

SOUTH AFRICA / JUDGMENT

Pieters NO v Absa Bank Limited (50865/2010) [2017] ZAGPJHC 18 (15 February 2017) [2017] ZAGPJHC 18

COURT

South Gauteng High Court, Johannesburg

BEFORE

Van der Linde

CASE / FILE NUMBER

50865/2010

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 50865/2010

Reportable:	No
	Of
	interest to other judges: No
	Revised.
	15/2/2017
	In
the matter between:	PIETERS, RENETTE N.O. Plaintiff and ABSA BANK LIMITED Defendant

JUDGMENT

Van der Linde, J:

Introduction

- [1] Three interlocutory applications are dealt with in this judgment. They all come before me as the allocated case management judge. In the pending trial action, the plaintiff sues the defendant for contractual alternatively delictual damages arising from a contract in terms of which an insolvent company,[1] the plaintiff liquidator's ward, had made over confidential intellectual property to the defendant. The plaintiff asserts that the defendant is disclosing the confidential information in the breach of the agreement, alternatively if the agreement has become terminated, the defendant's continued use of the confidential information, being the plaintiff's property, is unlawful entitling the plaintiff to the damages she asserts.
- [2] In response to a written request from the plaintiff, the Deputy Judge President allocated the matter to me under the local case management system. Two case management meetings were held. They were minuted, and the minutes form part of the papers before the court. Some reference to these will be made below. I deal with the three interlocutory applications in turn.

The defendant's striking out application

- [3] The defendant applies to strike out, in terms of rule 6(15), the allegations in paragraph 5 and 10 of the plaintiff's replying affidavit in the plaintiff's separation application, and the allegations in paragraphs 15 and 17 of the plaintiff's

answering affidavit in the defendant's application in terms of rule 35(7). Although the striking out application was argued as one separate matter, it is more correctly considered as two separate interlocutory applications, within each of the two applications in which the offending material occurs. The striking out applications were also so treated by the defendant in its striking out notices and affidavits.

- [4] For the sake of convenience the principle is dealt with here, and the appropriate orders are made below, in each of the two applications to which the striking out relates.
- [5] In the identified paragraphs of the plaintiff's replying affidavit, the defendant is accused variously of "trying to out-litigate me", with a legal team that deliberately for financial gain seeks to protract the case; and that the defendant is guilty of "trickery".
- [6] The identified paragraphs of the plaintiff's answering affidavit in the defendant's discovery compliance application,

accuse the defendant of the same conduct.

[7] I have little doubt that the defendant's description of the language as being "scandalous", "vexatious", and "irrelevant", is correct.[2] Counsel for the plaintiff also appreciated this when he conceded the relief in reply. In the result the striking-out applications

succeed with costs, in each instance. The appropriate orders appear below.

The plaintiff's separation application

[8] The defendant raised a special plea that the plaintiff lacks locus standi. The plaintiff sues in her capacity, she asserts, as liquidator of an insolvent company. The defendant pleads specially that, in terms of s.419 (1) of the Companies Act 61 of 1973, the Master transmitted a certificate to the Registrar of Companies on 14 August 2003 to the effect that the affairs of the insolvent company had been completely wound up, and consequently when in 2008 the Master is alleged to have appointed the plaintiff as liquidator, the Master had no power to do so, having become functus officio back in 2003.

[9] The plaintiff replicated to this special plea, denying that the Master had become functus officio because the Registrar had not acted on the Master's communication, by recording the dissolution of the company and by publishing notice of it in the prescribed manner, all as envisaged in s.419(2) of the 1973 Act. In the alternative, the plaintiff replicated that in terms of s.375(4) of the 1973 Act, all the plaintiff's actions as liquidator are valid notwithstanding defects that may afterwards be discovered in her appointment.

[10]The plaintiff applies to have this issue, that is to say the question of her locus standi, separated from the other issues, and decided before the others, with all other issues stayed meanwhile. The essence of the plaintiff's argument is, picking up the wording of rule 33(4), that the defendant cannot show that the locus standi issue cannot conveniently be decided separately. She submitted that the defendant's contention of unnecessary delay in the event of an appeal against the judgment on locus standi alone, is a feature not unique to this case; if it were a good point, no separation application could ever succeed.

[11]She submitted too that the defendant's point that it was currently unable to access documentation at CIPC to establish the veracity of the plaintiff's denial that the Registrar had recorded the dissolution of the company under s.419(2), was bad for two reasons. First, the court was not being asked to determine the locus standi issue immediately; some time will still lapse before that will occur and by then the defendant would likely have sourced the documents, if in fact they existed, from CIPC.

[12]Second, the argument about the current inability to access documentation at CIPC has no bearing, the plaintiff submitted, on whether or not a separation should be granted. The inability to access documentation is an issue that potentially arises irrespective of whether a separation is granted.

[13]The defendant made one other principled point. It was that the overarching approach of a court faced with a separation application

should be actually to anticipate the future course of the litigation, and then to assess whether in that light, a separation is convenient. In this case the proposed separation would not be convenient, it submitted, mainly for the two reasons already mentioned; but thirdly, because the parties had agreed at the two earlier case management meetings that the then anticipated amendments to the pleadings would first be effected before consideration would be given to issues of separation. That has not occurred, the defendant submitted, not only because the defendant still needs access to the CIPC documents before deciding whether to rejoin and if so how; but also because the amendment process that was expressly envisaged at those case management meetings was to be triggered by the plaintiff's anticipated amendments first being effected.

[14]I accept, with respect, the defendant's submissions about the principles that should be applied in applications such as these. Separation is all about the convenient and expeditious disposal of litigation, and the sobering dicta of the Supreme Court of Appeal in *Denel (Edms) Bpk v Vorster*[3] are certainly telling considerations against over-ready separation orders. Convenience is the password; so says the rule.[4] I would venture that, as is so often the case with rules of Procedural Law, at the heart of the rule lies respect for the administration of justice, and the rule of law. Cases should not be unduly delayed; that famously or perhaps infamously denies justice.

[15]But equally, a separation bluntly performed advances nothing but instead retards the progression of the litigation to its pinnacle, being a final judgment on the real issue between the protagonists.

[16]Moving on to more practical considerations, the quintessential separable issue is a narrow but discrete point, involving little documentary or viva voce evidence, which finally decides the case one way or the other. Generally, absent other considerations, a challenge to the locus standi of one of the parties qualifies as a separable issue. The other considerations raised here are the appeal point, the unavailability of evidence point, and the case management agreement point. I believe that the first two of these were appropriately answered by the plaintiff in her riposte, to which I have already referred above.

[17]That leaves the case management agreement point. The parties differed about the effect of the agreements reached at those two meetings. The defendant submitted that, in terms, the minutes are plain. They portray a desire to get the amendments that both parties anticipated at that stage out of the way, so that with pleadings closed everyone would know what had to be determined in the litigation. Such knowledge was a precursor to decisions about separation, so submitted the defendant. And, to be true, according to the minute the plaintiff would lead the way by effecting her amendments according to a timetable then laid down. The defendant would follow suit. In the event the plaintiff did not serve a notice of intention to amend, and neither did the defendant. It followed, submitted the defendant, that this application was premature.

[18] The plaintiff submitted that the correct perspective on those minutes was that the issue of locus standi as a potentially separable issue was discussed after the amendment discussion; and although the parties could not agree on a separation then, since the defendant wished to consider the issue, the defendant did not then suggest that an application for the separation of the locus standi challenge was automatically foreclosed by the amendment agreement.

[19]But, submitted the plaintiff, the court is in any event not bound by the parties' agreement; it is free to decide the issue within the precepts of what the rule envisages.

[20]It is necessary to look more closely at the amendments that were envisaged. From the plaintiff's side, the amendments related to the main issue in the trial. There were assertions on the pleadings, particularly that relating to the hypothesis of a terminated agreement, that were, prima facie, so lacking in particularity that they were difficult to follow. The anticipated amendments would clarify these.

[21]From the defendant's side, the anticipated amendments included, obviously, any consequential amendments. Since the plaintiff did not then anticipate amending her replication to the locus standi point, the defendant's consequential amendments would not touch on it.

[22]But the defendant wished, independently of the plaintiff's anticipated amendments, to amend in two respects her own challenge to the plaintiff's locus standi. The defendant's one amendment would be to introduce the assertion that on 14 August 2003 the Master not only issued the certificate referred to above, but went further and in fact discharged the plaintiff as liquidator. In these circumstances the purported later reinstatement of the plaintiff as liquidator was not competent. This amendment could have been affected at any time, and was – leaving aside the point about who was to initiate the amendments endeavour - not

substantively reliant either on the plaintiff first amending, or on any further evidence first having to be obtained.

[23] The defendant's second amendment is currently still uncertain. Whether it will be effected, and what it will say, will depend on whether the defendant unearths relevant documents at CIPC, and if it does, precisely what those documents will convey.

[24]In my view the appropriate perspective on the case management agreements is that the parties in fact wished first to get the amendments out of the way. Having articulated that desire the issue of the potential separation of the locus standi issue came up. Certainly it was not accepted that the locus standi issue could be separated before whatever had to be pleaded in regard to it, will have been pleaded. But it would be equally facile to accept that the parties did not in truth operate under the common assumption that the relevant amendments would be done before 2016 was over. This much is clear from the intimation that any opposed aspect of the anticipated amendments could be dealt with before 16 December 2016.

[25] Where we stand now is that the common assumption has failed. The amendments were not effected last year. It seems to me however on reflection, that the parties' central opposing contentions concerning whether or not to separate the locus standi issue will have remained[5] even if those amendments had been effected by now. This is evident from the following.

[26]First, the plaintiff does not anticipate any amendment affecting the locus standi issue, and both the defendant's anticipated amendments are therefore independent of the plaintiff's pleading. And yet the defendant does not suggest that it will concede a separation if its anticipated amendments were effected.

[27]Second, the defendant's anticipated amendments do not involve either comprehensive further discovery or vast new areas of law. They are refinements of points already taken. The defendant's first anticipated amendment can be effected immediately. It will not affect any separation of the locus standi issue. And yet the court cannot compel the defendant to amend; that is its call.

[28]The defendant's second anticipated amendment might or might not occur. It will depend on whatever documents the defendant is able to source from CIPC, if any. It seems to me that whether or not that amendment will in fact occur is thus, at least at this stage, entirely speculative.

[29]Third, the substantive contents of the defendant's anticipated amendments do not detract from the separability of the locus standi issue. The defendant is free to effect its first anticipated amendment right away, if it is so advised. And if the CIPC investigations reveal fruit for further amendment, it will effect that amendment, if it is so advised. The first anticipated amendment will simply assert, additionally, that the Master had on 14 August 2003, discharged the plaintiff as liquidator of Cell f in terms of s.385 (1) of the Companies Act 61 of 1973. The second anticipated amendment, if it occurs, will challenge the factual or legal legitimacy of the plaintiff's denial that the Registrar had recorded and published the dissolution of the company in the prescribed manner.

[30]Fourth, it seems to me therefore that in view of these considerations the decision about separation is in this case not affected by the debate concerning amendments; that debate is a red herring, and one is free to move on to considering whether convenience calls for separation. In this regard two overarching considerations weigh with me.

[31]The first is that the issues already defined in the main action are comprehensive and likely will involve expert evidence. The locus standi issue on the other hand is narrow, and it has nothing to do with the issues in the main action. It can be disposed of with little documentary evidence and equally sparse oral testimony, if at all.

[32]The second overarching consideration is that oftentimes cases that are pleaded comprehensively, and ostensibly involve many issues all of which are challenging, and that have for this reason a virtually systemic inertia against getting off the ground, require to be incentivised. This is, to my mind, such a case. A prior determination of a separate issue will likely provide the incentive.

[33]It follows that in my view the separation should be granted. In the result I make the following order on the separation application:

- a) Paragraphs 5 and 10 of the plaintiff's replying affidavit are struck out.
- b) The plaintiff is directed to pay the costs of the application for striking out, including the costs consequent upon the employment of two counsel.
- c) The issue as to whether the plaintiff has locus standi to have instituted the current action, as raised in the defendant's first special plea read with the plaintiff's replication thereto, is separated from the remaining issues that arise between the parties.
- d) The said issue concerning the plaintiff's locus standi is to be disposed of before the remaining issues that arise between the parties, and those remaining issues are stayed until the said locus standi issue will have been disposed of.
- e) The defendant is directed to pay the costs of this application, including the costs consequent upon the employment of two counsel.

The defendant's discovery compliance application

[34]The defendant applies for relief in terms of rule 35(7), the compliance provision of rule 35. The compliance sought is a response to the defendant's notice in terms of rule 35 (3) dated 27 October 2016 within five days. Attorney/client costs are sought.

[35]Inevitably the success of this application is determined, at least procedurally, by the separation application, the latter usually involving, as it does, an order staying the remaining issues that arise between the parties.

[36]And so too in this case. The separation order just granted follows the usual form of directing a stay of the other issues. The rule 35(3) sought to be enforced does not aim at discovery of documents relating to the locus standi issue. It was served on 28 October 2016, some days before the separation application was served on 11 November

2016. The compliance application, that under rule 33(7), was served thereafter, on 16 December 2016.

[37]The compliance application must have been launched on the supposition either that it will be decided before a stay is directed, or that the separation application will be refused. Neither has occurred, and the supposition has thus failed.

[38]In the result the following order is made:

- (a) Paragraphs 15 and 17 of the plaintiff's answering affidavit in the defendant's discovery compliance application are struck out.
- (b) The plaintiff is directed to pay the costs of the application for striking out, including the costs consequent upon the employment of two counsel.
- (c) The discovery compliance application is dismissed with costs, including the costs consequent upon the employment of two counsel.

WHG van der Linde

Judge, High Court

Johannesburg

Matter argued: Thursday, 09 February, 2017.

Judgment:

Thursday, 16 February, 2017.

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[1] Known as Cell f (Pty) Ltd (in liquidation).

- [2] Vaatz v Law Society of Namibia, 1991 (3) SA 563 (Nm) at 566 C – E, quoted by the defendant in paragraph 38 of its heads of argument.
- [3] 2004 (4) SA 481 (SCA) at 485 A-E.
- [4] The cases referred to footnote 5 and 6 of the defendant’s heads of argument are encyclopaedic sources of judicial interpretation and extrapolation of the concept of “expedience”.
- [5] Compare paras 8 - 11 of the defendant’s heads of argument.
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