[5] A ruling on postponement was made on the day of hearing of the application in court, ex tempore. The basis of the application was the Rule 35(1) Notice which became withdrawn, therefore the application for postponement against Access Bank fell away. The postponement was based on Standard Bank having to discover in terms of Rule 35(1) Notice. There were extensive and substantial arguments in respect of Rule 35(1) of which I was not in a position to make a ruling on. In the interest of justice, the postponement was dismissed so that the two exceptions could be argued and Rule 35(1)(2)(b) decided or determined with the exceptions.

[6] From Pages 45 to 72 of the transcript, it is evident that the applicants conceded; that in the event that the exceptions are found to be good it would not be necessary to deal with Rule 35(1) application. The applicants are not appealing against the order upholding exceptions.

[7] At page 46, the extracts in lines 13 to 20 are relevant. The court sought clarity on arguing of exceptions. Mr Jacobs's

response in page 47 commences with "if the exception is upheld". At page 58 from Line 4, Mr Jacobs deals with exceptions. At page 72 the opening sentence reads "in arguing my exception".

[8] From the above the court understood that the exceptions were being argued, however considering the submission by Mr Mc Connache at page 56 line 24, it appears that there was no agreement to argue exceptions.

[9] Having regard to the above, leave to appeal is granted to the Full Court of this Division. Costs shall be on the appeal.

Variation

[10] On 23 October 2024 I granted an order in the following terms:

"1. The plaintiffs' postponement application is dismissed.

2. The third and fourth defendant's exceptions are upheld.
3. The plaintiffs are granted 15 court days from the date of this order to amend their particulars of claim.
4. Should the plaintiffs fail to deliver a notice of amendment in respect of the aforementioned exception within 15 court days from the granting of this order, or should the notice of amendment fail to remove the causes of complaint referred to in the third and fourth defendant's notice of exception, then the third and fourth defendant shall be entitled to set the matter down on notice to the plaintiffs, on the same papers, duly supplemented, to seek an order striking out the plaintiffs' claim and dismissing the action with costs.
5. The plaintiffs are jointly and severally liable for the costs of the third defendant of the postponement application and the exception, including the costs of two counsel, on scale C in terms of Uniform Rules 67A(3) and 69.
6. In respect of the fourth defendant the costs of counsel on scale C, to be paid by the first to fifth plaintiffs and the eighth and ninth plaintiffs, jointly and severally."

[11] Rule 42 (1) (c) of the Uniform Rules of Court provides that the court may mero motu or upon the application of any party affected, rescind or vary any order or judgment in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity, or error or omission.

[12] The correct order is as follows:

1. The plaintiffs' postponement application is dismissed.
2. The third and fourth defendant's exceptions are upheld.

3. The plaintiffs are granted 15 court days from the date of this order to amend their particulars of claim.
4. Should the plaintiffs fail to deliver a notice of amendment in respect of the aforementioned exception within 15 court days from the granting of this order, or should the notice of amendment fail to

remove the causes of complaint referred to in the third and fourth defendant's notice of exception, then the third and fourth

defendant shall be entitled to set the matter down on notice to the plaintiffs, on the same papers, duly supplemented, to seek an order striking out the plaintiffs' claim and dismissing the action with costs.

5. The plaintiffs are jointly and severally liable for the costs of the third defendant of the postponement application and the exception, including the costs of two counsel, on scale C in terms of Uniform Rules 67A(3) and 69.
6. In respect of the fourth defendant, the costs of the fourth defendant of the postponement application and on exception, including the costs of counsel on scale C, to be paid by the first to fifth plaintiffs

and the eighth and nine plaintiffs, jointly and severally.

N.P. MALI

JUDGE OF THE HIGH COURT

Counsel for the Applicant

Adv FC Lamprecht

Counsel for Access Bank (1st Respondent)

Adv. C. Mcconnachie

Adv. Z. Raqowa

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Prepared on 10 October 2026 · Esheria