

IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 3955/2019

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

FIRSTRAND BANK LIMITED
t/a FIRST NATIONAL BANK

PLAINTIFF

and

PHILIPPUS JOHANNES JACOBUS CRONJE

1ST DEFENDANT

ADOLF JOHANNES DE BRUIN N.O.

2ND DEFENDANT

PHILIPPUS JOHANNES JACOBUS CRONJE N.O.

3RD DEFENDANT

CECILE CRONJE N.O.

4TH DEFENDANT

ANDRIES GUSTAV LE GRANGE N.O.

5TH DEFENDANT

**(In their capacity as trustees of the PC Trust registration
Number IT[...])**

DIE CRONJE SEUNS BOERDERY CC

6TH DEFENDANT

HENDRIK BERNARDUS CRONJE

7TH DEFENDANT

HESTER CRONJE N.O.

8TH DEFENDANT

**(In their capacity as trustees of the Hendrik Cronje Family
Trust registration number IT[...])**

JUDGMENT BY: C REINDERS, J

HEARD ON: 18 JANUARY 2023

DELIVERED ON: 20 APRIL 2023

[1] This is an application brought by the defendants (as served on the plaintiff on 14 November 2022) for the dismissal of the claims instituted by the plaintiff (FNB – “the bank”) against the defendants under civil case number 3955/2019. For the sake of clarity, the parties will be referred to as in the action.

[2] It is common cause that the plaintiff on 27 August 2019 instituted action proceedings against the defendants for payment in the amount of more than R30 million together with interest and costs. The claims are against the defendants jointly and severally, the one paying the other to be absolved. The claims arise from an overdraft facility and four loan agreements. The plaintiff’s cause of action is based on the allegation that the defendants have breached the agreements and are thus indebted to the plaintiff. When the action was instituted, the plaintiff also sought orders of executability over certain immovable properties by virtue of twelve registered mortgage bonds.

- [3] On 11 December 2019 the defendants caused to be filed their plea seeking orders, amongst others, an order in terms of the provisions of s130(4)(b) of the National Credit Act 34 of 2005 (the “NCA”) declaring that the bank has not complied with the provisions of s129 of the NCA; an order that the de facto control of the PC Trust rests with Mr PJJ Cronje (Mr Cronje, the first defendant); that the trust operated as Mr Cronje’s alter ego and that the debt of the PC Trust to the bank must be added to Mr Cronje’s indebtedness when assessing Mr Cronje’s financial position. A further order is sought in terms of s85 of the NCA referring the bank’s claims against Mr Cronje, the trustees of the PC Trust and Cronje Seuns Boerdery to a debt counsellor who is to make a recommendation to court. Defendants seek an order declaring the overdraft facility and business loan agreement to be the granting of reckless credit.
- [4] After the pleadings were considered to be closed in terms of Rule 29(b)(1) of the Uniform Rules of Court (the “Rules”) on 27 December 2021 the defendants served a request for further particulars on plaintiff in terms of Rule 21(2). On even date the defendants also served a notice in terms of Rule 35(3) indicating further documents to be produced by plaintiff.
- [5] On 24 February 2022 I was called upon to adjudicate an application brought by plaintiff for leave to amend its particulars of claim (mentioned in para [2] above) in terms of Rule 28(4). The defendants opposed the relief sought and filed a counter-application praying, amongst others, that the bank be ordered to furnish a reply to defendants’ notice in terms of Rule 35(3) and to defendants’ request for trial particulars (both dated 27 December 2021), failure whereof it could approach court on supplemented papers for the dismissal of plaintiff’s claims. At the time, the plaintiff had not responded to either the request for further particulars or the Rule 35 (3) notice.
- [6] Having duly considered the papers and submissions by counsel, I granted the following order on 30 May 2022 (“the court order”):

1. Leave is granted to the plaintiff in the main action (case no 3955/2019) to effect the amendment to its existing particulars of claim in the respects and to the extent contained in plaintiff's notice of intention to amend dated 23 December 2021.
2. The reference to the word "second" in paragraph 68 of the plaintiff's notice of intention to amend dated 23 September 2021 is removed and substituted with "third".
3. Plaintiff is ordered to furnish a reply to defendant's notice in terms of rule 35(3) dated 27 October 2020, within 20 days of this order.
4. Plaintiff is ordered to furnish a reply to defendants' request for further particulars dated 27 October 2020 within 20 days of this order.
5. Failing compliance by plaintiff with the orders in paragraphs 3 and/or 4 above, leave is granted to defendants to approach this court on the same papers duly supplemented for an order dismissing plaintiff's claim/claims.
6. Plaintiff is ordered to pay defendants' costs of the application on a party and party scale, such costs to include the costs of two counsel where so employed."

(emphasis added)

- [7] As leave was granted to the plaintiff to effect the amendment (which inter alia excluded the prayers for executability of the properties), reference will be to the amended particulars of claim henceforth. The defendants issued the application which currently serves before me, praying that the plaintiff's claims as contained in its combined summons and amended particulars of claim be dismissed with costs (including costs of two counsel) on an attorney and client scale. The application is opposed by the plaintiff, seeking that the application be dismissed with costs on a punitive scale.

- [8] Mr Cronje (one of the trustees of the PC Trust, averring that he has been duly authorised to depose to the affidavit on behalf of the trust) in the founding affidavit refers to prayers 3 and 4 of the order and states that the current application seeks to supplement “the papers filed in the counter-application” in terms of the leave granted to do so as per prayer 5 of the court order. It is submitted by the deponent that the defendant has failed to comply “with the above stated portion of the 30 May judgment and as such approach this court for a dismissal of the respondents’ claims as contained in the summons and particulars of claim.”
- [9] It is common cause that the plaintiff filed a reply to defendant’s request for further particulars on 24 June 2022, and its reply to the Rule 35(3) notice on 27 June 2022, thus within the 30 days as mandated by the court order.
- [10] Both parties were represented by senior and junior counsel, and filed comprehensive heads of argument. I am indebted to counsel for the assistance and arguments in open court. It is perhaps prudent to mention that defendants seek the dismissal of the plaintiff’s claims in main based thereon that I am to find that plaintiff failed to comply with the orders *supra* made by me on 30 May 2022. I was reminded of the provisions of Rule 21(4) and Rule 35(7) of the High Court Rules and I was urged to find that plaintiff abuses the process of court, entitling me to dismiss the plaintiff’s claims. It was also suggested that defendants’ right to a speedy trial in terms of the Constitution is negated which, in itself, constitute grounds for dismissal of the plaintiff’s claims.
- [11] I have carefully considered the arguments on behalf of both parties, but notwithstanding the passionate arguments on behalf of defendants I am not convinced that there are grounds entitling me or compelling me to dismiss the plaintiff’s claims. More specifically, the relevant orders granted by myself on 30 May 2022 compelled the plaintiff to deliver an answer to the request for further particulars and the Rule 35(3) notice. It did not compel the plaintiff to either furnish the particulars and/or to produce the documentation requested.

On the contrary, it required of the plaintiff to respond thereto by furnishing an answer. It is common cause that the plaintiff within the stipulated days delivered answers as ordered. Once the plaintiff has filed the answers, there can in my view be no dispute that they have in fact complied with the order. It might be that the defendants are not satisfied with the answers, but that is a long way from finding that the plaintiff did not comply with the order. Once a party has received an answer as ordered, it is for that party to consider whether it is satisfied with the answer or not. In the event that such a party is not satisfied it can bring an application to compel its opponent to supply further and/or better particulars and/or to discover the document in the event where the other party has raised an objection thereto. A court will then adjudicate those propositions based on the facts before it. This application does not seek orders to compel, it seeks the dismissal of the action at this stage. In my view the application to dismiss is therefore premature.

[12] The order that I granted on 30 May 2022 entitling the defendants to approach court for dismissal of plaintiff's claims was given in circumstances where the plaintiff had for a considerable time not responded to the request for further particulars and/or the Rule 35(3) notice. I ordered the plaintiff to respond thereto, granted it 30 days and, in the event plaintiff failed to respond, granted the defendants the right to approach court for dismissal. That had the required result and the plaintiff did respond.

[13] For the above reasons the application cannot succeed and stands to be dismissed.

[14] Both parties suggested in the event of success that I allow the costs of two counsel which I intend to do. Defendants submitted that in the event I decide that the plaintiff "be afforded yet another opportunity to comply with the 30 May judgment, such indulgence must be accompanied by a harsh punitive cost order against FNB." As is evident from paras [10] and [11] herein above, I did not find that plaintiff failed to comply with the orders as was submitted by defendants, nor did I exercise my discretion to dismiss plaintiff's claims against defendants on any of the alternative grounds relied upon by

defendants for the relief claimed in this application. The defendants request that I should show my displeasure with the manner in which the plaintiff has conducted this trial in causing delays, and take into account that defendants may ultimately be forced to abandon their opposition to the plaintiff's claims due to financial constraints. The defendants elected to bring this application and the plaintiff, faced with the possibility of a dismissal of its claim, had to defend the application. The plaintiff is in my view entitled to its costs, although I do not intend to award same on a punitive scale as requested.

[15] The defendants accuse the plaintiff of trampling on their Constitutional right to a speedy trial. Undoubtedly it is in the interest of justice for all parties that this matter be brought to finality. To alleviate the aforementioned complaint of the defendant, the procedures provided for in Uniform Rule 37(A) will in my view achieve such results. Once the matter is enrolled on the pre-trial roll, it will ensure that the case is trial-managed and swiftly dealt with. Should the defendants feel the need to expedite finalisation of the matter, it would then be open to them to request the pre-trial judge to order expedited time frames in respect of all outstanding issues. This option would obviously be open to the plaintiff as well and would dispel the notion that inordinate delays in finalising the matter are as a result of their actions/inactions. Although neither of the parties prayed for orders in respect of trial-managing the action, I find it prudent to make such orders as will be reflected below.

[16] I therefore grant an order in the following terms:

1. The application is dismissed with costs, such costs to include the employment of two counsel.
2. The main action under Case Number 3955/2019 is referred to the pre-trial roll of 12 June 2023.
3. The parties are ordered to convene a pre-trial meeting in compliance with Uniform Rule 37(A) by no later than 26 May 2023 and file the minutes

thereof in the court file not less than 7 (seven) days before the pre-trial date of 12 June 2023.

C. REINDERS, J

On behalf of the plaintiff:

Adv DJ van der Walt SC

Adv S Tsangarakis

Instructed by:

Symington & De Kok

BLOEMFONTEIN

On behalf of the defendants:

Adv H van Eeden SC

Adv B van der Merwe

Instructed by:

Lovius Block

BLOEMFONTEIN