

REPUBLIC OF SOUTH AFRICA



IN THE SOUTH GAUTENG HIGH COURT  
(JOHANNESBURG)

(1)	REPORTABLE	NO
(2)	OF INTEREST TO OTHER JUDGES	NO
(3)	REVISED.	
21 September 2011		

CASE NO: 17722/2011

In the matter between

JUPITER ELECTRICAL WHOLESALERS

Plaintiff

and

ABSA BANK

Defendant

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JUDGMENT

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WEINER J

[1] The plaintiff issued summons against the defendant who took an exception thereto. The first notice of exception was withdrawn. The defendant then filed a second Notice of Exception, alternatively a Notice in terms of Rule 30. Six grounds of complaint were set out. The defendant has abandoned the sixth ground. Accordingly there are now five grounds of complaint.

[2] In order to deal with the exception, I refer to the following paragraphs of the Particulars of Claim.

In Paragraphs 4 to 7, the plaintiff pleads:

- 4) *The defendant, during or about 2006, was the banker of the plaintiff and the plaintiff operated various accounts for the defendant and more particularly at the Germiston branch of the defendant.*
- 5) *During or about early 2006 Ms Alta Milne (acting on behalf of the defendant) approached Mr Haripersad (a member/official of the plaintiff) and suggested to him that the large amounts which were being held in a call account and the operating account of the plaintiff, which accounts were held at the defendant, should be invested by way of a fixed deposit which would earn a higher rate of interest.*
- 6) *On 6 March 2006, and as a result of the suggestion by Ms Milne, the plaintiff placed an amount of R4 million in a fixed deposit with defendant. A copy of the relevant fixed deposit receipt is attached as annexure "A".*
- 7) *It was agreed by the defendant that interest of 13.25% would be payable on the amount of R4 million as appears from annexure A.*

[3] The Particulars of Claim then refer to various other deposits that were made by the plaintiff into its account held at the defendant in a similar

fashion. Various “deposit slips” are attached although they are referred to in different terms.

[4] The defendant, in its Notice of Exception, which is now being dealt with, abandoned its reference to Rule 30 and relies only on Rule 23 of the Rules of Court.

[5] On the first ground of exception the defendant refers to the series of documents annexed to the Particulars of Claim as Annexures A, C, E, F, G and H. The plaintiff refers to these as “a fixed deposit receipt” in paragraph 6 of the Particulars of Claim, “a deposit slip” in paragraph 9.2 of the Particulars of Claim, and as “an invoice” in paragraph 11.2 of the Particulars of Claim.

[6] In various other paragraphs the words “deposit slip” and/or “invoice” are used.

[7] The defendant claims that the various descriptions of such annexures are contradictory and in conflict with the documents. The defendant is unable to determine from the plaintiff’s Particulars of Claim what the documents purport to be. Accordingly the particulars are vague and embarrassing and the defendant is unable to plead thereto.

[8] The second ground of exception contained in those annexures is that the plaintiff fails to plead what the relevance of the various annexures is, or upon what terms the plaintiff relies.

[9] The fourth ground of complaint is that the defendant is embarrassed by the plaintiff's failure to properly and/or adequately identify the annexures and to state what part of them constitutes the agreement between the parties.

[10] Those grounds of complaint all relate to the annexures and their relevance.

[11] The defendant in its response states that those annexures are merely evidence of the deposits and need not have been attached at all. According to the defendant, they do not form part of any agreement between the parties. This does not appear clearly from the Particulars of Claim and I will deal with the consequences thereof below.

[12] The third ground of exception is that the plaintiff has failed to comply with Rule 18 of the Uniform Rules of Court in that it has failed to aver:

1. when and where the fixed deposit agreements, referred to in paragraph 14 of the Particulars of Claim, were concluded.
2. who represented the parties in concluding such agreements.
3. whether such agreements were in writing or oral or partly writing or partly oral.

[13] In the result the defendant claims that the plaintiff's Particulars of Claim lack averments necessary to enable the defendant to plead thereto, are thus vague and embarrassing, and alternatively fail to comply with the requirements set out in Rule 18 of the Uniform Rules of Court.

[14] In paragraph 14 of the Particulars of Claim the following is stated:

*"It was an express, alternatively a tacit, alternatively an implied term of the fixed deposit agreements that the fixed deposit would mature within a year of the deposit made, at which stage the monies invested together with the interest thereon would become due and payable."*

[15] The documents attached to the Particulars of Claim being annexures A, C, E, F, G, and H, referred to above contain the following endorsement:

*"On maturity, unless you instruct Absa otherwise, your investment will automatically be renewed for the original term, but at the rate applicable at the time of maturity. Should you find this unsatisfactory, you may change details of this automatic reinvestment within 30 days from the date of the investment without incurring a penalty fee."*

[16] The defendant, in its fifth ground of exception contends that the term pleaded by the plaintiff in paragraph 14 is contradicted by, and inconsistent with, the express term of the fixed "deposit receipt" which provides for the automatic reinvestment. The plaintiff does not allege that it changed the details of the automatic reinvestment within 30 days.

[17] In dealing with these exceptions, I need first to refer to a point raised by the plaintiff that the Notice of Exception in terms of Rule 23(1) served on the 15<sup>th</sup> August 2011 allowed the plaintiff only 10 instead of 15 days to respond thereto. On the 17<sup>th</sup> August the plaintiff filed a Rule 30 Notice dealing with other aspects of the Rule 23 Notice, but not the fact that there was short

notice given. On the 29<sup>th</sup> August 2011 and after a period of ten days, the defendant served the notice of exception in terms of Rule 23.

[18] On the 7<sup>th</sup> September 2011, the plaintiff served a Rule 30 Notice in which it raised the issue in regard to the short period that was given to it in the Notice served on the 15<sup>th</sup> August.

[19] The defendant contends that this Rule 30 Notice was served out of time and after the Plaintiff had taken a further step by launching the previous Rule 30 Notice to set aside the notice of exception on different grounds. By not raising the short service in its previous Rule 30, the plaintiff took a further step in the proceedings and cannot raise that point.

[20] Mr Roos also submits that the defendant then set down the Exception prior to 10 days expiring.

[22] The plaintiff referred to two cases, *Viljoen v Federated Trust* 1971 [1] SA 751[O] at 753 [e] to [f], and *K.P. Kunsmis Verspreiders [Eiendoms] Beperk teen Sentrale Kunsmis Koöperasie [Eiendoms] Beperk en 'n ander* 1973 [2] SA 681[T].

[23] Both cases held that you could not take an exception without first serving a Notice in terms of Rule 23 if the basis of the exception was that the allegations were vague and embarrassing. In both those cases, the plaintiff was not afforded any opportunity to remove the cause of complaint.

[24] In the present case, the plaintiff was given such opportunity although the time allowed was curtailed. The Plaintiff did not raise this defect but filed a Rule 30 Notice dealing with other perceived irregularities, thus taking a further step in the proceedings. The plaintiff has filed papers dealing fully with the merits and there is no prejudice shown. In fact it is to their advantage that this matter be disposed of now. If the exception was dismissed on the basis of short service, it would then be served again and the process repeated at a further unnecessary cost to the parties.

[25] The plaintiff's previous Rule 30 Notice is still to be dealt with. In essence, the plaintiff contends that when the Defendant withdrew a previous Notice of exception, it was precluded from serving the Notice of exception dated 12 August 2011 and the exception dated 29 August 2011. Plaintiff submits further, that by serving the notice of exception on 12 August, the defendant took an irregular step which it seeks to set aside in terms of Rule 30. The defendant has countered this by submitting that only after a Notice of Bar is served, is the defendant obliged to file a further pleading, which included an exception. See *Tyulu v Southern Insurance Association Ltd* 1974(3) SA 726 E at 729.

[26] In dealing with the merits of the exception, the plaintiff has argued that since the defendant has withdrawn its Rule 30 application, it cannot rely on its Rule 23 Notice as same does not cover the present exception.

[27] Erasmus Superior Court Practice, at B.1/154 states the following:

*"Where a pleading both fails to comply with the provisions of Rule 18 and is vague and embarrassing the defendant has a choice of remedies. He or she may either bring an application in terms of Rule 30 to have the pleadings set aside as an irregular step or raise an exception in terms of Rule 23[1]. The remedies however are based on separate and distinct complaints requiring different adjudication. The crucial distinction between Rule 23 and Rule 30 are:*

- a. An exception that a pleading is vague and embarrassing can only be taken when the vagueness and embarrassment strikes at the root of the cause of action as pleaded, whereas;*
- b. Rule 30 may be used to strike out the claim pleaded when individual averments do not contain sufficient particularity. It is not necessary that the failure to aver material facts goes to the root of the cause of action."*

[28] In this regard Erasmus refers to *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) 902 [F] to [G].

[29] The plaintiff's complaint in regard to Rule 18 is that the agreements are pleaded in such a way that one does not have sufficient averments to enable the defendant to plead thereto.



[30] There is no allegation as to when and where the fixed deposit agreements were concluded. There is no allegation as to what the terms of the fixed deposit agreements were. There is only a reference to a suggestion made by the defendant's representative that the plaintiff place an amount in a fixed deposit with the defendant, which the plaintiff did. There is an averment as to who acted on behalf of the parties in the first instance and one is left to assume that those representatives continued to act on behalf of the parties.

[31] There is no indication as to whether the agreements were oral or in writing or partly in writing and partly oral and, if the latter, which were the written portions of the agreement. In this regard, reference was made to the annexures which the plaintiff's counsel contends are mere evidentiary documents. However, the plaintiff seeks to rely upon certain aspects therein such as the date that the deposit was made, the interest rate that was agreed upon, the amount that was deposited and the type of account into which it was deposited. It appears that a portion of this document might be the partially written agreement that is relied upon and that there were other oral terms which are relied upon.


[32] There is no distinct paragraph in which the terms of the agreement are set out clearly. In my view, this goes to the very root of the cause of action and would qualify as an exception to be taken in terms of Rule 23[1] as opposed to Rule 30. This finding would relate to the first, second, third and fourth grounds of complaint.

[33] In relation to the fifth ground of complaint it might be argued that the term pleaded that the amount became payable on the date of maturity as a final investment is an interpretation of the words which are contained in the annexures in regard to what happens to the investment on maturity. If this was the only ground of complaint it might be a different scenario and that particular ground of complaint might not succeed.

[34] However taken together with what has been set out above in regard to the lack of averments contained in relation to the terms of the initial agreement, and the relief which the defendant seeks, this paragraph of the Particulars of Claim could not remain alone.

[35] In my view the defendant has shown that the claims of the plaintiff as set out in the particular paragraphs to which objection was made, are excipiable on the grounds relied upon by the defendant. I accordingly make the following order.

1. The defendant's exception is upheld.
2. The plaintiff is to pay the costs relating to the exception.
3. The main claim in the plaintiff's Particulars of Claim is set aside.
4. The plaintiff is given a period of 14 days from date hereof within which to file an amended Particulars of Claim.
5. The Plaintiff's Rule 30 application is dismissed and the plaintiff is to pay the defendant's costs in relation thereto.

  
Weiner J

Date of hearing: 20 September 2011

Date of judgment: 21 September 2011

Counsel for the plaintiff: Adv JF Roos SC

Attorneys for the plaintiff: Roderick & Lowe Attorneys

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