REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appeal case no: A5022/2015
SCA Petition no: 20637/2014
GJ Case no: 15444/2010

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓
9/3/16 DATE
SIGNATURE

In the matter between:

Absa Bank Limited — Appellant

and

Molotsi, Teboho Tommy — Respondent

Judgment

Van der Linde, J:

Introduction

[1] This is an appeal against a judgment of Shakoane AJ, dated 30 September 2013 and handed down on 8 October 2013, with leave granted by the Supreme Court of Appeal. The court *a quo* had dismissed the appellant's application for payment of R128,794.22, interest at 10,5% pa, an order declaring certain property executable, and costs on an attorney and client scale. The appellant's cause of action was a loan secured by a mortgage bond, entered into on 15 July 1998, for R170 000, repayable in monthly instalments.

[2] In his answering affidavit, the respondent denied that he owed the appellant any money. He admitted having entered into the loan agreement but explained that he had repaid the loan which originally had a twenty year term, within eleven years, by means of a bullet payment of R137 063.58, in November 2008. Some four months after he had done so, in March 2009, a representative of the appellant, one Elize, called to say that as he had settled the mortgage bond early, an amount of about R90 000 was due to him, arising from what he understood to be a recalculation of interest. He withdrew this amount in two instalments, R60000 on 24 April 2009 and R30000 on 25 May 2009.

[3] He also said, by way of a point *in limine*, that it was clear that there were factual disputes that could not be resolved on the papers; these should have been foreseen by the applicant, who should accordingly have sued and not applied for relief on motion, and the application should be dismissed on this basis alone.

[4] In its replying affidavit, the appellant admitted that the respondent had repaid the loan by means of a payment of R137,063.58 on 24 November 2008. It also said the following:

"14. On 24 April 2009 the respondent requested the applicant to transfer R60000 from his account as set out in 'TM2". The applicant complied with the instructions of the respondent and transferred the amount from the respondent's account held with the applicant.

15. On 25 May 2009 the respondent requested the applicant to transfer R30000 from his account. The applicant once again complied with the instructions of the respondent and transferred the amount from the respondent's account held with the applicant."

[5] It said further that the respondent's version was not supported by his own attachment, "TM2", and it contended that there was no factual dispute on the papers. The appellant's deponent asked for the relief set out in the notice of motion. This replying affidavit was filed on 8 April 2011. On 8 June 2011 the respondent filed a notice of motion, supported by an affidavit, in which he asked that the application be referred for the hearing of oral evidence. In his supporting affidavit, he again explained how it came about that he withdrew the R90000.

[6] The matter was argued before the court *a quo* on 27 March 2013. The respondent, a lay person, appeared in person. Both parties had filed written argument that was put before the court below, but we do not have these. After the hearing the parties also filed supplementary written argument. We do not have the respondent's supplementary written argument but the appellant's supplementary written argument was bound into our papers. Although it forms part of the application to the Supreme Court of Appeal and should therefore not have come before us, we could have asked for it if only to clarify precisely what the court a quo was asked to do. That is the only purpose for which we apply it here.

[7] From the appellant's supplementary written argument, it appears that at the hearing the court asked for further authority *"relating to the referral of this matter to trial"*. It appears too that the appellant argued that *"insofar as there may be a dispute of fact (which is denied), such dispute of fact relates to the quantum of the respondent's indebtedness to the applicant. As aforesaid, the appropriate forum to determine this quantum is a trial court in due course."* In other words, the appellant's position was that a reference to evidence or trial was justified only in respect of the quantum of the respondent's indebtedness, not the fact of it.

[8] The court a quo found that the appellant's affidavits had not raised a real, genuine and *bona fide* dispute of fact of the respondent's version, and that on that basis the court would not accede to the appellant's request to refer the matter to evidence or trial to determine

the quantum of the respondent's indebtedness to the appellant.[1] In other words, the court *a quo* did not decline to refer the matter to evidence because the factual dispute raised by the respondent was not a real and *bona fide* factual dispute, which is the usual position.

[9] Instead, the court *a quo* declined to refer the matter to evidence because the factual dispute which the appellant had raised in regard to the respondent's version, was not real and *bona fide*. The court *a quo* rejected the appellant's version on the affidavits as not being *bona fide*, and accepted the respondent's version as being correct. On that basis the court *a quo* dismissed the application.

[10] As we see it, there arises in this appeal an *a priori* legal issue, which is whether the appellant could in any event have succeeded in the court below, given the case pleaded in the founding affidavit. We deal with that issue first.

Could the appellant have succeeded on its pleaded case?

[11] Motion proceedings are so designed that an applicant pleads its case, meaning it supplies both the facts and the legal cause of action, in the founding affidavit.[2] The replying affidavit is not the place to do so. The reason is simple: the applicant makes its case in its founding papers; the respondent answers that case, and makes its own case, in the answering affidavit; and the replying affidavit is there to afford the applicant the opportunity to reply to the respondent's case. If an applicant uses the replying affidavit to remake the case which it was supposed already to have made in the founding papers, that makes for fundamental unfairness, because the respondent then does not have the opportunity to respond.[3]

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[1] Judgment a quo, 3/130/6 to 3/131/6. See too 3/138/20 to 3/140/24.

[2] Cloete, JA in Transnet Ltd v Rubenstein, 2006(1)SA591(SCA) at [28]; and again in Min of Land Affairs and Agriculture and Others v D&F Wevell Trust and Others, 2008(2)SA184(SCA) at [43]. That the case must be made in the founding affidavit is recorded in the many cases listed at footnote 2 on page D1-57 of vol 2of Erasmus, Superior Court Practice, 2nd ed by Van Loggerenberg.

[3] See generally, Triomf Kunsmis (Edms) Bpk v AE & CI Bpk, 1984(2)SA261 (W).

[12]Of course these rules are not immutable, and there are always exceptions to this general approach. Where an applicant has actually made out its case in reply, a court could permit further affidavits to prevent an injustice being done to the respondent.[4] We return to this issue below.

[13]Against this background we may now consider the appellant's pleaded case, and how the pleadings, i.e. the affidavits, unfolded thereafter. The appellant's case of a loan secured by a bond is made out in its founding affidavit and three attachments. The second and third attachments can be ignored for present purposes. The first attachment is pertinent. It supports a pleaded case[5] of one written loan agreement, entered into on 15 July 1998, whereby the appellant lent R170 000, plus an additional sum of R36 000, to the respondent. This was repayable in monthly instalments. Neither the term nor the size of the instalments was pleaded.

[14]The first attachment is said to be the written agreement and its significance is that it bound the respondent's home by way of mortgage as security for the respondent's indebtedness to the appellant.

[15]About the manner in which a party in motion proceedings should go about if it wants to rely on documentary evidence by way of an attachment to the affidavits, it needs to be said that the specific portion of the attachment is required to be identified in the affidavit, and the

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[4] See eBotswana (Pty) Ltd v Sentech (Pty)Ltd and Others, 2013(6)SA327(GSJ) at [18]: *"The late introduction of this affidavit in reply was also objected to. Ultimately this question resolves itself by reference to prejudice and the orderly function of the courts through adherence to its rules, including the need to make one's case out properly in the founding affidavit. The survey was well identified in the founding affidavit and relevant extracts were attached. The issue is not one of making out a case or a new cause of action in reply. The survey was officially produced and the document itself could readily have been procured by Sentech if it seriously wished to challenge its authenticity. In the circumstances Sentech was well able to plead over. It elected simply to plead lack of knowledge. See Gore v Amalgamated Mining Holdings 1985 (1) SA 294 (C); and Replication Technology Group and Others v Gallo Africa Ltd 2009 (5) SA 531 (GSJ) in para 19."*

[5] And it does bear remarking that the founding affidavit is simply a pleading converted to present as an affidavit while in fact it was not. For example, of the respondent it is said that he is *"...TEBOHO TOMMY MOLOTSI an adult male/female ..."*. The language of the sequentially numbered paragraphs, and particularly the form of drafting of paragraph 6, is not that of an affidavit but of a pleading. This has some significance, because this generic form of pleading might explain why the appellant did not believe it necessary to focus on the specific facts of this case.

affidavit should say why and how the applicant's case relies on that specific portion.[6] We return to this issue below.

[16]The founding affidavit then went on to say that the monies were advanced to the respondent , and that as at 8 March 2010 the full balance was due and payable because the respondent had failed to pay all the instalments. This amount came to R128794.22, and is the amount that was sought in the application.

[17]It is clear that the drafter of the founding affidavit was aware of the requirement to identify those portions of the attachment on which the appellant would rely for its case; paragraph 6 of the affidavit sets out expressly to do that. The applicant nowhere there suggested that the loan agreement on which it was relying was any other than the agreement to advance R170 000. This is important, for reasons that will soon become apparent.

[18]As we have pointed out in the introductory portion above, the respondent's defence, when his answering affidavit came, was the settlement of the debt arising from the appellant's pleaded loan agreement, by payment. We have pointed out that the appellant admitted that assertion. The consequence of that admission is not only that there is no lawful scope to revisit that enquiry,[7] but the appellant's very cause of action for payment of the debt asserted in its founding affidavit had become extinguished. That admission also had the effect of rendering the certificate of balance attached to the founding affidavit otiose.

[19]The appellant's replying affidavit then asserted, as quoted above, that the amount claimed in the notice of motion arose from a number of other loans, at least some of them being

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[6] Van Zyl and Others v Government of the Republic of South Africa and Others, 2008(3) SA 294 (SCA) at [40]: *"Attached to the founding affidavit are about 850 pages of exhibits. The allegations contained in these annexures were not confirmed in the founding affidavit and are therefore not evidence. Mr Van Zyl and his legal advisers knew that it is not open to a party merely to annex documentation to an affidavit and during argument use its contents to establish a new case. A party is obliged to identify those parts on which it intends to rely and must give an indication of the case it seeks to make out on the strength thereof.15 The fact that the appellants again have ignored the procedural rules dealt with by Joffe J is probably due to Mr Van Zyl's belief, as he said during argument, that 50% of all court rules are unconstitutional and can be ignored."*

[7] S.15 of the Civil Proceedings Evidence Act, 25 of 1965: ***"15 Admissions on record.*** *It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings."*

listed in the respondent's own attachment, TM2 and TM3. But this assertion created the following difficulties for the appellant.

[19.1] First, the cause of action for the balance owning under a number of loans was first raised in reply. That was impermissible, as explained above. One is appreciative of the fact that the respondent did not apply to strike out the evidence; and also that the respondent did not apply to put up a fourth set of affidavits. But the respondent was a lay person and would not have been alive to those niceties of procedural law. In our view, the appropriate course was to have ignored those assertions on the basis that they constituted new matter.

[19.2]Second, the quality of the evidence on this score is at least suspect as constituting hearsay. The deponent does not testify to being the person who entered into those loan agreements on behalf of the appellant. He was merely giving his explanation of the content of another document, TM2 and TM3 to the respondent's affidavit. Again, there was no application by the respondent to strike out the evidence on the basis of hearsay; but again, the respondent is a lay person and will not have known about those available courses.

[19.3]Third, a party who claims the balance owing under a running account, which is what TM2 and TM3 amount to, has to prove each debit and each credit on the account. In this matter, the original certificate of balance having fallen to the ground, there was no proof of each debit and each credit on the account. It follows that even if the new matter were admitted, the amount claimed was not proved. That was likely appreciated by the appellant, which is why it applied to go to trial to prove the balance owing.

[20]In our view, the aforesaid difficulties are insurmountable, and the application should have been dismissed on that ground alone. If we are wrong in so concluding, or if we are wrong in raising these issues[8] which were, it would seem, not raised before the court below, we

[8] They are legal issues arising from the papers.

believe that in any event the appellant ought not to have succeeded on the basis that it did not apply to refer the factual disputes concerning liability to evidence or trial.

[21]And even if we are wrong on this score, we believe the court *a quo* was correct in declining to refer the matter to oral evidence, although for a different reason: that the reference to oral evidence or trial would have meant that the case in reply would become the main cause of action, and in the exercise of the court's discretion, the commencement of proceedings afresh would therefore have been more appropriate. We deal now with these two issues under one rubric.

Reference to evidence or trial?

[22]Two introductory remarks are appropriate on this score. The first relates to when an application for referral should be made, and the second relates to the nature of the so-called discretion which a court has to refer a matter to evidence or trial.

[23]On the first issue, the judgment of Morris, AJ in Marques v Trust Bank of Africa Ltd and Another[9] has for some time now been interpreted in this division to permit an applicant to argue in the alternative: to ask for final relief and then to ask, conditional on the court refusing the final relief, for a referral order. The problem for a busy motion court is that the court is then burdened with the responsibility of first analysing the papers and then either granting final relief or referring to evidence.

[24]It results, often, in a win-win situation for an applicant, because it is unusual for a court to dismiss an application for foreseeable factual disputes when faced with such a request. In turn, this results too in an increased burden on the motion court, because there is little risk of dismissal, and so cases that ought from the onset to have gone to trial, first find their way to the motion court.

[9] 1988(2)SA526(WLD) at 530E to 531F. This judgment was, on this point, most recently followed by Spilg, J in Fikre v Min of Home Affairs and Others, 2012(4)SA348(GSJ).

[25]It is, in our view, appropriate to bear in mind that the Supreme Court of Appeal has recently said the following about this practice (underscore supplied):[10] *"[23] It is clear from this exposition of the complaints that were lodged with the appellant that the full bench failed to assess the facts properly and that its assumption that the respondents were not guilty of unprofessional, dishonourable or unworthy conduct cannot be justified. There were further complaints levelled against them but these cannot be decided on the papers. The appellant submitted that in these circumstances we should refer those disputed for oral evidence. We cannot comply with the request. An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail (De Reszke v Maras and Others 2006 (1) SA 401 (C) ([2005] 4 All SA 440) at paras 32 - 33). In a case such as this a law society might be able to apply in part A of its application for an order ordering the respondent to appear before its council for an oral enquiry."*

[26]The full court of the then Cape Provincial Division in De Reszke, referred to in the quote above, in turn referred to the judgment by the then Appellate Division in Administrator, Transvaal, and Others v Theletsane and Others,[11] where Botha, JA referred to the approach of Morris, AJ as having much to commend itself. However, Comrie, J went on (underscore supplied):[12] *"It is my impression in this division, however, that the pendulum has swung too far the other way. Some younger counsel, in particular, seem to take it half for granted that a court will hear argument notwithstanding disputes of fact and, failing success on such argument, will refer such disputes, or some of them, for oral evidence. That is not the procedure sanctioned by the Supreme Court of Appeal. On the contrary, the general rule of*

[10] Law Society, Northern Provinces v Mogani, 2010(1)SA186(SCA) at [23] per Harms, DP.
[11] 1991(2)SA192(A) at 200C.
[12] At [33].

practice remains that an application to refer for oral evidence should be made prior to argument on the merits. The Supreme Court of Appeal has widened the exceptions to this general rule, but they remain exceptions."

[27]We respectfully subscribe to these remarks, for the very reasons that we have mentioned above.

[28]The second issue concerns the nature of the discretion. The Supreme Court of Appeal has called this a *"wide discretion"*,[13]but that is not automatically to be equated with what the full court in this division in Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another[14]referred to as a *"discretion loosely so called"*. In fact, Bookworks described the first class of discretion, meaning a discretion that cannot be appealed unless it can be shown that the court *a quo* exercised the discretion *"capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons"*, as a *"discretion in the narrow sense"*.

[29]Bookworks referred with approval to and relied on a full court of the then Transvaal Provincial Division, Tjospomie Boerdery (Pty) Ltd v Drakensberg Botteliers (Pty) Ltd and Another[15] in which it was said (underscore supplied): *"There are at least two categories to one or other of which the discretionary powers exercisable by courts of first instance may be assigned. The first of such categories relates to matters having the character of being so essentially for determination by the court of first instance that it would ordinarily be inappropriate for a Court of appeal to substitute its exercise of the discretionary power for the exercise thereof decided on by the court of first instance. The first matters identified as falling within this category were those discretionary powers that related to a Judge's control of the conduct of the business in his own Court. Later the first category was broadened to include certain other discretionary powers.*

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[13] Lombaard v Droprop, 2010(5)SA1 at [25], per Navsa JA et Malan JA.
[14] 1999(4)SA799(W) at 804, 805 per Cloete, J (as he then was).
[15] 1989(4)SA31(T) at 36,37 per Stegmann, J.

The second category relates to matters having the character of being equally appropriately determinable by the court of first instance and the Court of appeal.

When a particular discretionary power has been found to be of the character which places it in the first category, the Court of appeal has no jurisdiction to substitute its own exercise of discretionary power for that decided upon at first instance unless it has first been made to appear that the exercise of the power at first instance was not judicial. That can be done by showing that the court of first instance exercised the power capriciously or upon a wrong principle or with bias or without substantial reasons.

When a particular discretionary power has been found to be of the character which places it in the second category, the Court of appeal has jurisdiction to substitute its own exercise of the discretion for that decided upon at first instance without first having to find that the court of first instance did not act judicially. Sufficient reason for the Court of appeal to do so must be shown, but the reason need not reflect on the judiciality of the decision at first instance. The Court of appeal may interfere on the simple basis that it considers its own exercise of the discretionary power to be wiser or more appropriate in the circumstances."

[30]It seems to us then that a discretion to refuse or grant a referral to evidence belongs to the nature of the judge's control of the business of his or her own court. On that basis the discretion falls within the first category of Tjospomie, or what Bookworks called a *"narrow"* discretion, meaning interference is limited, but what the Supreme Court of Appeal called a *"wide discretion"*, also meaning interference is limited.

[31]Applying these principles to the present matter, it seems to us that the correct analysis is the following. First, the approach that we have to adopt in considering whether the court a quo was right or wrong, is limited: it is only if we can find that it acted *"capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons"*, that we are entitled to substitute our own discretion.

[32]Second, if we do find that we are entitled to do so, we would be free also to take into account that the appellant did not bring its application for a referral at the outset of the proceedings, as it should have done, and there being no exceptional circumstances to apply in the alternative for a referral as it has done, even assuming that its application was wider than limited merely to quantum.

[33]In our view the appellant fails on both these scores. We have not been pointed to any capriciousness, or wrong principle, or bias, on the part of the judge *a quo*. In fact, the appellant's submission was that the judge *a quo* did not exercise a discretion at all. And on the second score, even if we were to hold that the discretion may be exercised afresh, we would decline to do so, on the basis that the application should have but was not brought at the outset of the hearing, and not on a conditional basis.

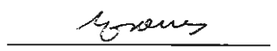
[34]It follows that the appeal must fail. There is no reason why costs should not follow the result.

[35]In the circumstances I propose the following order:

[35.1]The appeal is dismissed with costs.

WHG van der Linde
Judge of the High Court

I agree, and it is so ordered



EJ Francis
Judge of the High Court

I agree

NV Khumalo

DP

Judge of the high Court

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Date of hearing: 24 February 2016

Date of judgment: