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

Case No: **57858/2021**

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: ✓

[redacted] 19 FEBRUARY 2025

SIGNATURE DATE

In the matter between:

AD TRADE BELGIUM SPRL PRIVATE LIMITED Applicant

and

THE CENTRAL BANK OF THE REPUBLIC OF GUINEA Respondent

In *re*:

AD TRADE BELGIUM SPRL PRIVATE LIMITED Plaintiff

and

THE CENTRAL BANK OF THE REPUBLIC OF GUINEA First Defendant

THE REPUBLIC OF GUINEA Second Defendant

STANDARD BANK OF SOUTH AFRICA LIMITED Third Defendant

SOUTH AFRICAN RESERVE BANK Fourth Defendant

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be the 19 February 2025.

JUDGMENT

INTRODUCTION

[1] This is an interlocutory application brought by the applicant to compel the first defendant [the Central Bank] to provide an adequate response to their request for further trial particulars in terms of uniform Rule 21 [rule 21 compel relief]. The applicant's rule 21 request is substantial in that it poses no less than 180 questions. With reference to prayer 1 the applicant now submits that all the questions posed and referred in, no less than 47 separate paragraphs, in the rule 21 request, are "*strictly necessary*" for its preparation.

[2] Central Bank contends, *inter alia,* that the applicant's rule 21 compel relief must be considered having regard to a separation order which was granted on the 30 June 2023 in terms of uniform rule 33(4) by Francis-Subbiah J in that, the rule 21 compel relief, at this stage of the litigious process, stands to be determined having regard to this order. The Central Bank argues that the separation order expressly and unambiguously provides that:

> "*1. The first defendant's first to sixth special pleas as set out in its amended plea dated the 12 July 2022 (read with the corresponding portions of the plaintiff's particulars of claim and replication) in the*

action instituted under the above case number (the action) are separated and shall be determined prior to any other issue in the action, as contemplated in rule 33(4) (the separated issues).

2. *Notwithstanding paragraph 1 above, the separation of the separated issues from the merits of the action shall not stay existing interlocutory applications relating to the action, <u>nor shall it prevent the parties from bringing interlocutory applications relating to the separated issues</u>.* (own emphasis)"

[3] The Central Bank argues that the applicant's rule 21 compel relief must therefore be brought having regard to the separation order which, it contends is not the case and as such, the applicant's rule 21 compel relief should be dismissed.

[4] The applicant, in argument, advanced that certain of the questions, which questions were not highlighted with any particularity, in its rule 21 request indeed relate to its preparation of the separated issues, particularly the Central Bank's fifth special plea. On this basis, counsel advanced that the rule 21 compel relief should be granted. No amendment to the prayer1 of the compel relief was sought nor granted.

<u>Does the separation order apply to this interlocutory application?</u>

[5] Little doubt exists that the separation order must be applied. Procedurally, the application before this Court is indeed interlocutory relief, which was instituted by the applicant on the 2 August 2023, a date after the separation order. The application therefore is not 'an existing interlocutory application 'as envisaged in prayer 2 of the separation order. In consequence, the first question to be entertained is whether this interlocutory application, which is brought at this stage of the litigious process, relates to the separated issues. If so, then it too is envisaged in terms of prayer 2 of the separation order and the Court may enquire into the merits of the application.

[6] Against this backdrop it must be borne in mind that the applicant initiated its rule 21 request in April of 2023, a date prior to the separation order being granted

and, as such, the intent with the further particulars sought in the rule 21 notice could never have been in accordance with the separation order. No interlocutory compel application against the Central Bank in respect of the rule 21 request was launched by the applicant prior to the separation order. Although the procedural timeline described does not result in an automatically bar, by order, to seek compel relief in terms of the rule 21 request, it however does mean that, at this stage, the applicant must bring the rule 21 compel relief within the ambit of the separation order. To do that, the applicant must satisfy this Court that its compel relief is confined to enquiries strictly necessary for its preparation of the separated issues. The separated issues in this case are the Central Bank's special pleas.

[7] The Central Bank contended in argument that the application is not brought in compliance of the separation order. Therefore, it argued, on this basis alone the application should be dismissed. This argument warrants a proper analysis of the applicant's founding papers.[1]

Does this interlocutory application relate to the separated issues?

[8] At first blush the answer is no. This is because, the thrust of the applicant's founding papers is centred around complaints ranging from difficulties experienced with its preparation of the merits in the main action, albeit its inability to prepare for trial on the merits and, the difficulty it faces as a consequence thereof. In short, its difficulties to discharge its burden at trial. All such difficulties are laid at the feet of the Central Bank for its failure to answer, alternatively, the manner in which it in fact answered the rule 21 request. The summary of the applicant's complaints and difficulties it experiences was captured in its founding papers in paragraph 6. In paragraph 6, the applicant summarises the reason for initiating the rule 21 compel relief in the first place. In simple terms the applicant required answers from the Central Bank emanating from "*- pre-trial questions about money in its accounts held at Standard Bank. The plaintiff holds a judgment of R754 million against Guinea (the*

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1 ***MEC for Education, GP v Government Body, Rivonia Primary School*** 2013 (6) SA 582 (CC), par 94; ***Director of Hospital Services v Mistry*** 1979 (1) SA 627 (A) 637-6; Affirmed in ***President of the Republic of South Africa v South African Rugby Football Union*** 2000 (1) SA 1 (CC), par 150.

Republic of Guinea, the second respondent-own emphasis)." The necessity for the questions posed in the rule 21 request related to answers it required from pre-trial questions posed. No argument was made that the pre-trial questions, albeit which pre-trial questions, actually related to the separated issues. The complaints and difficulties appear to relate to the merits and the applicant's burden. This is a far cry from the separated issues attracting a rebuttal of the Central Bank's special defences.

[9] In fact, the applicant in its founding papers failed to specifically deal with he separated order. It did not even refer to the separation application under the heading "PROCEDURAL BACKGROUND' in the founding papers. The applicant's rule 21 compel relief was initiated in August of 2023, a date after the separation order was granted. It appears from its papers, when read as a whole, that the applicant forgot about the possible constraints and consequences of the separation order and simply forged ahead dealing with the discharge of its own evidentiary burden in the preparation of a trial on the merits. In this way, it appears that it hoped to catch a few fishes by casting it's compel net wider than the separated issues. In consequence to leave it to the Court to wade through questions to identify the fish.

[10] In an attempt now to overcome this difficulty, the applicant's Counsel in oral argument, contended that the compel relief is competent as against the Central Bank's fifth special plea. To expand, the fifth special plea is found at paragraph 5 of the Central Bank's special plea. In paragraph 5 the Central Bank relies on its separate legal personality, stating it as a fact. This it does in sub-paragraph 5.4 by simply stating that, as a fact, and in the absence of a Constitutional challenge to declare certain founding statutes it relied on[2] unlawful, then it flows as a fact or for that matter in law, that the Central Bank possess separate legal personality. In this way the Central Bank sets out its special defence to ward off a basis for such separate legal identity to be disregarded, as prayed for.

[11] The reliance by the applicant's Counsel on sub-paragraph 5.4 was to justify a *lis* between the rule 21 request and the fifth special plea by arguing that, other

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[2] Section 1 and 2, Article 2 of Act No L 2017 AN of 08 June 2017.

than the unchallenged law, it was a call by Central Bank to place facts before Court to establish its separate legal entity. Not only is the argument misplaced but an afterthought at best, which argument is not underpinned by its own papers. The applicant had ample opportunity to deal with the fifth special plea directly in its founding papers and to clearly set out the basis of its understanding of the allegations made by Central Bank, but it did not. Instead, a disconnect between the applicant's own papers and Counsel's argument at the hearing occurred.

[12] To bolster the disconnect, it must be noted that all the examples used by the applicant in its founding papers to demonstrate the Central Bank's astounding and absurd answers to its rule 21 request were, confined with reference to the Central Bank's plea over, on the merits. Of particular interest, is the applicant's justification for a proper answer from the Central Banks regarding its relationship with the second respondent. Instead of relying on the Central Bank's fifth special plea as argued to establish a *lis*, the applicant illustrated its point with reference to the Central Bank's answer in their plea on the merits. This it did with reference to the Central Bank's answer to paragraph 10 of its particulars of claim. Paragraph 10 of the particulars of claim, consists of allegations in support of prayer 1.5 in which the applicant seeks that "

> "*1.5* *the separate legal personalities of the first and second defendants be disregarded;*"

[13] In paragraphs 22-24 of the applicant's founding papers the applicant sets out the reasons for the posed questions and its reciprocal complaint justifying the rule 21 compel relief. In paragraph 24 the applicant states that:

> "24. *Thus, the most important question <u>at trial</u> (own emphasis) will be whether the funds of the accounts are, as the Central Bank alleges, held to maintain a foreign exchange balance to be used in emergencies and to overcome cash deficits. The questions posed <u>relate to source of funds and purpose of transaction</u> (own emphasis) yet the Central Bank refuses to answer any of these questions and asserts, absurdingly, that the questions "do not seek particularity in*

relation to any averment made in the first defendant's plea (Central Bank – own emphasis)"."

[14] No reference no reliance of the fifth special plea or any of the other separated issues are found on the papers. There is simply no basis that the rule 21 compel relief relates to the separated issues and if so on what basis it falls within the purview of the separation order. The first question now fully answered. The success of this interlocutory application boils down to timing. It should have been brought within the timeline of rule 21 following the request made but, before the separation order (as an existing interlocutory) or after the separate issues had been dispensed with. But the applicant has failed to appreciate the consequences. It simply forged ahead on unamended papers. The applicant has failed to show that this interlocutory application relates to the separate issues and therefore the application must fail. In consequence, the necessity for the Court to entertain the merits becomes unnecessary.

[15] There is no reason raised nor argument that the costs should not follow the result.

[16] The following order:

1. The application is dismissed.

2. The Applicant is to pay the First Respondent's costs, including the costs of two Counsel, if so employed, one Senior Counsel and one Junior Counsel, to be taxed on scale C.

[redacted]

L.A. RETIEF
Judge of the High Court
Gauteng Division

Appearances:

For the Applicant:	**Francois Joubert SC** **Zach Joubert** Applicant's counsel
Instructed by attorneys:	**PRIMERIO LAW INCORPORATED** Attorneys for the Plaintiff 135 Daisy Street Sandton JOHANNESBURG 2031 Email: j.oxenham@primerio.international Email: m.currie@primerio.international **C/O WEAVIND & WEAVIND INC** Block E Glenfield Office Park Oberon Avenue Faerie Glen PRETORIA Tel: 012 346 3098 Email: hanro@weavind.co.za
For the Respondent	**H F OOSTHUIZEN SC** **LENE BRIGHTON** First Respondent's counsel Chambers, Pretoria and Sandton
Instructed by attorneys:	**NKOANA ATTORNEYS** Attorneys for the First Respondent

Building 1 Maine
Pegasus
210 Amarand Avenue
Menlyn
P.O BOX 3217
PRETORIA
Tel: 012 003 2879
Cell: 082 766 5369
Email: kwena@nkoanakattorneys.co.za

Date of hearing:	3 December 2024
Date of judgment:	19 February 2025