IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 18093/2021

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

03/05/2022
DATE SIGNATURE

FIRSTRAND BANK LIMITED Excipient/Plaintiff

and

LEKOLOTA ABRAHAM MAKUA Respondent/Defendant

Summary: summons - counterclaim - exception - no cause of action – exception upheld

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JUDGMENT

PHOOKO AJ:

INTRODUCTION

[1] This matter concerns an averment by the Excipient that the Respondent's counterclaim does not disclose a cause of action.

[2] The case came before me sitting in the opposed motion court on 14 March 2022. The Excipient was represented by counsel. The Respondent, who is an advocate and a member of the Pretoria Society of Advocates, represented himself. On the same day, I granted an order in favour of the Excipient to the effect that the Respondent must amend his counterclaim among other things. This judgment sets out the reasons for my ruling against the Respondent.

THE PARTIES

[3] The Excipient is FirstRand Bank Limited a registered bank with registration number 1929/001225/06, a bank as defined in the Banks Act 94 of 1990, and a registered credit provider in terms of the National Credit Act[1], registered as such with the National Credit Regulator whose main address of the business is 1 Enterprise Road, Fairlands, Johannesburg having taken transfer of the NBS Home Loans Division of BOE Bank Limited (former known as Boland Bank PKS) limited in terms of section 54 of the Banks Act which Bank in turn obtained all assets and liabilities of NBS Bank Limited in terms of section 65 of the Banks Act 94 of 1990.

[4] The Respondent in the interlocutory application is Lekolota Abraham Makua an unmarried adult male whose full and further particulars are unknown to the Excipient.

[1] Act 34 of 2005

JURISDICTION

[5] The mortgaged property is within the jurisdiction of this Court. Therefore, this Court has the power to adjudicate this case.

THE ISSUES

[6] The issues to be decided by this Court are:

(a) Whether the Respondent's application for a postponement should be granted?

(b) Whether the Respondent's Application to supplement his pleadings should be granted?

(c) Whether the Respondent's counterclaim discloses a cause of action?

THE FACTS

[7] This matter originates from a home loan agreement that was concluded between the Excipient and the Respondent on 7 November 2017. The Excipient lent the Respondent R2 400 000.00 and R480 000.00 for the costs related to the purchase of property.

[8] The aforesaid home loan was secured by a mortgage bond registered in favour of the Excipient for the sum of R2 400 000.00 and R480 000.00 respectively.

[9] The Defendant defaulted on a monthly instalment towards the repayment of the loan and was indebted to the Excipient for payment of R2,677, 992.85 as of 17

March 2021. The said amount includes interest at the variable rate of 7.25% per annum from 1st March 2021 to the date of final payment.

[10] In April 2021, the Excipient caused summons to be issued against the Respondent to recover the outstanding amount. In the same month, the Respondent entered an appearance to defend and served the same to the Excipient's attorneys.

[11] On 31 May 2021, the Excipient served the Respondent/Defendant with a notice of bar in terms of Rule 26 of the Uniform Rules of Court as the Respondent/Defendant had failed to timeously deliver a plea in response to a combined summons. A notice of bar requires a defendant to file a plea or exception within five days; failing which the defendant will be barred from doing so without special leave of the Court. The Respondent served a special plea and a plea to the merits on the Excipient on 4 June 2021.

[12] On 14 June 2021, the Respondent further served a counterclaim on the Excipient's attorneys of record. The Excipient then served its notice of exception on the Respondent's attorney of record on 6 July 2021 on the basis that the Respondent's counterclaim does not disclose a cause of action. It is this Excipient's exception on the Respondent's counterclaim that is to be decided by this Court.

APPLICATION TO SUPPLEMENT PLEADINGS

[13] This matter has become a hot potato. Initially, I anticipated dealing with an interlocutory application. However, shortly before the date of the hearing, an

application for the postponement of the proceedings was uploaded on CaseLines by the Respondent. On the date of the hearing, I was also presented with an oral application to supplement the pleadings for an application for postponement.

[14] The Applicant/Respondent argued before this court that he be allowed to supplement his papers because he was dealing with a financially stable banking institution. He further argued that supplementing his papers was in the interests of justice because it was going to pave a way for mediation which is less expensive compared to litigation.

[15] The Applicant, an officer of this court, adopts his processes, and disregards the rules and processes of this court. There is no supplementary notice of motion whatsoever before this court. It appears that the Applicant has opted to use the principle of interests of justice to bypass court procedures.

[16] Contrary to his written submissions, the Applicant submitted that it was in the interests of justice that this matter is postponed because it was still pending before the Ombudsman for Banking Services.

[17] The Application for a postponement was drafted by the Applicant's former attorney, Mr. Mmowane, who clearly stated the grounds for postponement. Nothing whatsoever was indicated about the Respondent having contracted COVID-19. However, the Applicant now also raises a ground of COVID-19 as having affected his ability to attend to the drafting of his pleadings.

[18] The Excipient objected to this application on the basis that it is not properly before the court, and that it was a completely new case that they did not anticipate.

[19] This Court will always ensure that both parties are afforded an equal opportunity to present their cases including granting an indulgence to any party seeking such provided that this court is taken into confidence to do so. However, this is a rare case. The Applicant appears to be stretching the sympathy of this Court. He wants the court to give him a license to ambush his opponent with a completely new case. First, for the very first time before this Court, he indicated that this matter is still pending before the Ombudsman for Banking Services. Second, he states that he had contracted COVID-19 and therefore had challenges in attending to the pleadings. All these are new factors.

[20] What is more troubling is that the Applicant, from time to time, argues matters that never formed part of the founding affidavit in support of an application for postponement. The rules and processes of the court must be adhered to except in permissible circumstances. In *Maphango and Others v Aengus Lifestyle Properties*[2] Jaftha J, as he was then, said:

> The rule of practise is that in motion proceedings a party stand or falls by its papers.

[21] I am persuaded by the above statement, especially in circumstances where the Applicant in this case cuts, chops, and changes his version as and when he wishes to do so without the leave of this Court. The court is in doubt as to which version is correct. In my view, it cannot be in the interests of justice to accept unclear multiple versions before this court.

[22] I, therefore, decline the Applicant's application to supplement his pleadings.

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[2] *Maphango and Others v Aengus Lifestyle Properties* (Pty) Ltd (CCT57/11) (CCT 57 of 2011) [2012] ZACC 2 (13 March 2012); para 102 at footnote 162.

POSTPONEMENT

[23] An application for postponement has no rigid formular to the extent that it can also be made in person right on the day of the hearing by a party seeking a postponement. A party seeking an application must show good cause as to why an application for postponement should be granted thus halting the proceedings.[3] It is at the discretion of the court whether to grant a postponement or not.[4] However, such discretion must be exercised properly because it can be reversed on appeal if it was exercised capriciously.[5]

[24] Turning to the Applicants' request for postponement, the Applicant was not helpful to assist this court to understand his reasons to have the matter postponed. The Applicant in his founding affidavit initially based his application for postponement on the basis that both the parties be afforded an opportunity to exhaust mediation and attempt to resolve the dispute.[6] However, during oral submission, the Applicant submitted that it was in the interests of justice that this matter is postponed because it was still pending before the Ombudsman for Banking Services.

[25] On 06 September 2021, the Ombudsman for Banking Services addressed a letter to the Applicant *inter alia* informing him that "there is regrettably no reasonable prospect of this office making a finding in your favour".[7] This means that at the time of making this application, the Applicant's erstwhile attorney, Mr.

[3] *Gentriuco AG v Firestone SA (Pty) LTD* 1969 (3) SA 318 (T).
[4] *Isaacs & Others v University of the Western Cape* 1974 (2) SA 409 (C) at 411.
[5] *Prinsloo v Saaiman* 1984 (2) SA 56 (O) AT 57G).
[6] See Applicant's affidavit in support of an application for postponement.
[7] Letter from the Ombudsman for Banking Services.

Mmowane' knew about this outcome. Despite this, both the Applicant and Mr. Mmowane still insisted under oath that this matter is before the Ombudsman for Banking Services. However, the information before this court indicates otherwise. Given the fact that this misleading information comes from officers of the court, this is regrettable, to say the least.

[26] In summary, the Applicant's oral submissions were all over the place. At some stage, the Applicant again argued that the interest of justice requires the court to listen to every piece of information that he wished to say. As already indicated earlier, the Applicant was now completely arguing a new case. A case different from the one prepared by his erstwhile attorney. A case made up of contradictory information.

[27] In the circumstances of this case, and considering the submissions made in respect of postponement, I find myself persuaded by Slon J in *Grobler v MFC*[8] who said:

> The conduct of the applicant is, in my view, therefore to be characterized as vexatious and abusive, and an end must be put to it.

[28] It has been said that the courts should be slow to refuse a postponement where the true reason for the party's non-preparedness has been fully explained.[9] The explanations advanced by the Applicant are not clear. They are different versions of stories that are hard to comprehend. I do not find any reasonable explanation as to why this matter should be postponed. The application is in my view not

[8] (19/01548) [2021] ZAGPJHC 856 at para 19.
[9] *Madnitsky* v *Rosenberg* 1949(2) SA 392(A) at 399.

bona fide but made to delay the proceedings.

[29] For example, a submission by the Applicant to the effect that he seeks time to explore a mediation process with the Respondent in this matter was dealt with by the parties before this hearing. The Applicant and/or his erstwhile attorneys never filed any notice related to mediation. Instead, the Applicant only filed a notice of mediation post his plea. This, as correctly argued by the Respondent, is an unusual and irregular step.

[30] Given the above exposition, I am therefore of the view that the application for postponement should also be refused.

APPLICABLE LAW

[31] An Excipient must show that the pleading is excipiable on every possible interpretation that can reasonably be attached to it.[10] Furthermore, the onus rests upon the Excipient to persuade the court that no cause of action can be ascertained from a pleading in question among others.[11] As was correctly held in *Frank v Premier Hangers CC*[12] where Griesel J said:

> "In order to succeed in its exception, the plaintiff has the onus to persuade the court that, upon every interpretation which the defendant's plea and counter-claim can reasonably bear, no defence or cause of action is disclosed. Failing this, the exception ought not to be upheld."

[10] *Theunissen & andere v Transvaalse Lewendehawe Koöp* BPK 1988 (2) SA 493 (A) at 500E-F; *First National Bank of Southern Africa Limited v Perry N.O. & others* 2001 (3) SA 960 (SCA) at 965C-D.
[11] *Shell Auto Care (Pty) Ltd v Laggar and Others* 2005 (1) SA 162 (D).
[12] 2008 (3) SA 594 (C) at para 22.

[32] Considering the above, it is evident that when considering an exception, this court must consider the allegations contained in the Respondent's counterclaim.

[33] I now deal with the submissions of the parties in relation to the exception to the Respondent's counterclaim.

EXCIPIENT'S SUBMISSIONS

[34] Counsel for the Excipient argued that a "claim in reconvention must set out the material facts relied upon" as per the requirements of the Uniform Rules of the Court.[13] *Further*, Counsel *inter alia* submitted that the Defendant "must make all the allegations necessary to support his counterclaim in reconvention".[14]

[35] To this end, the Excipient *inter alia* argued that the Applicant's counterclaim does not disclose a cause of action in that:

(a) The Respondent has not pleaded whether or not the alleged agreement was written or oral including who represented disclosing who represented him during the conclusion of the said agreement; and

(b) the Respondent has not made any reference to the allegations relied upon by him in his counterclaim contained in the Excipient's particulars of claim and the allegations made in his plea;

[13] See for example, Rule 18(6) "which provides that A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading".

[14] Excipient's Heads of Argument in support of its exception para 3.9.

[36] In light of the above, the Excipient submitted that the Respondent's Counterclaim falls short of compliance with the requirements of Rules 18, 20 and 24 of the Uniform Rules of Court. Consequently, the Respondent's counterclaim is "excipiable as failing to disclose a cause of action".[15]

[37] Considering this, the Excipient argues that the Respondent's counterclaim should be dismissed with costs for failure to disclose a cause of action.

RESPONDENT'S SUBMISSIONS

[38] The Respondent *inter alia* argued that in an exception one does not deal with merits but deals with the ambiguity, and vagueness that is making it hard for one to plead. In this regard, the Respondent argued that based on what they have mentioned in their objection, they are asking the court to dismiss the exception without costs because no one should benefit from interlocutory application.

[39] The Respondent further argued that he has complied with Rule 18(4) and that the Excipient agreed to the same. To this end, The Respondent relied on the passage in *B v B and Others*,[16] where Mkhubele AJ said that Rule 18(6) of the Uniform Rules of Court provides as follows:

> A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.

[15] Excipient's Heads of Argument in support of its exception para 3.11.
[16] Pars 5 and 6.

> The ultimate test, however , must in my view still be whether the pleading complies with the general rule enunciated in Rule 18(4) and the principles laid down in our existing case law.

[40] Based on the above, the Respondent argued that they have complied with rule 18(4) and that the Excipient has failed to specify the specific portions of the counterclaim which makes it difficult for them to plead.

EXCIPIENT'S REPLY

[41] In reply, the Excipient disputed almost every argument advanced by the Respondent. Firstly, Counsel for the Excipient disputed the Respondent's claim in that the Excipient has agreed that the Respondent's particulars of claim comply with rule 18(4) of the Uniform Rules of the Court.

[42] The Excipient reiterated his argument in that Rule 18(4) was peremptory in that a pleading must be clear and concise to enable the opposite party to reply thereto. To this end, Counsel for the Excipient referred this court to a portion wherein the Respondent's counterclaim has two amounts (R780 000.00 and 28 00.000.00) claimed, but there are no indications whatsoever where those amounts came from. Consequently, Counsel for the Excipient submitted that they are unable to plead and/or advise their client about what to do regarding the Respondent's counterclaim.

EVALUATION OF SUBMISSIONS

[43] The question that this court needs to ask is whether the Excipient is aware of the claim that he/she must meet in the circumstances of the Respondent's

counterclaim.[17] In *McKelvey v Cowan NO*[18], the court stated that:

> "A pleading is only excipiable on the basis that no possible evidence led on the pleading can disclose a cause of action."

[44] The Excipient focused its case on the ground that the Respondent's counterclaim does not disclose a cause of action because it fails to precisely indicate whether the alleged agreement that the Respondent relies on was verbal or written. In addition, the Respondent fails to state who represented him and/or which aspects of the Excipients' particulars of claim does he relies on among other things.

[45] A closer perusal of the Respondent's counterclaim in paras 4 and 5 provide:

> "During or about 7 November 2017 at or near Pretoria the Plaintiff and the Defendant represented by duly authorized agents, entered into a Home Loan Agreement (the loan) in terms of which the Plaintiff granted the Defendant an amount of R2 400 000 as loan for a property described Erf 379 Lynwood Glen Township known as 62 Maldon Road, Lynnwood Glen, Pretoria ("the property") situated within the Jurisdiction of the above Honourable Court".

[46] Indeed, a simple reading of the aforesaid paragraph does not say whether the contract was verbal or written. Instead, the Respondent himself appears to not know whether the contract was written or not. I say this because the Respondent has written that "The relevant express, alternatively implied, further alternatively tacit terms of the loan …".[19] This statement alone does not assist the Respondent but confirms the Excipient's concerns. In my view, there is no compliance with

[17] *Jowell v Bramnell Jones and Others* 1998 (1) SA 836 (W) at 905E-H.
[18] 1980 (4) SA 383 (D) at 393F-G.
[19] Defendant's counterclaim para 5.

Rules 18 (4) and 24[20] of the Uniform Rules of the Court.

[47] The Respondent *inter alia* confidently referred this court to the case of *B v B and Others* as per paragraph 38 above.[21] In my view, this case does not help the Respondent for failure to comply with Rule 18(6) which *inter alia* requires that, if the contract is written, "a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading". The Respondent in this case left the issue of whether the contract is written or verbal open. Nothing has been attached to the Respondent's pleadings too. Accordingly, there is no complies with Rule 18(6). Further, Rule 18(6) requires the Respondent to clearly state the parties who concluded the contract. This too has not been done by the Respondent. The Respondent's reliance on the aforesaid case is thus self-defeating.

[48] In *Living Hands (PTY) Ltd and Another v Ditz and Others*[22] the court warned that

> "…**Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars**. . .". (Own emphasis added).

[49] In my view, this is a different case where the flaws are countless to be cured by a request for further particulars. The Respondent further goes on to claim huge sums of money from the Excipient but does not state the basis of where such claims originated from.

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[20] Rule 24(1) provides that "a defendant who counterclaims shall, together with his plea, deliver a claim in reconvention setting out the material facts thereof in accordance with rules 18 and 20 unless the plaintiff agrees, or if he refuses, the court allows it to be delivered at a later stage".

[21] (10417/2015) [2017] ZAGPPHC 1292 (24 May 2017).

[22] 2013 (2) SA 368 (GSJ) para 15.

[50] In my view, the Excipient has made out a case in that upon every interpretation which the Respondent's counterclaim can reasonably bear, it does not disclose a cause of action.

COSTS

[51] The Respondent submitted that the Excipient's application should be dismissed with no order as to costs. According to the Respondent, no one ought to benefit from costs order resulting from interlocutory applications. To a limited extent, the Respondent has a point, because the unwarranted award of costs will likely prevent access to justice. As was correctly said by Seale AJ in *Van Wyk v Millington*[23] that:

> "The court is always loath to award attorney and client costs against a party unless for very strong reasons, because every man has a right to bring his complaints or his alleged wrongs before the court to get a decision and he should not be penalised if he is misguided in bringing a hopeless case before the court."

[52] However, this is a unique case. The Respondent came to gamble before this court. At times, he started a completely new application, made of different versions, and in total disregard of the rules of procedure and practice. It would have been a different matter if these were coming from a layperson. However, all these came from a practicing advocate who kept on changing his arguments throughout the proceedings. I do not think that all these applications were *bona fide*.[24]

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[23] 1948 (1) 1205 (C) at 1215.
[24] *Cook v Seabush Investments (Pty) Ltd* (4282/2017) [2018] ZAECGHC 36 (21 May 2018).

[53] Further, the Respondent and his former representative (Mr. Mmowane) were not as honest as one would have expected from officers of the court. The pleadings drafted by Mr. Mmowane including the Respondent's oral submissions before this court persisted that this matter was before the Ombudsman for Banking Services. This is even though the evidence before this court indicated otherwise.

[54] Officers of the Court such as both the Respondent and Mr. Mmowane should as far as possible try to assist the court and not the other way around. In the matter between the *Pretoria Society of Advocates v Van Zyl*,[25] dealing with removal of name from the roll of advocates, the court cautioned that:

> "An advocate who lies under oath in striking off proceedings must know that such dishonesty can be held against him or her in deciding whether he or she is a fit and proper person to continue to practise as an advocate. The appellant has strict rules to ensure that its members do not deceive a court".

[55] I find the aforesaid case relevant in the present circumstances. The Respondent and Mr. Mmowane are officers of the court. Their duty is to assist this court and not to deceive it. They must be careful about their conduct, especially when dealing with the court and elsewhere.

[56] The Excipient in this matter has been a successful party. Therefore, the costs should follow the result.[26]

CONCLUSION

[25] (517/18) [2019] ZASCA 13 (14 March 2019).
[26] *Speaker of the National Assembly v Public Protector and Others; Democratic Alliance v Public Protector and Others* [2022] ZACC 1 para 112.

[57] After reading through the papers, hearing the Respondent, and counsel on behalf of the Excipient, I grant judgment in favour of the Excipient as follows:

(a) The Excipient's application is upheld;

(b) The Respondent is ordered to remove the grounds of objection and amend his counterclaim in accordance with Rule 28 of the Uniform Rules of Court within 10 days of this order;

(c) The Defendant is ordered to pay the costs of this application on a scale as between attorney and client.

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M R PHOOKO AJ

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/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 03 May 2022.

APPEARANCES:

Counsel for the Excipient:	Adv. HP PSAJ Jacobsz
Instructed by :	Hack Stuppel & Ross Attorneys
Counsel for the Respondent:	Mr. LA Makua (in person)
Date of Hearing:	14 March 2022
Date of Judgment:	03 May 2022