

SOUTH AFRICA / JUDGMENT

Nel v Merchant Commercial Finance (Pty) Ltd t/a M Factors (9733/2009) [2021] ZAGPPHC 587 (14 September 2021) [2021] ZAGPPHC 587

COURT

North Gauteng High Court, Pretoria

BEFORE

D Makhoba

CASE / FILE NUMBER

9733/2009

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE: NO/YES

(2)

OF INTEREST TO OTHER

JUDGES: NO/YES

(3)

REVISED. NO/YES

14_

SEPTEMBER 2021

Case Number:

9733/2009

In

the matter between:

MARIA

MAGDALENA

NEL

Applicant

And

MERCHANT

COMMERCIAL FINANCE (PTY) LTD T/A

M

FACTORS

Respondent

In

re: M
FACTORS
Plaintiff
HERCULES
JOHANNES PETRUS NEL
First Defendant
MARIA
MAGDALENA NEL
Second Defendant

JUDGMENT

MAKHOBHA J

INTRODUCTION

1. The applicant in this application is the second defendant in an action instituted against her and her late husband who was the first

defendant in an action under case number 9733/2009.

2. The respondent is Merchant Commercial Finance (Pty) trading as M Factors a company duly incorporated with limited liability in terms of the company laws of the Republic of South Africa under registration number 98/18441/07 with the principal place of business at 4th floor, 2 Long Street, Cape Town.
3. For ease of reference the parties shall be referred to in this judgment as the applicant and the respondent respectively.

BACKGROUND

4. The respondent is a money lender and factoring house. During October 2005 the respondent lent and advanced certain monies to one Hercules Johannes Nel who is the son of the applicant and her late husband.
5. As security for the payment of the debt the respondent obtained a deed of suretyship from the applicant. He also obtained a deed of pledge of shares in Golden Harvest Retirement Resort Share block Limited, signed only by the applicant. Due to these shares the applicant occupies unit a retirement home.
6. Hercules Nel the applicant's son after lending the money from the respondent he was unfortunately sequestrated. Consequently, in 2009 the respondent sued the applicant and her late husband jointly and severally for Hercules Nel's debt based on the suretyship and also claimed an order declaring the applicant's shares be declared executable. This matter (the action) is still pending with the respondent having amended its particulars of claim three times. The applicant had filed a plea and conditional counter claim. The respondent

filed a plea to the applicant's conditional claim.

7. The applicant approached this court asking that there be separation of the issue of the validity of the shares from all other issues in terms of Rule 33 (4).
8. The applicant further asks for the determination of the separate issues on affidavit in these proceedings and that the deed of pledge signed by the applicant be declared null and void ab initio. The respondent opposes the relief sought in this application.
9. The stance of the respondent is that the application is based with procedural irregularities and respondent shall suffer substantial

prejudice if the relief in this application is granted.

THE LAW

10. Uniform Rule 33 (4). Uniform Rule 33(4) reads as follows:

"If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application

of any party make such order unless it appears that the questions cannot conveniently be decided separately".

11. In *Braaf v Fedgen Insurance Limited*[1]refereeing to the wording of Rule 33 (4) of the Uniform Rules of Court the court said "there is also, of course, the interests of expedition and finality of litigation which are better served by the disposal of the whole matter in one hearing". This decision is referred to in the Appellate Division *S v Malinde*[2].
12. The SCA decision which succinctly deals about Rule 33 (4) in the decision *Denel (Edms) Bpk v Vorster*[3] in this decision the court said "Before turning to the substance of the appeal, it is appropriate to make a few remarks about separating issues. Rule 33 (4) of the Uniform Rules-which entitles a Court to try issues separately in appropriate circumstances- is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be assumed that result is always achieved by separating issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately. But, where the trial Court is satisfied that it is proper to make such an order-and, in all cases, it must be so satisfied before it does so-it is the duty of that Court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms

like the ‘merits’ and the ‘quantum’ is often thought by all the parties to be self-evident at the outset of a trial, but, in my experience, it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33 (4) and when issuing its orders, a trial Court should ensure that the issues are circumscribed with clarity and precision. It is a matter to which I shall return later in this judgment”.

13. The position is summarised by Erasmus Superior Court Practice [4] “The convenience must be demonstrated and sufficient information must be placed before the court to enable it to exercise its discretion in a proper and meaningful way. The relief is not a mere formality and the convenience must be demonstrated. If grave prejudice may result for the opposing party should separation be ordered, it would be a further factor, which the court will take into account when considering a separation.”
14. Counsel for the respondent raised three pertinent issues to be dealt with by this court before separation is ordered.
15. These issues are the validity of the deed of pledge, the possible leading of oral evidence and the precise ambit of the enquiry. The respondent submit that this will result in prejudice to the respondent.
16. When one carefully looks at the decisions I have referred to above it is clear that in regard to the application of Rule 34 (4) a court should not apply this rule wilfully or carelessly.
17. In this matter before me the applicant does not deal with the pertinent concerns raised by the respondent in paragraphs 18.2 to paragraphs 19 of the respondent’s heads of argument.
18. I am of the view that it will result in chaos should this court in this application declare the contested deed of pledge invalid. Obviously this might require oral evidence and failure to do so will result in an irregularity.
19. On the other hand, the matter will ordinarily be delayed by a possible appeal. This cannot be allowed seeing that this matter is old and must be finalised as soon as possible. Moreover, the respondent will be prejudiced by any long postponement.
20. In Denel (Edms) Bpk v Vorster[5] the court said before separation is ordered “court should ensure that the issues are circumscribed with clarity and precision”.
21. In this matter before me it can hardly be said that the issues are circumscribed with clarity and precision. It is evident from what I have alluded to.
22. I am therefore of the view that taking into account the case law I have referred to above and the issues I am requested to separate, this will result in delay and grave prejudice to the respondent.

Order

I make the following order:

1. The application is dismissed with costs, including the costs consequent upon the employment of senior counsel.

D MAKHOBHA

JUDGE OF THE GAUTENG DIVISION PRETORIA

APPEARANCES:

For the appellant: Adv K Fitzroy

Instructed by: Jordaan and Smit Inc

For the respondents: Adv Smallberger SC

Instructed by: Werksman Attorneys

Date heard: 10 August 2021

Date of Judgment: 14 September 2021

[1] 1995 (3) SA 938 (C) at 941 para (d)

[2] 1990 (1) SA 57 (A) at 68 A-F

[3] 2004 (4) SA 487 (SCA) at para 3 page 484-485

[4] At D-437

[5] Supra at paragraph D-E page 485

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Prepared on 12 October 2026 · Esheria