

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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|---------------------|---------------------------------|
| (1) | Reportable: No |
| (2) | Of interest to other judges: No |
| (3) | Revised: Yes |
| SIGNATURE: | |

CASE NUMBER:

61392/2020

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED
APPLICANT

and

DANIËL THEODORUS JANSE VAN RENSBURG
RESPONDENT

Coram: A Vorster AJ

Heard: 20 April 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by uploading the judgment onto <https://sajustice.caselines.com>, and release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 5 June 2024.

ORDER

The application is dismissed with costs.

JUDGMENT

A Vorster AJ

Introduction

1. The relationship between the applicant and the respondent came into existence when the applicant agreed to open bank accounts in the name of the respondent. The relationship between the parties are defined by the types of activities, products, or services provided by the applicant to the respondent or availed by the respondent. The applicant and the respondent concluded 3 separate agreements, an overdraft agreement, a credit agreement, and a

home loan agreement. The nature of these relationships are contractual where the applicant is the creditor and the respondent is the debtor. See: **Di Giulio v First National Bank of South Africa Ltd** 2002 (6) SA 281 (C) & **Standard Bank of SA Ltd v Oneanate Investments (Pty) Ltd** 1995 (4) SA 510 (C) & **London Joint Stock Bank Ltd v MacMillan and Arthur** [1918] AC 777 (HL).

2. Given the different legal aspects of the agreements between the applicant and the respondent, the agreements simultaneously embodies the characteristics of different categories of contract, namely, mandatum, mutuum and depositum. See: **Standard Bank of SA Ltd v ABSA Bank Ltd and Another** [1995] 1 All SA 535 (T).
3. As security for the respondent's obligations in terms of the home loan agreement the respondent registered a mortgage bond in favour of the applicant over his immovable property situated at and known as [...] J[...] Main Road, Mooikloof Equestrian Estate, Mooikloof, Pretoria ('the property').

Case information

4. On 10 November 2020 the applicant issued out an application against the respondent in which it claimed performance of the respondent's obligations under the overdraft agreement, the credit agreement, and the home loan agreement. Properly construed these claims are liquidated claims ad pecuniam solvendam, based on specific performance, alternatively breach of the agreements by

the respondent. The applicant also claimed foreclosure and execution against the respondent's immovable property, based on security provided through a mortgage bond for the due fulfilment by the respondent of his obligations under the home loan agreement.

5. The founding affidavit was deposed to by a Manager: Business Support, Rescue and Recoveries, a division of the applicant. The deponent claims personal knowledge of the facts deposed to in the founding affidavit on the basis that all files, documents and records, both electronic and physical, relating to the matter and the indebtedness of the respondent, resort under her direct control by virtue of the position she holds with the applicant. I will briefly deal with the substantive content of the founding affidavit.
6. According to the deponent:
 - 6.1. The respondent breached the overdraft agreement by exceeding the credit limit and by failing to repay the credit drawn on the account as and when it became due. It is alleged that on 26 March 2020 the respondent owed an amount of R538'231.95 which was due and payable. On 18 May 2020 the applicant's attorney delivered a notice in terms of section 129 of the NCA to the respondent personally. Thereafter, during July 2020, the respondent made two payments to the applicant, totalling an amount of R300'000.00. On 8 September 2020 the amount still due and payable was R253'302.45.

- 6.2. The respondent breached the credit agreement by exceeding the credit limit and by failing to repay credit drawn on the account in the sum of R68'775.58, which became due and payable on 3 April 2020. The applicant claims payment of R260'947.18 which is the total amount of credit drawn on the account which, according to the agreement, the applicant may claim at its election. On 18 May 2020 the applicant's attorney delivered a notice in terms of section 129 of the **National Credit Act** to the respondent personally. The respondent failed to make any payments.
- 6.3. The applicant claims payment of R10'428'976.70 which amount has become due and owing in terms of the respondent's home loan account. The respondent defaulted on his obligations under the agreement by failing to pay all monthly instalments in full on due date. As a consequence the full outstanding balance became due and payable. On 19 February 2020 the respondent last made a payment on the account in the sum of R50'000.00. On 18 May 2020 the applicant's attorney delivered a section 129 notice to the respondent personally. On 14 October 2020 an amount of R1'232'408.46 was due and payable by the respondent.
7. On 1 February 2021 the respondent gave notice of his intention to oppose the application. On 9 February 2021 the respondent delivered a notice in terms of rules 35(1) and 35(13), calling upon the applicant 'to make discovery of documents and tape recordings relating to any matter in question in this application' and a notice in

terms of rule 7, challenging the authority of the deponent to the founding affidavit.

8. On 15 February 2021 the applicant delivered a reply to the notice in terms of rule 7 in which it correctly contended that rule 7 does not provide for a deponent's authority to be challenged, but rather the authority of an attorney¹.
9. On the same day the applicant delivered an affidavit in response to the notice in terms of rules 35(1) and 35(13). The affidavit was deposed to by a Manager: Business Support, Rescue and Recoveries, a division of the applicant. This manager was not the same as the one who deposed to the founding affidavit. The deponent took over from that manager after the latter emigrated to Canada. The deponent stated under oath that:
 - 9.1. she perused all the applicant's records relevant to the respondent's accounts;
 - 9.2. all books and documents which the applicant has, or had, in its possession, or under its control, which relate to the application, and which the applicant intends to use in the application, or which tend to prove or disprove either party's case, are attached to the founding affidavit;
 - 9.3. the applicant does not have, nor had, tape recordings in its possession.

¹ **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA) at para 19.

The applicant delivered the affidavit notwithstanding the fact that at the time the respondent had not approached the court by way of an application on notice to order discovery and declare sub-rule 35(1) applicable to the proceedings.

10. The respondent failed to deliver an answering affidavit within the period prescribed by the rules. This prompted the applicant to enrol the matter for hearing on the unopposed motion court roll of 22 July 2021.
11. On the day of the hearing the respondent delivered what he styled a 'provisional answering affidavit'. The matter was postponed sine die at the behest of the respondent and he was ordered to pay the wasted costs occasioned by the postponement. The applicant did not object to the late delivery of the answering affidavit.
12. In his answering affidavit the respondent did not dispute that the applicant advanced credit to him. It is clear from the bank statements attached to the applicant's founding affidavit that the respondent transacted on all three accounts for many years and utilised the credit advanced to him by overdrawing on his current account, utilising the credit facility on his credit account, and acquiring an immovable property with the proceeds of the home loan. The registration of a mortgage bond over his immovable property in 2008 is immutable proof that the applicant extended credit to the respondent.

13. The respondent's answering affidavit is replete with irrelevant matter and it is difficult to discern what the bases of his opposition to the applicant's claims are. The respondent devoted a considerable part of the answering affidavit to blaming the applicant for his financial distress. A defence in respect of all three claims seems to be that the applicant is part of a scheme orchestrated by the respondent's former business partners to 'decimate and destroy' him, and that the proceedings were instituted with an ulterior motive. Attached to the answering affidavit are combined summonses in actions instituted by the respondent and third parties against various entities. One of these summonses, issued out four months after the application was served, evidences damages claims by the respondent and two close corporations against the applicant.

14. Properly construed, the respondent's defences may be summarised as follows:
 - 14.1. The applicant approached the court with unclean hands and as a result should not be allowed to enforce the credit agreements.

 - 14.2. Certain provisions in the agreements, such as acceleration clauses, are against public policy and unenforceable.

 - 14.3. Certain suspensive conditions in the agreements were not met.

- 14.4. The certificates of balance attached to the founding affidavit are void and invalid and there is accordingly insufficient proof of the respondent's indebtedness.
- 14.5. The respondent has an unliquidated damages claim against the applicant.
- 14.6. The respondent relies on the protections afforded by the **National Credit Act**.
- 14.7. The respondent relies on the protections afforded by the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act**.
- 14.8. The Magistrate's Court has concurrent jurisdiction, and the claims should accordingly be prosecuted in that court.
15. The applicant delivered a replying affidavit on 13 September 2021. In the replying affidavit the deponent to the affidavit restated what was contained in the applicant's reply to the respondent's notice in terms of rule 7, and the affidavit delivered in response to the notice in terms of rules 35(1) & (13), and the applicant's response thereto.
16. On 25 October 2021 the applicant delivered a notice of set down enrolling the main application for hearing on the opposed motion court roll of 31 January 2022.
17. On 1 December 2021 the respondent delivered an interlocutory application, dated 22 November 2021, in which he seeks the following relief:

- 17.1. an order that the main application be postponed until finalisation of the interlocutory application;
 - 17.2. an order that the applicant 'make full and proper discovery in terms of rule 35(1) read with rule 35(13)';
 - 17.3. an order that the respondent 'shall be entitled to seek further and better discovery in terms of rule 35(3).
 - 17.4. an order that the respondent "shall be entitled to file a final (sic) answering affidavit in the main application...";
 - 17.5. an order compelling the applicant to provide the respondent with documents evidencing the authority of the deponent to the founding affidavit.
18. Although not required by rule 6(11), on 30 November 2021 the applicant gave notice of its intention to oppose the interlocutory application and on the same day delivered its answering affidavit.
19. On 21 January 2022, ten days before the hearing of the matter on the opposed motion court roll, the respondent delivered his replying affidavit and a notice in terms of rule 35(12). He also delivered a notice in terms of rule 7(1) in which he challenged the authority of the deponent to the opposing affidavit in the interlocutory application.

20. On 3 February 2022 Basson J referred both the main and interlocutory applications, as well as a further anticipated interlocutory application by the respondent, to the third motion court. In respect of the further anticipated interlocutory application Basson J issued directives for the exchange of papers.
21. Basson J directed that the respondent should deliver the further anticipated interlocutory application by 15 February 2022, which he failed to do. On 22 April 2022 the applicant delivered a supplementary affidavit in which it dealt with the notices in terms of rules 35(12) and 7(1), delivered on 21 January 2022.
22. On 28 April 2022 the respondent 's attorney wrote a letter to the applicant's attorney in which the latter was informed that the respondent will no longer persist with the relief sought in terms of rule 7(1). On 13 June 2022 the respondent delivered an affidavit in response to the applicant's supplementary affidavit and confirmed that he will not be persisting with the relief sought in respect of rule 7(1) and abandoned that which he sought in the notice in terms of rule 35(12).
23. The Deputy Judge President directed that the matters should proceed on the ordinary opposed motion court roll and that the interlocutory application should be disposed of before the main application is adjudicated.
24. What is now before me is an application by the respondent to make the rules relating to discovery applicable to the main application, and leave to deliver a final answering affidavit in the main application, once discovery is made.

Discussion

25. At the outset it is necessary to deal with the status of the respondent's so-called 'provisional answering affidavit'. There are normally three sets of affidavits in motion proceedings, namely a founding affidavit, an answering affidavit, and a replying affidavit. A party who wishes to file any other affidavit may only do so with leave of the court. See: **Standard Bank of SA Ltd v Sewpersadh** 2005 (4) SA 148 (C) at 153G-H. The rules do not make provision for a respondent to deliver a 'provisional answering affidavit' and thereafter a 'final answering affidavit'. The rules only contemplate an answering affidavit. Prior to delivery of the 'provisional answering affidavit' the respondent did not apply for leave to file anything other than an answering affidavit, and I must accordingly accept that the 'provisional answering affidavit' is the respondent's answering affidavit as contemplated in rule 6(5)(d)(2) of the Uniform Rules of Court. Having delivered an answering affidavit, it is not open to the respondent to file a further answering affidavit.
26. To determine whether the rules relating to discovery should be made applicable to the application the court needs to establish whether there are exceptional circumstances which justify a departure from the usual procedure for the launching, hearing and completion of motion proceedings². In **Premier Freight (Pty) Ltd v Breathetex Corp (Pty) Ltd** [2003] JOL 10797 (SE) at par 12

² **MV Urgup: Owners of the MV Urgup v Western Bank Carriers (Australia) (Pty) Ltd** 1999 (3) SA 500 (C) 507 513; **MV Rizcun Trader** (2) 1999 (3) SA 956 (C).

Plasket AJ, as he then was, held that the notion of exceptional circumstances appears to encompass two aspects:

“... the first is that, by the very nature of applications and the discovery procedures, as a matter of practice, it is only rarely that a party seeks an order directing the rules of discovery to apply; secondly, even then, a case in which a party seeks an order to make the rules of discovery applicable must have special features that render the making of such a direction necessary.”

27. It is only necessary to detain myself with the second aspect, namely whether the application has special features that render the making of a direction that discovery should apply to the proceedings necessary. The enquiry is not an abstract enquiry but should be decided with reference to the facts put forward by the party seeking such a direction. Differently put, it is incumbent on the respondent to make out a case for the direction to be exercised in his favour.

28. The respondent’s main contention is that claims such as the ones preferred by the applicant in the main application are normally brought by way of action proceedings, and not by way of motion proceedings, because it should be foreseen that disputes of fact will arise. The respondent argues that the decision by the applicant to approach the court by way of motion proceedings was deliberate and calculated to avoid having to make discovery, as it would have been compelled to do if it had instituted action. The respondent further believes that through discovery he would be able to obtain documents which will either prove his defence or disprove the applicant’s claim. The respondent states that he will apply at the

hearing of the main application for the matter to be referred to oral evidence and that the application be consolidated with his unliquidated damages claim against the applicant.

29. The respondent's contention that the applicant should have approached the court by way of action proceedings is completely without merit. A litigant is at liberty to approach the court by way of motion proceedings, unless motion proceedings aren't permissible at all, such as matrimonial causes and unliquidated claims for damages³. Nothing in the rules prevents an applicant with a liquidated claim for payment, and a claim for foreclosure and execution against immovable property, to approach the court by way of motion proceedings.
30. If a litigant approaches the court on motion proceedings, where such proceedings are permissible, and the application cannot properly be decided on affidavit for whatever reason, a respondent's remedy does not lie in the provisions of rule 35 but in the provisions of rule 6(5)(g). The rule allows the court to dismiss the application or make such order as it deems fit with a view of ensuring a just and expeditious decision⁴.
31. Sub-rule 6(5)(g) envisages a specific instance where an application cannot properly be decided on affidavit, namely where it can be

³ **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1161.

⁴ **Cresto Machines (Edms) Bpk v Die Afdeling Speuroffisier, SA Polisie, Noord-Tvl** 1970 4 SA 350 (T) at 365.

shown that a dispute of fact arose in the application. The sub-rule prescribes a remedy in such an instance, namely for oral evidence to be heard on specified issues with a view to resolving the dispute of fact and to end the court may (i) order any deponent to appear personally or grant leave for such a deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness; or (ii) refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.

32. The respondent's belief that documents (evidence), which might tend to prove his defense, or disprove the applicant's claims, can be adequately dealt with if the matter is referred to oral evidence in terms of rule 6(5)(g). I must make it clear that I am not expressing myself on whether such an application should be successful if or when it is made.
33. It is of course so that in instances where there are foreseeable disputes of fact motion proceedings should not be used because such proceedings are not geared to deal with factual disputes but principally for the resolution of legal issues⁵. If a dispute of fact was foreseeable, and motion proceedings are not prescribed for the type of claim, and an applicant nonetheless persisted to approach the court on application, the respondent's remedy does not lie in the provisions of rule 35. If the respondent is correct in his assertion that real, genuine, and bona fide disputes of fact have arisen on the affidavits, and that these disputes were foreseeable, he has an appropriate remedy through the application of the now

⁵ **Cadac (Pty) Ltd v Weber-Stephen Products Company and Others** [2010] ZASCA 105; 2011 (3) SA 570 (SCA).

trite **Plascon Evans** principle which in essence provides for the application to be decided on his version.

34. The respondent's intention to apply for a consolidation of the application with his unliquidated damages claim is not relevant because such an application had not been made. I am not in a position to consider whether the consolidation of the proceedings will constitute exceptional circumstances because I do not know if such an application will even be successful if and when it is made.
35. Therefore in summary, the proposed consolidation of the proceedings is irrelevant and the facts that (i) the applicant decided to approach the court by way of motion proceedings, and (ii) the possibility that the applicant might be in possession of documents (evidence) which might tend to prove the respondent's defense or disprove the applicant's claims, and (iii) the respondent's contention that foreseeable disputes of fact have arisen on the affidavits, are not exceptional circumstances that that render the making of a direction that discovery should apply to the proceedings necessary.
36. I accordingly propose to dismiss the application with costs.

A. VORSTER AJ
Acting Judge of the High Court

Date of hearing: 20 April 2023

Date of judgment: 5 June 2024

Counsel for the applicant: Y Coertzen

Instructed by: Newtons Incorporated

Counsel for the respondent: R du Plessis SC
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