



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 16 March 2023

Case No. 2021/28660

In the matter between:

CAPITEC BANK LIMITED

Applicant

and

LERATO JACQUELINE MANGENA

First Respondent

CITY OF JOHANNESBURG

Second Respondent

Summary

Practice – application for dismissal of a rescission application for failure to file heads of argument – procedure allowing the striking out of a claim or defence for non-compliance with the rules was developed for use in the context of action proceedings before any evidence has been led – procedure not of easy application in motion proceedings, where the affidavits constitute both the pleadings and the evidence – a court is not entitled to overlook the merits of an application simply because a procedural rule or court order has not been complied with – applicant for relief striking out a claim or defence in application proceedings must show both non-compliance with the relevant procedural rule or court order and that the claim or defence to be struck is itself without merit.

JUDGMENT

WILSON J:

- 1 The applicant, Capitec, seeks the dismissal of a rescission application brought by the respondent, Ms. Mangena. The application was brought before me in unopposed motion court on the sole basis that Ms. Mangena had failed to submit her heads of argument in the rescission application.

- 2 The basis for the application was said to be section 9.8.2 (12) of this court's practice manual. That section of the practice manual authorises an application to this court for an order compelling a party who has not timeously filed heads of argument in an opposed motion to file their heads within a period of not less than 5 days, failing which "the defaulting party's claim or defence [will] be struck out". The provision appears to be inspired by similar sections of the Uniform Rules of Court which entitle a party, in appropriate circumstances, to apply for the striking out of a defence or the dismissal of a claim. For example, Rule 35 (7) of the Uniform Rules of Court provides that a party that is delinquent in making discovery of documents may have their claim or defence struck out.

- 3 In the context of action proceedings, which are generally longer-lasting, more costly, and procedurally more complex than motion proceedings, the rules permitting a claim to be dismissed or a defence to be struck out are important procedural tools. They enable a court to ensure that a party with a frivolous claim or defence is not permitted to delay the trial process through sheer non-compliance with the rules designed to move the trial forward. They also enable the court to protect its process against a wide variety of other potential abuses.

- 4 The strike-out and dismissal procedures are particularly well-suited to action proceedings because no evidence of the claim has generally been led at the time they are engaged. In striking out a claim or defence, a court does no more than bring an early end to a trial action because of a party's persistent failure to observe the rules. In doing so, the court need not have regard to the merits of the action, or the strength of the claim or defence to be struck out. Indeed, the court cannot do so, because it will not have seen or heard the evidence necessary to sustain the claim or defence to be dismissed or struck out.
- 5 Motion proceedings are different. Every affidavit in motion proceedings contains both a pleading and the evidence necessary to sustain it. When a court is asked to dismiss a claim or strike out a defence for failure to file heads of argument promptly, it does so once all the evidence thought necessary to sustain the claim or defence has been placed before it. It seems to me that, in these circumstances, a court is not at liberty simply to ignore the affidavits and to dismiss a claim or strike out a defence merely because one of the parties has failed to take an important procedural step. The court must go further, and satisfy itself that, on the evidence before it, the claim or defence sought to be dismissed or struck out has no intrinsic merit.
- 6 This court has already recognised that necessity in the context of applications for eviction under the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act") (see *Gefen v De Wet NO 2022 (3) SA 465 (GJ)* ("*Gefen*"), paragraphs 26 and 27). In *Gefen*,

the court held that an application to strike out a defence under the practice manual did not displace the mandatory exercise of a court's equitable discretion under the PIE Act. The decision in *Gefen* was undoubtedly correct (and is, in any event, binding on me), but I see no difference in principle between a court's obligation to exercise its discretion under a statute, and a court's general duty to apply its mind to relevant evidence placed before it. The failure to file heads of argument does not make relevant evidence irrelevant. Nor does it mean that the substantive law applicable to the application in question no longer applies. Accordingly, the duty to consider whether a claim or defence is meritorious in itself before dismissing it or striking it must, in my view, apply in all application proceedings.

7 In this case, Ms. Mangena wishes to rescind an order of this court dated 19 August 2021. The 19 August 2021 order granted a money judgment against Ms. Mangena under a mortgage bond passed over her primary residence. It appears that Capitec asked the court that granted the 19 August 2021 order to give judgment for both the full accelerated amount due on the mortgage credit agreement, and to make an order declaring Ms. Mangena's home specially executable. The court granted the money judgment, but it postponed the claim for special execution. This, it appears, was because the summons initiating Capitec's claim had not been served personally on Ms. Mangena. The court directed that Ms. Mangena be served personally before the claim for special execution was re-enrolled.

8 This approach was inconsistent with the general rule laid down by this court in *ABSA Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ). The

general rule is that, where the mortgaged property is a home, Judges of this Division will not entertain and determine an application for a money judgment on a mortgage credit agreement separately from the application to execute against the mortgaged property. The money judgment forms part of the cause of action for the application for leave to execute. Whether or not the money judgment should be granted is inextricably bound up with the question of whether execution against the mortgaged property is proportionate, within the meaning of the decisions of the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) and in *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC).

9 That there were good reasons to depart from this rule is not apparent from the 19 August 2021 order, or from anything else I can see on the documents filed. Ms. Mangena says in her rescission application that she had no notice of Capitec's application until she was personally served with the application for leave to execute in terms of the 19 August 2021 court order.

10 Accordingly, it seems to me that Ms. Mangena's rescission application is one of some merit. Although the rescission application does not address Rule 42 (1) (b), it seems likely that the 19 August 2021 order was erroneously sought or granted both because Ms. Mangena had not been served with the application at the time it was placed before the court, and because the court that granted the 19 August 2021 order departed from the rule established in *Mokebe* without any reason to do so.

11 I put these difficulties to Mr. Ahir, who appeared before me for Capitec, and I gave him an opportunity to address me on the merits of the rescission

application. Mr. Ahir declined that opportunity, pressing the application only on the basis that Ms. Mangena had not timeously filed her heads of argument, even after having been directed to do so by an order of this court dated 9 September 2022. In the circumstances of this case, to dismiss the rescission application solely on that basis would, I think, have been an injustice.

12 For all these reasons, I make the following order -

12.1 the application to dismiss the rescission application is dismissed with costs.

12.2 the rescission application is to be placed on the opposed motion roll.



S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 16 March 2023.

HEARD ON: 7 February 2023

DECIDED ON: 16 March 2023

For the Applicant: U Ahir
Instructed by Jay Mothobi Incorporated

