

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA****(GAUTENG DIVISION, PRETORIA)**

4/1/2015

CASE NO: 14239/2014

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LTD**APPLICANT**

and

JOHAN GIBHARD**RESPONDENT**

J U D G M E N T

KUBUSHI, J

[1] In this application, the applicant, the plaintiff in the main action, seeks an order for leave to amend its particulars of claim. The respondent, the defendant in the main case, has raised a point *in limine* to the effect that the application is not properly before court. According to the respondent's counsel, the applicant did not follow the proper procedure as is required in terms of uniform rule 28 (4).

[2] The procedure for amendments of pleadings is regulated in terms of uniform rule 28. The rule stipulates the following:

- “(1) Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his/her intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in sub-rule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.
- (4) If objection which complies with sub-rule (3) is delivered within the period referred to in sub-rule (2), the party wishing to amend may, within 10 days lodge an application for leave to amend.
- (5) ...”

[3] What happened in this instance is that the applicant, as required in terms of uniform rule 28 (1), notified the respondent of its intention to amend its particulars of claim. The respondent within the period stipulated in uniform rule 28 (2) delivered a written objection to the proposed amendment. The applicant thereafter, instead of lodging an application for leave to amend as is required in terms of uniform rule 28 (4), proceeded to set the matter down for hearing. It is on this basis that the respondent has raised the point *in limine* contending that the applicant has not complied with the provisions of sub-rule (4) and as such the matter is not properly before the court and should be struck off the roll.

[4] The applicant's counsel concedes that there is no application as required by sub-rule (4). He further submits that this is just a technical defence and since the respondent will not be prejudiced the non-compliance should be condoned. According to counsel, the respondent will not be prejudiced because there is no request for a postponement and the parties are prepared and ready to argue the application. The respondent has always known that the parties are to argue the application and it will not be in the interest of justice to strike the matter from the roll, so the argument goes.

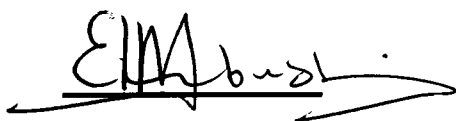
- [5] Uniform rule 28 provides for a two stage process whereby a party may amend a pleading or document filed in terms of any proceedings. The first step envisaged by the rule is in terms of sub-rule (1). A party wishing to amend a pleading must first notify the other party of his or her intention to amend. This is a process whereby the parties have an opportunity to settle the matter between them without having to appear before court. The other party may agree to the amendment or refuse. If an agreement is reached the amendment is effected accordingly. If there is no agreement, the party refusing the amendment should object by delivering a written objection which sets out the grounds upon which such objection is grounded.
- [6] The second stage is triggered by the lodgement of the written objection. Once the written objection is lodged, the party wishing to amend may approach the court by application for leave to amend. This is a formal application, though not on affidavit, and should be lodged before the matter can be set down for hearing.
- [7] It is trite that the procedure laid down by the rules of court should be complied with. Where there is non-compliance with any rule, the uniform rules provides for the condonation of such non-compliance in terms of uniform rule 27. In this instance, there is no application before

this court in terms of uniform rule 28 (4). There is also no application for leave to condone the non-compliance.

[8] It is my view that this court is not competent to grant the applicant leave to amend its particulars of claim when the applicant has failed to comply with the requirements of sub-rule (4). Compliance with sub-rule (4) should as a general rule be insisted upon, unless there are circumstances which justify departure from the sub-rule.¹ In this instance there are no such circumstances. The application can, therefore, not be heard.

[9] On that basis the application ought to be struck off the roll. This does not preclude the making of a subsequent application, in proper form, for the relief sought by the applicant.

[10] Consequently the application is struck off the roll with costs.



EM KUBUSHI

JUDGE OF THE HIGH COURT

¹

Gouws v Venter & Co 1961 (2) SA 329 [D & CLD] at 335A - B

APPEARANCE:**HEARD ON THE:**

27 JANUARY 2015

DATE OF JUDGMENT:

04 FEBRUARY 2015

FOR APPLICANT:

ADV C B SADLER instructed by LIEZEL DAVID ATTORNEYS

FOR RESPONDENT:

ADV T P KRUGER instructed by SHOEMAN & ASSOCIATES