IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO. 1778/2021

WESBANK (a division of Firstrand Bank Ltd) **Plaintiff**

and

ADV. GOODMAN MYEKENI MZOTANE **Defendant**

JUDGMENT

NQUMSE AJ:

[1] This is an interlocutory application wherein an order is sought in the following terms:

1.1. The defendant's plea and counterclaim be set aside as an irregular proceeding;

1.2. That the defendant pays the costs of this application and further and/or alternative relief.

[2] For sake of convince the parties are referred to as they appear in the main action.

[3] The background facts are succinctly set out in the founding affidavit of Shakira Ahmed who states that pursuant the serving of summons on the defendant, arising out of an instalment sale agreement, the defendant served a plea and counterclaim on the plaintiff on 22 July 2021. Copies of the plea and counterclaim are attached to the founding affidavit and annexed as SA1 and SA2 respectively.

[4] The plaintiff contends that the defendant's plea is irregular in that the defendant has failed to comply with Rule 22 (2) of the Uniform Rules of Court by admitting or denying or confessing and avoiding all the material facts alleged in the

combined summons or to state which of the said facts are not admitted and to what extent.

[5] It is further contended that the pleadings have failed to comply with Rule 18 (4) of the Uniform Rules which require all pleadings to contain a clearer and concise statement of material facts upon which the defendant relies for his defence.

[6] The plaintiff is also of the view that the counterclaim is irregular, as it does not comply with Rule 25 read with Rule 19 of the Uniform Rules which require each pleading to contain a clearer concise statement of the material facts upon which the pleader relies for his claim in order to enable the opposite party to reply thereto.

[7] The defendant has further failed to comply with Rule 18 (6) which requires any party relying on a contract to state when the contract was concluded, whether it was oral or written, and by whom it was concluded and if it was written, a copy thereof must be attached to the pleadings.

[8] The plaintiff further states that according to Rule 18 (10) a party claiming damages out in a manner to enable the opposite party to reasonably assess the quantum thereof. The defendant has failed to do so.

[9] The plaintiff further contended that despite the (15) fifteen days within which the defendant was required to remove the complaint raised in the preceding paragraphs, he failed to do so. Instead on 11 August 2021 the defendant filed a notice of intention to amend both his plea and counterclaim. This caused the plaintiff to file a notice of objection to the two notices to amend. The notice of objection was served on the defendant on 18 August 2021.

[10] Plaintiff further contends that the defendant failed to bring the necessary application for leave to amend to court within (10) ten days as required by the rules. Thus, it was contended by the plaintiff that the defendant’s failure to remove the causes of complainant renders the plea and counterclaim irregular.

[11] The defendant in his answering affidavit which I must mention took me a great deal of an effort to understand and to make out what was being conveyed, raised a point in limine which was to oust the jurisdiction of this court from hearing the matter.

In so doing the defendant places reliance on section 29 of the Magistrate's Court Act, Act 32 of 1944 which according to the defendant, confers jurisdiction of a monitory claim which is not in excess of R400 000 to the sole jurisdiction of the district and Regional Courts to the exclusion of the High Court. It was contended that the plaintiff's action is a non-starter on that ground alone. He also stated that his intended amendment of the plea was to clarify the existence of a motor vehicle a Mercedes Benz 220 which has a history of many possessors and which was part of the contract entered into between the plaintiff and defendant.

[12] In paragraph 13 of his affidavit the following is stated: "*These averments have no bearing at all as there were other intended amendment to remedy the complaints this application stands to fall on as judicate which fall the application to be dismissed with costs."* (sic). A reading of the paragraph above confirms the difficulty alluded to earlier on the incoherent nature of the answering affidavit. In paragraph 16 the affidavit states "*Before the expiring of (10) days the plaintiff brought another vexation (sic) application setting aside a plea already filed a notice to amend it with its intend to amend counterclaim and such are further delays by plaintiff for me to more Rule 28 (4) application papers which I am entitled to move by means of substantive application (sic).* He continues in paragraph 17 and states *"I humble submit further that counterclaim as a defence is in line with Rule 22 (4) of the uniform rules under practice defendant could properly plead that although the amount claimed by plaintiff was owing and due, he was excused from paying because the plaintiff was owing and due, because the plaintiff owed him like or larger sum of money which he claimed it by a way of counterclaim filed simultaneously with a plea and this Rule is transgressed by the plaintiff deliberately."(sic)*

[13] In paragraph 19 he states *"I am advised herein that still substantive application in terms of the Rule 28 (4) still applicable and I am intending to proceed hereof*". (sic). In paragraph 21 he states "*This application is a non-starter and stand to be dismissed with costs on an attorney and client scale.*

[14] Before me, Ms Sephton for the plaintiff sought the courts indulgence in the condonation application for the late filing of her heads of argument. Mr Mkhongozeli for the defendant gave a neutral response and said he has nothing to submit but leaves the application for condonation in the hands of the court. Satisfied with the

explanation and having taken into account that the delay was two (2) days, the application for condonation was granted.

[15] Ms Sephton further submitted that after the plaintiff was saved with a plea and counterclaim, the defendant was served with a notice of objection in terms of Rule 28 (3) in which it was explained that the proposed amendments fail to cure the issues raised by the notice of irregular proceedings which will result in the plea being irregular and excipiable on the basis that it is vague and embarrassing. Upon receipt of the notice of objection the defendant's attorney acknowledged receipt of the said notice of objection and advised plaintiff's attorneys that its objections are baseless in law, the defendant has a bona fide defence and intended amending its plea, and further advised that the defendant will make an application for leave to amend. But such an application has never been brought to court up to the stage of the hearing of the present application.

[16] She further argued that neither the defendant's plea or counterclaim complies with the rules relating to pleadings. The notice of irregular proceedings granted the defendant an opportunity to remove the cause which he failed to utilise. When the plaintiff objected to the amendment the defendant again failed to bring an application under section 28 (4). She further submitted that the defendant has no real intention to amend its pleadings instead he defends vigorously the irregular pleadings.

[17] In his heads of argument and before me, Mr Mkhongozeli followed the contention that this court lacks the jurisdiction to hear this matter on the grounds of section 29 of the Magistrate's Court Act. In amplification of this point he relies on the National Credit Act, Act 34 of 2005 (the NCA) and the notice of determination in Government Notice 670 of 29 July 2010, published in Government Gazette 33418 of 29 July 2019. The notice referred to relates to the establishment of regional courts for the adjudication of civil disputes and for the determination of monitory jurisdiction. The court asked from Mr Mkhongozeli whether the pieces of legislation referred to specifically oust the jurisdiction of the High Court and what was his view on the concurrent jurisdiction of the High Court in matters justiciable in the Lower Courts. His reply was an emphatic no, that the High Court has no jurisdiction in such matters.

[18] I find it apposite to dispose of this issue at this early stage with reference to the ***Standard Bank of SA Ltd and Others v Thobejane and Others***[1] and ***Standard Bank of SA Ltd v Gqivana N.O. and Another***[2] where in both matters it was held that flowing from the principle of concurrent jurisdiction the High Court is obliged to entertain matters that fall within the jurisdiction of the Magistrate's Court. The court further held that there is no obligation in law on financial institutions to consider the cost implication and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings. This puts paid to the protest by the defendant against this court's jurisdiction.

[19] It was further argued by the defendant that the plaintiff had approached the court having concealed material facts and further accused the plaintiff of non-disclosure that there was a vehicle which the defendant had used as a deposit when he concluded an instalment sale agreement for the vehicle that is the subject matter of the claim in the main action. In the heads of argument, the defendant presented a long history regarding a Mercedes Benz referred to above which according to the defendant on 16 May 2013 its ownership passed to Auto Mitsubishi. Where after on 17 May 2013 it was owned by Kokstad and on 26 May 2014 it was under Business Zone 1841, subsequently it returned to Wesbank on the same date. On 7 August 2014 it was once more under Auto Mitsubishi until 29 January 2015 when it changed to Proxicron (Pty) Ltd until 2 February 2015. On 21 January 2021 it was taken by Bankfin Potgietersrus under Maritime Motors and is currently owned by Zummelog (Pty) Ltd with its registration JY 657 GGP, from its original registration which was FFM 964 EC. This whole history above by the defendant does not address the application before this court nor am I clear as to its relevance in these proceedings.

[20] I was also referred to a long list of authorities that do not address the issue at hand but attempt to give a lecture on the Consumer Protection Act, as well as the protection of consumers under the NCA. Similar to the plea which is difficult to follow as well as the answering affidavit, I have to say respectfully that it was difficult to make sense of the heads of argument of the defendant. It was like searching for a

[1] (38/2019 & 47/2019 (999/2019)
[2] [2021] ZA SCA 92 (25 June 2021)

needle in a haystack. By way of example I was referred to ***Home Fires Transvaal v Van Wyk and Another 2022 SA 9375***, a citation that I battled to find until through patience I came across ***Home Fires Transvaal CC v Van Wyk and Another 2022 (2) SA 375*** where the paragraph I was referred to in the incorrect citation which I confirmed in the correct one to read "*A party will not be held by his signature to a contract which he has not read where the other party knew that he had not done so, was not misled by the signature and only had himself to blame for the other's ignorance of the contents of the document"*. I was also referred to ***Dinner's Club SA (Pty) Ltd v Thornburn 1990 (2) SA 870 (C)*** where the court said "*A signatory can be misled by the form and appearance of the document itself.*" There was no clear address on the relevance of the authorities referred to in the matter at hand nor in what way are they intended to assist the court. The defendant further referred me to the provisions of the National Credit Act, specifically section 90 thereof which prohibits an unlawful provision in an agreement. Once again I have not been pointed to a specific provision of the agreement between the parties that is an infraction of section 90 of the NCA.

[21] Mr Mkhongozeli, followed his submission in his heads of argument and further submitted that the application before me is vexatious in that upon the defendant receiving a notice of objection dated 18 August 2021, the defendant wrote a letter explaining that the objection has no basis and intends to bring an application to effect the amendment within (10) days. However, before the expiry of (10) days the plaintiff launched this application.

[22] When the court asked from Mr Mkhongozeli if there was any impediment which caused the defendant not to approach this court with an application for leave to amend after it has been served with a notice of objection. He said there was nothing preventing the defendant except that they were acting out of a good heart and thought the plaintiff would reciprocate such kindness and would discuss with them the way forward. When he was squeezed by the court as to who had drafted the plea of the defendant and whether he had sight thereof. He said, the plea was drafted by colleagues in his office but it had to come through him to sign it off.

[23] The court further asked if the plea as it stands complies with the rules. He conceded that after he had a relook at the plea and the counterclaim he has to admit

that it does not comply and has to be done afresh and he seeks an opportunity to do so.

[24] The court further asked, based on his concession why does he oppose the application to set aside the plea and counterclaim and whether the net effect of the application does not allow the defendant the opportunity it seeks to amend or redo the plea and counterclaim. In response, he asked that when the court considers costs against the defendant, it should award costs on a party and party scale.

[25] It is trite that the purpose of pleadings is to define the issues for the other party and the court[3]. Compliance with Rule 18 (4) was illustrated in ***Troope v South African Reserve Bank***[4] thus "*it is of course a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of activation or defence must appear clearly from the factual allegations made (Harms Civil Procedure in the Supreme Court at 263-4). At 264 the learned author suggests that, as a general proposition, it may be assumed that, since the abolition of further particulars and the fact that non-compliance with the provisions of Rule 18 now (in terms of Rule 18 (12) amounts to an irregular step, a greater degree of particularity of pleadings is required. No doubt the absence of the opportunity to clarify an ambiguity or cure an apparent in consistency, by way of further particulars, however, must in my view still be whether the pleadings complies with the general rule enunciated in Rule 18 (4) and the principles laid down in our case law*".

[26] The concession made by the legal representative of the defendant puts the question for the opposition of this application to bed. The plaintiff has established clearly that its application to set aside the defendant's plea and counterclaim is not misplaced. It is my view that it ought to succeed.

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[3] ? v Reckitt and Colman v African (Pty) Ltd and Another 1968 (3) SA 98 (A) at 122A; Imprefed (Pty) Ltd v National Transport Commission 1993 (3) SA 94 (A) at 107.

[4] 1993 (3) SA 264 (A) at 273A

[27] The only issue I am left with to decide is the issue of costs. Ms Sephton requested costs to be on a punitive scale more especially in light of the concession made by Mr Mkhongozeli that the plea had no defence.

[28] As already alluded this matter is badly litigated from its inception by the defendant. The plea as well the counterclaim has been badly drafted far from complying with the rules of this court. Even when this had been brought to their attention he continued to litigate the matter in total disregard of the rules of this court. Surely, the legal representative of the defendant should have been aware of the defects and short comings in both the plea and counterclaim. Nevertheless, no attention was paid therein, only to concede at the hearing of this application that the plea and counterclaim do not conform with the applicable rules. As if that was not enough, two (2) days from the hearing of this matter the defendant filed an application in terms of Rule 28 (4) to move an application for condonation of the late filing of its leave to amend which was set down for hearing together with the plaintiff's application. Once again this is an undeniable demonstration of the flagrant disregard of the rules. I find no justifiable reason for the defendant to have put the plaintiff though the trouble of approaching this court with this application for which there was no defensible opposition. I am therefore convinced that the defendant has to bear the costs of this application and be ordered to pay such costs in the scale between attorney and client.

[29] In the result the following order will issue:

(1) The defendant's plea and counterclaim are set aside as an irregular proceeding;

(2) That the defendant pays the costs of this application on an attorney and client scale.

M.V. NQUMSE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the appellant	:	Adv. Sephton
instructed by	:	Huxtable Attorneys 26 New Street Grahamstown
Counsel for the respondent	:	Adv. Mkhongozeli
instructed by	:	Mkhongozeli Attorneys c/o Yokwana Attorneys 10 New Street Grahamstown
Date of hearing	:	10 March 2022
Date of delivery of judgment	:	24 March 2022