

SOUTH AFRICA / JUDGMENT

Mahlangu and Another v Firststrand Bank Limited and Others (55279/2021) [2024] ZAGPPHC 1291 (2 December 2024)

[2024] ZAGPPHC 1291

COURT

North Gauteng High Court, Pretoria

BEFORE

Woodrow

CASE / FILE NUMBER

55279/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 55279/2021

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: YES

DATE:

2 December 2024

SIGNATURE

OF JUDGE:

In

the matter between: MDUDUZI
SIBUSISO MAHLANGU
First
Applicant
SIBONGILE
PORTIA MAHLANGU
Second Applicant
and
FIRSTRAND
BANK LIMITED
First Respondent
SHERIFF
JOHANNESBURG CENTRAL
Second Respondent
REGISTRAR
OF DEEDS, JOHANNESBURG
Third
Respondent
JOHN
OZAHEME CHWUKU
Fourth Respondent

JUDGMENT

Woodrow, AJ:

Introduction

- [1] The present matter has a long and arduous litigation history.
- [2] The interlocutory application before me concerns an application for leave to amend Part B of the applicants’ notice of motion (in what I describe later herein as the ‘main application’). The applicants further seek costs against the first respondent, Firststrand Bank (“Firststrand”), on a punitive scale.
- [3] In essence, the applicants seek an amendment of their notice of motion in a pending application in order to introduce prayers seeking rescission of a court order/judgment. I deal with the amendment sought in more detail later.
- [4] Firststrand opposes the application for leave to amend.
- [5] In order to properly contextualise the present application and the order that I intend granting in this matter, it is necessary to sketch briefly certain factual background to this matter and steps in the litigation path that this matter has followed. I do not intend to provide detailed facts in this regard nor to make any findings in respect of the actual merits of the main application as this is the domain of the court hearing the main application. Accordingly,

nothing in this judgment is to be construed as a finding in respect of the merits of the main application, and the findings herein are limited to the amendment application and certain procedural steps that I deem necessary for purposes of advancing the litigation

between the parties.

Synopsis of certain facts and litigation history

[6] In about March 2017, the applicants purchased a home (the “Property”) with the financial assistance of Firststrand. The purchase price of the Property appears to have been in the sum of approximately

R512,100.00. (CaseLines 02-4, par 10) The applicants concluded a homeloan agreement and a written mortgage loan agreement (the

“agreements”) with Firststrand. According to Firststrand, in terms of the agreements, the applicants acknowledged their indebtedness to Firststrand in the sum of R512,100.00 plus an additional sum of R102,420.00 which the Applicants were to repay to Firststrand by way of monthly instalments. (CaseLines 04-3, par 9)

[7] The applicants fell into arrears.

[8] During or about June 2020, Firststrand issued summons against the applicants in which it claimed payment of the amount it alleged was due in terms of the agreements as well as an order declaring the Property specially executable. According to Firststrand, at the time that the summons was issued, the applicants were in arrears in the amount of R17,873.44, which represented 3.05 months’ worth of arrears. (CaseLines 04-4, par 13)

[9] On or about 5 October 2020, Firststrand issued an application to have the Property declared specially executable in terms of Rule 46A (the “Rule 46A application”). (CaseLines 04-4, par 16) (Rule 46A application, AA9, CaseLines 04-186 – 04-223)

[10] The Rule 46A application was not served on the Applicants personally and the applicants failed to oppose. (CaseLines 04-4 – 04-6, par 16 – 22)

[11] Firststrand sought an order in terms of the Rule 46A application that the Property be sold without a reserve price, alternatively subject to a reserve price of R293,339.14. (CaseLines 04-186 – 04-188) Firststrand stated the following inter alia in the founding affidavit to the Rule 46A application:

a. The arrears on the bond account as at the date of the application

were R40,695.95. (CaseLines 04-195, par 9)

b. As far as the Firststrand deponent could establish the Property was the applicants’ primary residence and occupied by the applicants. (CaseLines 04-196, par 11)

- c. The estimated market value of the Property was R540,000.00, (CaseLines 04-199, par 13.1) and the municipal valuation of the Property was R428,000.00. (CaseLines 04-200, par 13.2)
- d. Firststrand provided detailed reasons why it was not necessary for the court to set a reserve price, including, in short, that the 'buy in' figure of Firststrand had been determined in the sum of R293,339.14, and in essence that the Property would not be sold at a price lower than this. In order to accurately relay what was stated by Firststrand in this regard, I quote an extract from the founding affidavit of Firststrand in the Rule 46A application below: (CaseLines 04-201 – 04-205, par 16[1] – 15.7.11) (In the Rule 46A application, Firststrand was the 'applicant' and the applicants in the present application appear to have been referred to as 'the Respondent')

"I submit that it would be appropriate to declare the properly executable without a reserve price and I wish to highlight the following in this regard:

...

15.6 Advertising the auction as having no reserve price will be desirable because it will potentially attract a greater number of bidders which in turn will create competition which I submit will result in a higher price ultimately being achieved.

15.7 In order to serve the best interests of both Applicant and the Respondent, the Applicant will approach a sale in execution of immovable property as follows:

15.7.1 buy-in figure will be determined after considering the marketability and location of the property, [further factors are then set out] ...;

15.7.2 The Applicant's attorney of record will thereafter be provided with a power of attorney and instructed to attend the sale in execution;

15.7.3 The Applicant's attorney of record will be provided with the buy-in figure a day before the sale in execution date;

15.7.4 The Applicant's attorney or his nominee will then attend the sale in execution as a bidder on behalf of the applicant and ensure that the immovable property be sold for at least the buy-in figure;

15.7.5 In the event that the immovable property is not sold for the buy-in figure, the Applicant's attorney or his nominee will buy in the immovable property on behalf of the Applicant, where after it will be marketed and resold In the open market;

15.7.6 In the event that the immovable property is sold for a surplus after deductions of costs, the surplus will be paid into the Respondent's residual account to settle or reduce the outstanding balance;

15.7.7 The advantage of the applicant's representative keeping the buy-in figure to himself/herself, is that the other bidders will not know when the buy-in figure is reached, which will most likely lead to a higher price being obtained;

15.7.8 In the premises I respectfully submit that there are sufficient checks and balances in place to render the setting of a reserve price unnecessary;

15.7.9 As the application will be served on the Respondent, the Respondent is invited to address the Court on any issues contained herein which the Respondent does not agree with, and the Respondent's failure to do so can be regarded as consent to the proposals put forward to the Honourable Court;

15.7.10 The applicant's buy-in figure has on the basis hereinbefore referred to been determined at R293 339.14, as prayed for in the notice of motion. It is this sum that should be the reserve should the court deem it necessary.

15.7.11 In the premises I respectfully submit that there are sufficient checks and balances in place to render the setting of a reserve price unnecessary and that it is in the best interests of the Respondent and the Applicant that the property be sold without reserve for the reasons set out above.”

e. In the alternative, “... and only if the court deems it necessary that a reserve price be set ...”, Firststrand contended that a reserve price in the sum of R293,339.14 was appropriate. (CaseLines 04-205, par 16)

[12] On 26 April 2021, default judgment as well as an order in terms of the Rule 46A application was granted by Her Ladyship Justice Mokose in the absence of the applicants. (the “default order”) (CaseLines 04-7, par 26 – 27) The default order included judgment in the sum of R519,555.92, plus interest, an order declaring the Property specially executable and that the Property be sold without a reserve price, and costs on an attorney and client scale. (Order of Mokose J, dated 26 April 2021, CaseLines 02-42).

[13] As this gains some relevance later herein, I point out that order 4 of the default order reads:

“4. THAT the property be sold without a reserve price;”. (CaseLines 02-44) (This is referred to as ‘order number 4’ in Part B of the notice of motion in the main application referred to below.)

[14] A sale in execution of the Property took place on 27 September 2021, and the Property was sold to the fourth respondent in the sum of R5,000.00. (CaseLines 04-8, par 28 – 29)

[15] On 4 November 2021, the applicants issued out an application with a notice of motion in two parts: (the “main application”) (Notice of motion, CaseLines 01-1)

a. Part A in essence seeking urgent interim relief pending the outcome of Part B of the notice of motion, staying/suspending execution and interdicting the Registrar of Deeds from registering the Property in the new purchaser’s name;

- b. Part B, to be heard in the ordinary course, in which the following relief is sought:[2]

“6. That order number 4 of the court order dated 26 April 2021 under case number 24686/2020 is varied to read as follows;

The property be sold at a reserve price of R428 000.00.

7. Any other respondent who opposes this application, is ordered to pay the applicants’ costs;
8. Further and/or alternative relief.”

[16] I do not intend to deal with the facts set out in support of the application in any detail at this stage. I shall refer to such facts to the extent necessary when dealing with the amendment application that serves before me.

[17] At the time of delivery of the main application, the applicants were unaware of the identity of the new purchaser[3] until Firststrand filed its answering affidavit and raised non-joinder as one of the defences to the relief sought by the applicants in terms of Part A of the notice of motion in the main application.

[18] Part A of the notice of motion was set down to be heard in the urgent court. On 9 November 2021, His Lordship Mr Justice Fourie granted an order that pending an application for the joinder of the fourth respondent (which the applicants were directed to institute within 5 days) and pending the finalisation of the relief sought in Part A, transfer of the Property to the fourth respondent was stayed. Fourie J granted further orders for purposes of the determination of the application, including timeframes, reserved costs, and postponed the application sine die. (Order of Fourie J, dated 9 November 2021, CaseLines 15-12)

[19] Pursuant to the aforesaid order, the applicants launched an urgent joinder application that was to be heard together with the relief sought in Part A of the main application. (Joinder application, CaseLines 14-1) The matter was heard by Her Ladyship Justice Lenyai who declared the matter to be urgent and granted an order on 1 December 2021 in the following terms: (Order of Lenyai J, dated 1 December 2021, CaseLines 15-1)

“1. The joinder application is declared to be a matter of urgency and [and] is heard with Part A of the application;

2. Mr John Ozaheme Chukwu is joined as the Fourth Respondent;
3. Transfer of the house described as ... is stayed pending final determination of Part B of this application;
4. The Third Respondent is interdicted from registering the property described in prayer 2 above in the names of a new purchaser pending determination of Part B of this application;
5. Costs of this application are reserved for Part B application.”

[20] On or about 29 March 2022, attorneys for Firststrand served notice of set down of the main application for hearing of Part B of the notice of motion on 25 April 2022. (Notice of set down, CaseLines 16-1). On or about 22 April 2022, the attorneys for the applicants served two notices of intention to amend, as well as an application to postpone

Part B of the main application. (Notice to amend, CaseLines 17-1 and 17-4; Application for postponement, CaseLines 18-1). One of the reasons advanced by the applicants for the postponement was to effect amendments to Part B of the notice of motion and to file a supplementary [founding] affidavit. (Postponement application, founding affidavit, par 12, CaseLines 18-7). Firststrand opposed the postponement application. (Postponement application, answering affidavit, CaseLines 18-13)

[21] On 26 April 2022, His Lordship Mr Justice Mbongwe granted an order in the following terms: (Order of Mbongwe J, dated 26 April 2022, CaseLines 27-1)

“1. The applicants to file and serve their application for the filing of an additional affidavit and set both their applications of rescission and the application for filing of an additional affidavit on the same day.

2. Costs are reserved.”

[22] On or about 5 May 2022, the applicants filed a supplementary affidavit, but without an application to admit such affidavit into evidence. (Applicants’ supplementary affidavit, CaseLines 20-1) On or about 10 May 2022, the applicants ‘withdrew’ their supplementary affidavit as it had been filed without a notice of motion / application to admit such affidavit into evidence and the applicants indicated that it would be filed with a notice of motion. (Notice to withdraw supplementary affidavit, CaseLines 21-1) On or about 10 May 2022, the applicants delivered a notice of motion

(together with their supplementary affidavit) in which they sought an order in the following terms inter alia: (Application for leave to file supplementary affidavit, CaseLines 22-1)

“1. That an application for leave to file a supplementary affidavit is granted;

2. That an application for leave to file a supplementary affidavit is heard in conjunction with the rescission application;

...”

[23] On or about 31 May 2022, the applicants delivered an ‘amended notice of motion’, ostensibly in an attempt to amend Part B of the notice of motion in the main application. (Amended notice of motion, CaseLines, 23-1). Part B of the ‘amended notice of motion’ read as follows:

“6. Application by Applicants to file supplementary affidavit is granted;

7. Application for rescission of a court order dated 26 April 2021 is granted;

8. The sale of the Applicant's house held by deed of transfer number ST21004/2017 pursuant to a court order dated 26 April 2021 under case number 24686/2020 is reversed; and

9. The Second Respondent is ordered to refund the Fourth Respondent R5 000,00 paid by the Fourth Respondent for the purchase of immovable property held by deed of transfer number ST21004/2017;
10. Further and/or alternative relief.”
- [24] On or about 10 June 2022, Firstrand served notice of an irregular step in respect of the delivery of the ‘amended notice of motion’ which had been delivered by the applicants on 31 May
2022. (Notice of irregular step, CaseLines 28-1) Therein, Firstrand raised an number of objections, including that Firstrand had objected to the initial notices of intention to amend, that the applicants had failed to bring an application in terms of rule 28(4) after such objections had been made, that the applicants had delivered their ‘amended notice of motion’ outside of the time periods required by rule 28, and that the applicants had failed to comply with the uniform rules of court.
- [25] The applicants failed to remove the causes of complaint and Firstrand accordingly proceeded with an application to set aside the ‘amended notice of motion’ as an irregular step (in terms of rule 30 of the uniform rules of court). (Application to set aside ‘amended notice of motion’, CaseLines 29-1 to 29-46) (the “Rule 30 application”) The Rule 30 application was opposed by the applicants (Answering affidavit to application to set aside ‘amended notice of motion’, CaseLines 31-1 to 31-20), and was set down to be heard on 24 April 2023. (Set down, CaseLines 41-1)
- [26] The Rule 30 application was heard by His Lordship Mr Justice Baqwa who granted an order in the following terms: (Order of Baqwa J, dated 24 April 2023, CaseLines 15-18)
- “1. That the Applicants’ “Amended Notice of Motion” served on 31 May 2022, under the above mentioned case number, be set aside.*
2. Applicants, jointly and severally, the one paying the other to be absolved, to pay the costs of this application.”
- [27] On or about 17 July 2023, Firstrand filed heads of argument, an authorities list, a practice note, and a chronology in respect of Part B of the main application. (CaseLines, 42-1, 43-1, 44-1, and 45-1)
- [28] On or about 18 July 2023, the applicants filed a notice of intention to amend in terms of rule 28(1), which is the subject of the present application. (Notice of amendment in terms of rule 28(1), CaseLines 46-1). Firstrand delivered notice of objection to the proposed amendment on or about 1 August 2023. (Notice of objection, CaseLines 47-1) Accordingly, the applicants launched the present interlocutory application for leave to amend. (Application for leave to amend,

CaseLines 48-1) The applicants and Firstrand have exchanged founding (CaseLines 48-4), answering (CaseLines 50-1) and replying (CaseLines 51-1) affidavits in the present application for leave to amend.

[29] Before dealing with the amendment application, I point out that one of the reasons that I have sketched the aforesaid litigation history is due to the fact that I intend to grant an order that will hopefully streamline this matter to finality. In my view, the drawn-out nature and piecemeal adjudication of this matter is not in the interests of any of the parties and is not in the interests of the administration of justice.

The application for leave to amend

[30] As indicated already, Part B of the notice of motion in the main application currently reads as follows:[4]

[31] The applicants seek to amend Part B of the notice of motion as follows:[5] (Notice in terms of rule 28(1), CaseLines 46-3 read with Application in terms of rule 28(4), CaseLines 48-1)

- a. By substitution of prayer 6 (of part B) with the following: “6. Application by applicants to file supplementary affidavit is granted;”
- b. By substitution of prayer 7 to read as follows: “7. Application for rescission of a court order dated 26 April 2021 is granted;”
- c. By addition of the following [to prayer 7]:

“7.1. The sale of the Applicant's immovable property held by deed of transfer number ST21004/2017 pursuant to a court order dated 26 April 2021 under case number 24686/2020 is invalid; and

7.2. The Second Respondent is ordered to refund the Fourth Respondent R5 000, 00 paid by the Fourth Respondent for the Purchase of immovable property held by deed of transfer number ST21004/2017.”

- d. By substitution of prayer 8 with the following: “8. The first Respondent to pay the costs on attorney and client scale.”
- e. By addition of prayer 9 to read as follows: “9. Further and/or alternative relief.”

[32] Firstrand has objected to the intended amendment and has opposed the application for leave to amend.

[33] The principles relevant to amendment are trite. In *Commercial Union Assurance Co Ltd v Waymark NO*, [6] the court, after citing various authorities, summarised certain principles applicable to amendments:[7]

“The principles enunciated in the abovementioned cases can be summarised as follows:

1. The Court has a discretion whether to grant or refuse an amendment.

2. An amendment cannot be granted for the mere asking; some explanation must be offered therefor.
3. The applicant must show that prima facie the amendment 'has something deserving of consideration, a triable issue'.
4. The modern tendency lies in favour of an amendment if such 'facilitates the proper ventilation of the dispute between the parties'.
5. The party seeking the amendment must not be mala fide.
6. It must not 'cause an injustice to the other side which cannot be compensated by costs'.
7. The amendment should not be refused simply to punish the applicant for neglect.
8. A mere loss of time is no reason, in itself, to refuse the application.
9. If the amendment is not sought timeously, some reason must be given for the delay.”

[34] In *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC) par [9], the Constitutional Court held as follows: (footnotes omitted)

“[9] The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in Commercial Union Assurance Co Ltd v Waymark NO. The practical rule that emerges

from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?”

[35] The permissive principle entails that amendments are allowed, unless they are sought in bad faith or would cause an injustice that cannot be remedied by an award of costs.[8]

[36] Firststrand has raised a point in limine of non-service of the notice of intention to amend and the application for leave to amend on the fourth respondent. (Amendment application, answering affidavit, par 3, CaseLines 50-9) In reply, the applicants have indicated that the fourth respondent has elected not to participate in the proceedings at all, and is not prejudiced. The applicants further indicate that the fourth respondent has since been served with the notice of intention to amend and the present application, and they attach a copy of an e-mail in this regard. (Amendment application, replying affidavit, par 12 - 16, CaseLines 51-7; Email, “JOC”, CaseLines 51-13) The contention that the fourth respondent has elected to abide the decision of the court is consistent with the fact that the fourth respondent has not filed any papers in these proceedings to date. Further, the parties appear to have accepted this position - for instance, Firststrand does not appear to have served the Rule 30 application on the fourth respondent. Be this as it may, the applicants have

furnished proof that they have informed the fourth respondent of the current amendment application, and the fourth respondent appears to have elected not to participate and to abide. I am accordingly not inclined to uphold the point in limine. In the event that I am wrong in this regard, I intend to grant an order requiring that the order that I intend to grant in these proceedings is to be furnished to the fourth respondent. Should the facts stated by the applicants, namely that the fourth respondent has been provided with the notice of amendment and amendment application, and that the fourth respondent has elected not to participate and to abide, be incorrect, the fourth respondent has remedies at his disposal.

[37] The objections and grounds raised by Firststrand have been articulated in the joint practice note in this matter.[9] (CaseLines, A3) I deal with each of the grounds, which I quote in turn below, as raised by Firststrand.

[38] First ground: “i) The Applicants wish to include new prayers into their Notice of Motion which is not supported by any evidence as their founding affidavit does not make out a case for the relief sought.”

a. In my view it is not correct that the founding affidavit does not

contain facts in support of the “new prayers” and that there is no evidence in the founding affidavit to make out a case for the relief sought.

b. Whilst it is correct that the facts contained in the founding affidavit were stated in support of a case for variation of the court order of Mokose J as opposed to the rescission of the order, in my view there is in fact evidence in support of the rescission that shall be sought if the amendment is allowed.

c. Without being exhaustive, in the founding affidavit in the main application:

i. The applicants allege that the court which granted the default order omitted to follow the prescripts of Rule 46A of the uniform rules when it granted order number 4 (Founding affidavit, CaseLines 02-7, par 23), and state inter alia that “... Our house that is worth R428 000.00 was sold for a mere R5 000.00 on a debt of more than R500.00 ...” (Founding affidavit, CaseLines 02-8, par 26).

ii. The applicants set out facts in support of and call into aid inter alia Rule 46A of the uniform rules read together with section 26(3) of the Constitution, Rule 31(2)(b) of the uniform rules, and Rule 42 of the uniform rules.

iii. Prima facie, it appears that Mokose J was given the assurances set out in the founding affidavit in the Rule 46A application detailing why a reserve price ought not to be set (set out in the founding affidavit of Firststrand in the Rule 46A which I have quoted above). There does not appear to be any explanation why the process described by Firststrand and the ‘checks and balances’ were not in fact followed, and instead the Property was sold to the fourth respondent for R5,000.00.

- d. In my view, it is not correct that there is no evidence in the founding affidavit/main application, in support of a rescission application, at least in respect of a portion of the order granted by Mokose J. I express no view on the merits of the main application, but I am of the view that there is evidence in support of the amended

relief claimed.

- e. In addition, this ground of objection loses sight of the fact that the applicants have launched an application for the admission of a further supplementary affidavit in support of the amended relief

claimed. (Application for leave to file supplementary affidavit, CaseLines 22-1)

[39] Second ground: “ii) The Applicants are attempting to completely change the relief sought from varying the order to a rescission and setting aside the sale in execution. The Applicants’ application to amend from a variation to a rescission has already been dismissed by the Honourable Judge Baqwa: this is thus *res judicata*.”

- a. The Rule 30 application before Baqwa J, which I have described above

already, (irregular step proceedings in terms of rule 30), related to the procedure followed by the applicants to effect an amendment to their notice of motion. For example, Firststrand in the Rule 30 application proceedings complained of the fact that the applicants

had not followed rule 28(4) after objections had been raised to the initial notice of intention to amend, that the applicants had

delivered their ‘amended notice of motion’ outside of the time periods required by rule 28, and that the applicants had failed to comply with the uniform rules of court.

- b. The Rule 30 application was not an application for leave to amend in terms of rule 28(4) and dealt with prior notices of intention to amend and procedural steps which occurred prior to the notice of intention to amend that is the subject of the present application.

- c. The decision of Baqwa J in the Rule 30 application setting aside the ‘amended notice of motion’ as an irregular step does not support an argument that the relief sought by the applicants in the present application for leave to amend is *res iudicata*.

[40] Third ground: “iii) The Applicants cannot merely include a prayer in their Notice of Motion stating that the application by the Applicants to supplement is granted. The Applicants need to apply to the above Honourable Court for leave to supplement. As previously ordered by Judge Mbongwe, the Applicants need to file their application for leave to supplement and set same down for hearing together with the rescission, which the Applicants failed to do.”

- a. In terms of the Order of Mbongwe J, (CaseLines 27-1), the application

to supplement and the rescission application are to be set down on the same day. The applicants have filed a notice of motion

together with their supplementary affidavit seeking leave to file their supplementary affidavit. (Application for leave to file

supplementary affidavit, CaseLines 22-1) In terms of the aforesaid order, the applicants are required to set down the main application

(in terms of Part B of the notice of motion) and the application for leave to file the supplementary affidavit on the same day.

- b. The grounds advanced by Firstrand herein are not grounds that militate against the grant of the amendment sought.
- c. Be the aforesaid as it may, the applicants already seek an order admitting the supplementary affidavit in their notice of motion for leave to file their supplementary affidavit. This prayer is included in the notice of motion in that application. (Application for leave to file supplementary affidavit, CaseLines 22-1) There is no sense in having such prayer repeated in the main application. I am accordingly not inclined to grant the amendment which the applicants seek namely – the substitution of prayer 6 (of part B) with the following: “6. Application by applicants to file supplementary affidavit is granted;”, as this is what is already claimed in the application for leave to file the supplementary affidavit.
- d. The effect of such amendment not being granted is that the original

prayer 6 in the notice of motion in Part B of the main application remains in place, namely the prayer originally included in Part B of the notice of motion seeking a variation of the order of Mokose J by inserting a reserve price of R428,000.00.

- e. Should the applicants persist with such relief, in my view this would have to be claimed in the alternative to the rescission relief sought. Rule 42 of the uniform rules of court provides for such alternatives providing that a court may “... rescind or vary ...”, and in my view these remedies could be claimed in the alternative to each other.[10] This, however, is not an issue that I have to decide, and it is not for the court to impose its views in this regard. It is for the applicants to ventilate their case as they decide, within the bounds of the principles of pleading.[11]

[41] Fourth ground: “iv) Should the Applicants amendment be effected, the parties will have to file new answering and replying affidavits and heads of argument. This will result in further delays and more legal costs being incurred.”

- a. The fact that an amendment will result in further affidavits and heads of argument having to be filed does not constitute a ground for the refusal of an amendment. Such can be cured by an appropriate order for costs.

- b. When filing its answering affidavit, Firstrand itself reserved for itself the right to file a further affidavit: “I do however fully reserve the respondents right to supplement this affidavit should the need arise at any stage in the future as this affidavit has been drafted on very short notice.” (Main application, Answering affidavit, par 4, CaseLines, 04-2)
- c. The prejudice asserted by Firstrand in this context is not such that the amendment ought to be refused.
- d. However, in my view there is merit in the contention on the part of Firstrand that if the application to admit the supplementary affidavit is heard on the same day as the main application, there is a very real risk that the present matter will be postponed again, and that the parties will be prejudiced in this regard (and further court resources wasted). Firstrand states in its answering affidavit in the amendment application that: (Amendment application, answering affidavit, par 14.3, CaseLines 50-17) “14.3 Should the supplementary affidavit be accepted, then it will follow that the Honourable Court must grant the Respondent the opportunity to deliver a supplementary answering affidavit and the Applicants to deliver a supplementary replying affidavit. The parties will further have to supplement their heads of argument. All this will be as a consequence of the Applicants conduct herein and the Respondent will seek costs for all the further expenses it will have to incur as there is no reason or basis why the Respondent should be out of pocket.” In this regard further, in the heads of argument on behalf of Firstrand it is submitted that the “... respectful difficulty with [the order of Mbongwe J] however [is] the execution of same ...” (Firstrand Heads, par 4.7, CaseLines 53-12)
- e. In order to avoid further delays, I intend to grant an order permitting the respondents to file answering affidavit/s to the supplementary

affidavit of the applicants and permitting the applicants to file a replying affidavit to such answering affidavit/s. Such order is not to be construed as an order granting the applicants leave to file their supplementary affidavit, as such application is not before me and also the order of Mbongwe J has already directed that such application is to be determined on the same day as the main application. The aforesaid procedural directions that I intend issuing are issued in order to address the practical prejudice raised by Firstrand (with which I agree) and to attempt to achieve, in the circumstances of this matter, the least expensive and most expeditious completion of litigation between the parties.[12]

[42] Fifth ground: “v) Should the Applicants wish to place new facts and/or relief before the Court, they should withdraw their current application, tender the First Respondent's costs and start afresh.”

- a. This is not a ground that ought to defeat the amendment sought.

Costs

[43] The applicants have been substantially successful in their application for leave to amend. Be this as it may, the applicants seek an indulgence in seeking to amend their notice of motion.

[44] Considering the facts of the matter, fairness to both sides, and in the exercise of my discretion, it is my view that the costs of the present application for leave to amend ought to be costs in the cause of Part B of this application.

Order

[45] The following order is accordingly granted:

1. Part B of the applicants' notice of motion dated 3 November 2021 located at CaseLines 01-4 is amended as follows:
 - a. The current prayer 7 is substituted to read as follows: "7. Application for rescission of a court order dated 26 April 2021 is granted;"
 - b. The following further prayers are inserted after prayer 7:

7.2. The Second Respondent is ordered to refund the Fourth Respondent R5 000,00 paid by the Fourth Respondent for the Purchase of immovable property held by deed of transfer number ST21004/2017."

- c. The current prayer 8 is substituted to read as follows: "8. The first Respondent to pay the costs on attorney and client scale."
 - d. The following further prayer 9 is inserted after prayer 8: "9. Further and/or alternative relief."
2. The applicants are directed to furnish a copy of this order to each of the respondents.
3. For purposes of the expeditious finalisation of Part B of the notice motion in the main application, the following directives are

issued:

- a. The respondents are granted leave and are afforded a period of 20 days from the date of receipt of this order, such period to exclude the days between 21 December and 7 January, both days inclusive, in order to deliver an answering affidavit to the applicants' supplementary affidavit, if so advised;
 - b. The applicants are granted leave and are afforded a period of 10 days from date of receipt of any answering affidavit that may be received in terms of order 3.a. to deliver a replying affidavit to such answering affidavit, if so advised;
 - c. The aforesaid directives are not to be construed as the grant of leave to the applicants to file the supplementary affidavit, which is an issue this court has directed is to be heard together with the main application as per the order of this court dated 26 April 2022, at CaseLines 27-1.

4. The costs of this application are costs in the cause of Part B of the notice of motion in the main application.

WOODROW AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties and / or parties' representatives by e-mail and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on this 2ND day of December 2024.

Appearances

Attorney on behalf of the Applicants: JV Sithole Of: JVS Attorneys Incorporated Counsel for the First Respondent: J Minnaar instructed by: Hammond Pole Majola Attorneys Date of Hearing: 7 August 2024 Date of Judgment: 2 December 2024

- [1] There is a typographical error in the numbering in the affidavit.
- [2] Notice of motion, Part B, CaseLines 01-4. I quote the relief sought in Part B as this is the part of the notice of motion that the applicants seek leave to amend in the present interlocutory application.
- [3] Main application, Founding affidavit, par 75, CaseLines 02-19; Replying affidavit, par 22, CaseLines 05-7.
- [4] Notice of motion, Part B, CaseLines 01-4.
- [5] I have retained the wording used by the applicants as far as possible.
- [6] 1995 (2) SA 73 (Tk).
- [7] at p 77.
- [8] Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH 2024
- (1) SA 331 (CC) par [64].
- [9] These grounds set out in the joint practice note recite the grounds raised in the notice of objection to the intended amendment delivered by Firststrand (CaseLines, 47-1).
- [10] Cf. Kgasoane and Another v Nedbank and Another (13040/2019) [2021] ZAGPJHC 32 (23 March 2021).
- [11] Media 24 (Pty) Ltd v Nhleko & Another (Case no 109/22) [2023] ZASCA 77 (29 May 2023) par [18] – [19].
- [12] Cf. Ngassam v MTN Group Management Services (Pty) Ltd (4337/2022)
- [2024] ZAGPJHC 277 (15 March 2024) par [19] – [27].

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Prepared on 10 October 2026 · Esheria