IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GQEBERHA

Case No: 2451/2020

In the matter between:

ABSA BANK LIMITED Plaintiff/Respondent

and

URSULA FELICITY REZANT NO.
(In her capacity as the Executor of the joint deceased estate of **JOHANNES BASIL REZANT** and surviving spouse **URSULA FELICITY REZANT**) Defendant/Applicant

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JUDGMENT

Zilwa AJ

Introduction

[1] The Plaintiff instituted action against the Defendant on 14 October 2020. Pleadings eventually closed and the parties convened and held a pre-trial

conference in May 2022. Trial bundles were prepared, and the matter was set down for trial.

[2] On 13 February 2023 a notice of amendment, which was similar to the one on which this application is based, was delivered by the Defendant seeking to introduce a special plea. On 21 February 2023 a notice of objection to the proposed amendment was delivered. No further action was taken by the Defendant insofar as the amendment that was objected to.

[3] It appears from the record that the trial in this matter was initially set down for 7 March 2023 and was postponed to 14 September 2023. On 30 August 2023 a second notice of amendment was delivered and it was objected to on 31 August 2023. On the eve of the hearing, 13 September 2023 at 15H21, the application as envisaged in Rule 28(4) of the Uniform rules was launched.

[4] The matter could not proceed on 14 September 2023 as it was crowded out due to shortage of judges on the day and was postponed to February 2024.

[5] On 29 September 2023 the Plaintiff delivered its opposing affidavit and the replying affidavit was due on 20 October 2023. After the expiry of the *dies,* the Plaintiff prepared its heads of argument and applied for a date of hearing on 27 October 2023. The Registrar allocated a date of hearing in the opposed motion court and a notice of set down was delivered by the Defendant on 31 October 2023.

[6] The Defendant's replying affidavit was only delivered on 24 November 2023 and it was not accompanied by any application for condonation.

[7] The Plaintiff opposes the proposed amendment on the following grounds:

7.1 It alleges that no case has been made out for the indulgence sought;

7.2 It further alleges that the application is not *bona fide* or aimed at ensuring that the true issues are dealt with by the Court but rather a delay;

7.3 It alleges further that it will be prejudiced in preparation of the upcoming trial, should the proposed amendment (which does not comply with the Rules and will render the pleadings expiable as vague and embarrassing / not disclosing an action) be allowed.

[8] Although I sympathise with the Plaintiff concerning the general dilatoriness of the Defendant in this case I can only express the hope that both parties will expedite matters in future.

[9] As alluded to above the Defendant did not file any condonation application for her late delivery of the replying affidavit. All what was given is the 'so-called' explanation in paragraphs 1 and 2 of the heads of argument. It is apposite to quote *verbatim* these paragraphs:

> '[1] I first beg pardon of this Honourable Court for filing these Heads late. I refused to do any further work on the matter as I was not place on funds in respect of the

services I had rendered before. I was phoned by my instructing attorneys on 20th November 2023 and advised that the applicant will pay on 21st November 2023. It was only after my instructing attorneys were placed on funds that I accepted the brief to prepare my heads.

[2] Upon perusal of my brief enclosures, I realized that the reply was also due. I thereafter consulted with the applicant and proceeded with the settlement of the reply and prepared my heads. I sincerely apologize for the delays caused on the matter. I beg leave of this Honourable Court to file both these heads and the reply. I submit that the applicant enjoys good prospects of success on the matter considering the principles applicable in matters of this nature.'

[10] *Mr Wessels* took a point that there was no substantive application for condonation brought and that the replying affidavit should not be accepted. *Mr Nzuzo,* appearing on behalf of the Defendant, was adamant that the explanation given both in the replying affidavit and heads of argument was sufficient so as to constitute an application for condonation. There is no need, so his argument goes, for a substantive application on notice, supported by an affidavit, to be brought. He further argued that it is sufficient for an application for condonation to be made from the bar as far as he knows.

[11] In the midst of the argument, there was a electricity loadshedding interruption and I directed the parties to consider during the adjournment the case of *Watloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd and Others*[1] at paragraphs 35 and 36 thereof.

[1] *Watloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd and Others* 2008 (5) SA 461 (T) at [35] and [36]

[12] After the adjournment *Mr Nzuzo* was still adamant that there was no need for a substantive application as envisaged in Rule 27(3) of the Uniform rules. The relevant paragraphs in *Watloo* read as follows:

> '[35] Even though I am of the view that the defects in the notice of motion can be condoned, the applicant still has a problem. In view of the fact that there is no formal application for condonation, it being based only on the request contained in the replying affidavit whose very legitimacy is in issue, and also that the correspondence relied on by the applicant appears only in the same replying affidavit, there is no basis on which Mr Vivian could have argued on behalf of the applicant for condonation. Moreover, Mr Vivian at no stage conceded that the procedure adopted by the applicant was defective. How, then, can there be condonation?
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> [36] I have already stated that, when I raised that aspect with both counsel, they were in agreement that it was appropriate for either of them to address the court on the basis of what is contained in the replying affidavit. For the reasons I have already given, I disagree with them.' (my underlining)

[13] It is clear from the above extract, which *Mr Nzuzo* failed to appreciate, that the Defendant's failure to deliver a substantive application and argue on what is contained in the replying affidavit was, with respect, an unfortunate lack of appreciation of the procedure. Ratiocinatively speaking, I could not have had regard to the contents of the affidavit until condonation for its late delivery has been granted. In the circumstances, I find that there has been no proper attempt to persuade me to grant condonation. Put it differently, there is no formal application for condonation

and therefore I am unable to exercise my discretion in a *vacuum* as there no facts before me, under oath, upon which I can exercise it. In the result I refuse to accept the replying affidavit.

[14] In the case of *Fourie v Honeyborne*[2] , Raulinga J had an occasion to put this point beyond any doubt when he stated the following:

> 'At the hearing of the application, the applicant attempted to sneak in a supplementary affidavit in order to cure the defect in the founding affidavit. This the applicant did without condonation and an indulgence in terms of Rule 6(5)(e) of the Uniform Rules of Court. It is trite that observance of the Rules of Court is not a mere formality - Watloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd and Others 2008 (5) SA 461 (T) at 472G-H. I therefore refuse to admit the affidavit for non-compliance.' (My emphasis)

[15] *Mr Nzuzo* further referred this court to two authorities in support of his argument, namely, *Minister of Safety and Security v Mzukisi Tyali*[3] and Kubupay (Pty) Ltd v Mayibuye Transport Corporation[4].

[16] In the case of *Tyali (supra),* Hartle J was simply drawing a distinction between an application brought on notice and the one brought on notice of motion. My sister was simply emphasizing that not every application brought on notice should be

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[2] *Fourie v Honeyborne* 2017 JDR 1332 (GP) at [8]

[3] *Minister of Safety and Security v Mzukisi Tyali* 2012 JDR 1112 (ECM)

[4] *Kubupay (Pty) Ltd v Mayibuye Transport Corporation* 2023 JDR 2927 (ECGEL)

supported by an affidavit and she was referring to a Rule 30A application that was serving before her. I am completely in agreement with her sentiments in this regard.

[17] In the case of *Kubupay (supra),* Collett AJ was faced with an application for striking out as envisaged in Rule 23(2) of the Uniform rules. Her focus was on the applicability of Rule 6(5) in Rule 6(11) applications and her finding was that Rule 6(5) is not applicable. She was echoing the finding in *Tyali,* which is a trite legal position.

[18] In a nutshell both authorities relied upon by *Mr Nzuzo* are, with respect, not addressing the issue at hand in these proceedings. There is no contention nor argument that was ever made during argument that the Defendant should have brought an application on notice of motion and in compliance with Rule 6(5). All what the Defendant was required to do was to bring an application in terms of Rule 27 of the Uniform rules which provides as follows:

> ‘(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.
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> (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so

prescribed or fixed, whether such results flow from the terms of any order or from these rules.

(3) The court may, on good cause shown, condone any non-compliance with these rules.' (my underlining)

[19] It is clear that Rule 27 envisages an application on notice and not on notice of motion and such application should disclose a good cause. It is on the basis of the good cause shown that the Court exercises its discretion in favour of that particular Applicant. Logic dictates that there is no other way of showing good cause other than bringing facts under oath before Court by deposing to an affidavit. It is therefore without any doubt that Rule 27 envisages an application brought on notice and supported by an affidavit.

[20] Even the wording in Rule 6(11) does not discard deposition to an affidavit.[5] It makes it clear that an affidavit can be deposed to in support of an application as the case may require.

[21] Indeed not every application as envisaged in Rule 6(11), brought on notice, needs to be supported by an affidavit. In *Chelsea Estates and Contractors CC v Speed-O-Rama*[6], Mullins J concluded that:

[5] Notwithstanding the aforegoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by a judge. (my underlining)

[6] *Chelsea Estates and Contractors CC v Speed-O-Rama* 1993 (1) SA 198 (SE) at 202C

> ‘there is no doubt that this is an interlocutory application. Furthermore in many interlocutory applications there is no need to file affidavits, and certainly the provisions of Rule 6 (5)(f) do not apply to such applications.’

[22] I turn now to the merits of the application, namely whether the amendment should be granted. The principles applicable to this issue have been set out in numerous cases. In *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another*[7] Corbett CJ stated at 565G:

> 'Although the decision whether to grant or refuse an application to amend a pleading rests in the discretion of the Court, this discretion must be exercised with due regard to certain basic principles.'

[23] The following statement by Watermeyer J, as he then was, in *Moolman v Estate Moolman and Another*[8] has been accepted and followed as reflecting our jurisprudence:

> 'The question of amendment of pleadings has been considered in a number of English cases. See for example: *Tildesley v Harper* (10 ChD 393); *Steward v North Met Tramways Co* (16 QBD 556) and the practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs, or in other words unless the parties cannot be put back for

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[7] *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A)

[8] *Moolman v Estate Moolman and Another* 1927 CPD 27 at 29

the purposes of justice in the same position as they were when the pleading it is sought to amend was filed.'

[24] In *Rosenberg v Bitcom*[9], Greenberg J, as he then was, stated:

'Although it has been stated that the granting of the amendment is an indulgence to the party asking for it, it seems to me that at any rate the modern tendency of the Courts lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the dispute between the parties.' (my underlining)

[25] In *Zarug v Parvathie NO*[10], Henochsberg J held that:

'An amendment cannot however be had for the mere asking. Some explanation must be offered as to why the amendment is required and if the application for amendment is not timeously made, some reasonably satisfactory account must be given for the delay.'

[26] In *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another*[11], Caney J had the following to say:

'Having already made his case in his pleading, if he wishes to change or add to this, he must explain the reason and show *prima facie* that he has something deserving of

[9] *Rosenberg v Bitcom* 1935 WLD 115 at 117

[10] *Zarug v Parvathie NO* 1962 (3) SA 872 (D) at 876C

[11] *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another* 1967 (3) SA 632 (D) at 641A

consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on the record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable.'

[27] And at 639B:

'The mere loss of the opportunity of gaining time is not in law prejudice or injustice. Where there is a real doubt whether or not prejudice or injustice will be caused to the defendant if the amendment is allowed, it should be refused, but it should not be refused merely in order to punish the plaintiff for his neglect.' (my underlining)

[28] And at 642H:

'In my judgment, if a litigant has delayed in bringing forward his amendment, this in itself, there being no prejudice to his opponent not remediable in the manner I have indicated, is no ground for refusing the amendment.'

[29] In *Benjamin v Sobac South African Building and Construction (Pty) Ltd*[12], Selikowitz J stated:

[12] *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 958B

> 'Where a proposed amendment will not contribute to the real issues between the parties being settled by the Court, it is, I think, clear that an amendment ought not be granted. To grant such amendment will simply prolong and complicate the proceedings for all concerned and must, in particular, cause prejudice to the opposing party who will have to devote his energy and expend both time and money in dealing with an issue, the resolution of which may satisfy the needs (or curiosity) of the party promoting it, but which will not contribute towards the adjudication of the genuine dispute between the parties. Mr *Seligson* urged me to adopt this guideline for the exercise of my discretion here where the applicant applies to amend his cause of action. It is, in my view, necessary in this application that I consider whether or not the claim for relief under s 32(2) is competent before I grant the amendment. If the claim is, in the circumstances of this case, not in law a viable claim I would be doing not only the respondent but also the applicant an injustice by granting the amendment.'

[30] As alluded to above the issue of granting or refusing an amendment is at the Court's discretion which should be exercised judiciously, it is important to highlight the impact of granting or refusing the contemplated amendment. The Defendant is seeking to introduce a special plea which, if successful, will exonerate her in the sense that the debt owed in respect of the property in question will be settled. On the other hand, if the special plea is dismissed, she will remain liable for the debt which is being sued for by the Plaintiff and that may ultimately result in her losing the property in question.

[31] I am alive to the Plaintiff's contention that the amendment sought will render the plea excipiable as it will be vague and embarrassing and will not be disclosing

any defence. I have considered this contention but I am unable to reach such finding as that is the debate that can be better presented during the hearing of the exception. In any event, even if I would accept such possibility, that on its own does not prevent me from allowing amendment.[13]

[32] Cumulatively, I also weighed the repercussions of refusing the amendment as against granting it and I am inclined to grant it as that would be in the interest of justice to do so and that would allow both parties to fully ventilate all the issues. Interest of justice dictates that the amendment should be granted notwithstanding the clumsy and cavalier manner in which the Defendant's legal representatives have handled the matter. Unfortunately, I do not find any basis to penalize the Defendant for the less than perfect work done by those representing her.

Costs

[33] Inasmuch as the Defendant has been successful in this application with all the shortcomings as highlighted above, I do not find any basis to mulct the Plaintiff with costs moreso that the Defendant is seeking an indulgence. A proper order would be for each party to pay its own costs.

[34] In the result the following order shall issue:

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[13] See : *Crawford-Brunt v Kavnat and Another* 1967 (4) SA 308 (C) at 310G, where Tebbut AJ (as he then was) held that:

'If the pleading would appear to be possibly open to exception or even if the court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.'

1. The Defendant is hereby granted leave to amend her plea as per the notice dated 29 August 2023 in terms of Rule 28 of the Uniform rules.
2. That each party shall pay its own costs.

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H ZILWA
JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For Plaintiff:	Adv LN Wessels
Instructed by:	Sandenberg Nel Haggard Attorneys, Bellville c/o McWilliams & Elliot Inc., Gqeberha
For Defendant:	Adv S Nzuzo
Instructed by:	Mente Faltein Attorneys, Gqeberha
Date Heard:	30 November 2023
Date Delivered:	23 January 2024