



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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
<u>DATE</u> 22/11/2016	<u>SIGNATURE</u>

DATE: 24/11/2016.

CASE NO: 42823/2013

IN THE MATTER BETWEEN:

ABSA BANK LIMITED

Applicant / Plaintiff

And

MOHAMED ADAM

1ST Respondent / 1ST Defendant

CASE NO: 42824/2013

IN THE MATTER BETWEEN:

ABSA BANK LIMITED

Applicant / Plaintiff

And

MOHAMED ADAM

1ST Respondent / 1ST Defendant

**FREDERICK HERSELMAN
LLOYD**

2ND Respondent / 2nd Defendant

ALIDA MARIA LLOYD

3rd Respondent / 3rd Respondent

JUDGMENT

KOLLAPEN J:

1. The plaintiff has sued the defendants for payment based on deeds of suretyship signed by the defendants in favour of the plaintiff and in respect of the liability of the Medical Review Corporation Limited.
2. Both those separate actions in which the issues in dispute are the same are still pending in this Court and during August 2016 the trials in both matters were postponed *sine die*.
3. The application which currently serves before me was launched on the 11th of September 2016 and in it the applicant seeks an order striking out the defendant's plea and/or dismissing the defendant's defence, and following that, seeks judgment to be entered in favour of the plaintiff.
4. The applications which came before me on the 20th of October 2016 are premised on the following grounds (described as three separate and self-standing grounds):

- a) That the defendant is in breach of orders of this Court (these relate to the plaintiff's request for further particulars for trial, and an order directing the defendant to make discovery in terms of Rule 35).
 - b) That the defendant has shown a disregard and lack of interest in the litigation, constituting an abuse of process.
 - c) That there is no merit in the defendant's defence to the action.
5. In respect of the last ground, it is common cause that on the 25th of July 2016 this Court made orders directing the defendant to respond to the plaintiff's notice in terms of Rule 35(1) within ten days of the order as well as an order directing the defendants to respond to the plaintiff's request for further particulars within ten days from the date of the order.
6. The further particulars and the discovery affidavit contemplated in the orders of the 25th of July 2016 were served on the plaintiff's attorneys on the 19th of October 2016 and were accompanied by an application for condonation for their late filing.
7. Accordingly on the 20th of October 2016 the position was that there had been compliance with the orders of the 25th of July 2016 albeit out of time, for which condonation was sought. The stance of the plaintiff was that it persisted with the relief sought while the defendant intimated that it wished to oppose the relief sought. The matter was postponed with time-frames for the exchange of affidavits and heads of argument being part of the terms of the postponement.

8. With regard to the first ground relating to the non-compliance with the orders of this Court, my view is that at the time the application to strike served before me, there was compliance with the orders made, coupled with an application for condonation which the plaintiff has elected not to oppose.
9. Under such circumstances and in the light of the explanation offered for the lateness in complying with the orders of this Court of the 25th of July 2016, I would not in the exercise of my discretion grant the relief based on this ground as in my view there has been substantial compliance with the orders of this Court as well as an explanation that is not challenged for the delay in complying with these orders timeously. To grant the relief sought which is far-reaching, would be disproportionate to the mischief complained against, and which in any event has been substantially remedied.
10. The second leg of the application is premised on an assertion that the defendant has repeatedly acted *mala fide* in respect of this action and related and parallel litigation between the bank, the defendant and companies making up his group of companies. In advancing this ground the plaintiff makes reference to both the manner in which the defendant approached an application for a postponement of the trial in one of the matters which was set down for the 2nd of August 2016, as well as other related litigation, contending that the defendant acted with *mala fides* in respect of the litigation in general, not complying with time limits and Court-ordered directions.

11. The defendant has brought an application to strike in respect of these allegations in terms of Rule 6(15) contending that they contain material that is either scandalous, vexatious or irrelevant.
12. In my view the conduct of the defendant in relation to litigation other than the two actions which are the subject of this application would not be relevant in these proceedings as that conduct (whatever its content may be) stands to be determined by the processes in those proceedings and the parties' respective rights and obligations as they arise. It does not appear that any of the complaints in respect of the defendant's conduct in those matters has resulted in a finding of recalcitrance or recidivism in those matters. Under such circumstances I am not convinced that those allegations assume relevance in these proceedings and in the circumstances I would uphold the application to strike with costs.
13. What then remains in respect of this ground are the allegations of recalcitrance in these proceedings. In this regard the failure to comply with time limits and court orders may reflect a less than ideal approach to litigation which of course activates certain rights on the part of the innocent party. The first ground of this application has already traversed the orders of the 25th of July 2016 and they should not resurface in respect of this ground again. Each instance of non-compliance carries consequences and I am not satisfied that the allegations of non-compliance are such that they constitute recalcitrance or recidivism justifying extraordinary relief of striking out and judgment.

14. The third and final leg on which the application is brought is the lack of a valid and sustainable defence to the plaintiff's action. In this regard the plaintiff seeks in the founding affidavit in this application, to analyse the defences raised and to conclude that they are without merit.
15. I am not convinced that these are the proper proceedings for such an approach. The defendant's plea was filed as far back as in August 2015. If the plaintiff was of the view that it evidenced no valid defence in law then it was open to the plaintiff to utilise the provisions of Rule 23 of the Rules of this court in excepting to this plea. Such a course of action was not followed and the matter proceeded to be enrolled for trial on the basis that the defendant would ventilate the defences in his plea in those proceedings.
16. Determining in motion proceedings such as these that the defences lack merit would in my view seek to achieve the same effect as an exception through a different guise and would effectively deprive the defendant of ventilating his defence, which up to the filing of this application, was not the subject of a challenge as contemplated in Rule 23.
17. For these reasons I would not uphold the application based on this ground.

ORDER

18. In the circumstances I would make the following order:

- I. Paragraph 25 – 63 of the founding affidavit under case number 42823/2013 are struck in terms of Rule 6(15) of the Uniform Rules of Court;
- II. Paragraph 22 – 63 of the founding affidavit under case number 42824/2013 are struck in terms of Rule 6(15) of the Uniform Rules of Court;
- III. Paragraph 17 of the Replying Affidavit filed for both case number 42823/2013 and 42824/2013 are struck in terms of Rule 6(15) of the Uniform Rules of Court;
- IV. The applicant is to pay the costs of the applications to strike.
- V. The applicant's applications in terms of case numbers 42823/2013 and 42824/2013 are dismissed with costs
- VI. No order of costs is made in respect of the proceedings of the 20th of October 2016.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

42823/2013 & 42824/2013

HEARD ON: 20 October 2016 & 14 November 2016

FOR THE APPLICANT: Adv. K W Lüderitz SC (appearing with Adv. G W Amm)

INSTRUCTED BY: Lowndes Dlamini Attorneys (ref.: A Wright/II/MAT12567)

(Correspondent attorneys – Riaan Bosch Attorneys (ref.: R Bosch/RD0293))

FOR THE RESPONDENT: Adv. J Roux SC

INSTRUCTED BY: Boshoff Smuts Inc Attorneys (ref.: J Smuts/N Brand/BL0526)