THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 22751/18

In the matter between:

WILLEM LODEWICUS ROOS Plaintiff / Respondent

And

LEON BERGH Defendant / Applicant

Coram: **YAKE AJ**

Argument: **19 February 2026**

Delivered: **Electronically on 10 March 2026**

Summary: Civil procedure - absolution from the instance – rule 39 (6) of the Uniform Rules.

JUDGMENT

YAKE AJ

Introduction

[1] This is an application for absolution from the instance brought by the defendant at the close of the plaintiff's case, in terms of Rule 39(6) of the Uniform Rules of Court.

[2] The plaintiff's claim arises from an alleged breach of a partly written and partly oral loan agreement concluded between the parties on 23 September 2015. The written terms of the agreement appear on page 1 of the trial bundle, while the oral component related to repayment of the loan directly into the plaintiff's personal bank account. The plaintiff alleges that the defendant breached the loan agreement by making only four payments before refusing to make any further repayments. Two witnesses, Mr. Roos, the plaintiff and Ms. Williams of Standard Bank, testified in support of the plaintiff's case, after which the plaintiff closed his case. The defendant then applied for absolution from the instance which the plaintiff opposed.

Summary of evidence

[3] The Plaintiff testified that he was previously married to the defendant's mother, Mrs Roos. During the marriage, the plaintiff sold his property at […] A[...] Street to her. On 28 March 2003, Mrs Roos obtained a mortgage loan of R550 000 from Standard Bank, followed by a further loan of R483 200 on 12 August 2010 to fund improvements to the property, resulting in a total outstanding bond amount of approximately R1 028 655. It is common cause that, although the property was registered in Mrs Roos's name, the plaintiff was solely responsible for all monthly bond repayments. In March 2015, the plaintiff transferred R1 million from his company, Alwic Construction (Pty) Ltd to Mrs. Roos's bond account. At the time of transfer, the outstanding balance on the bond was R1 019 741. According to the plaintiff, the payment was made for the purpose of accruing interest.

[4] On 23 September 2015, the plaintiff and the defendant concluded a written loan agreement as depicted on page 1 of the plaintiff's trial bundle. The terms of the loan agreement are as follows:

"It is herewith acknowledged that Leon Bergh (the defendant) ID 8[...] loans the sum of R550 000 from Willem Lodewicus Roos (the plaintiff) ID 4[...], which amount to be drawn against the home loan of Lorraine Roos, the total repayment is respect of the loan of R550 000 currently with Standard Bank to be repaid with the connected interest rate in accordance with the ban contract by Leon Bergh.

Leon Bergh shall also nominate MR WL Roos as the beneficiary under the personal policy with Discovery policy no 5[...] for the sum of R550 000 in case of death of any of the aforementioned in order to settle the loan amount. As the amount being repaid, the amount to be paid under the policy will be reduced."

[5] The agreement was duly signed by both parties, with Mrs Roos and Adele Van Staden acting as witnesses. Following the defendant's request for a loan of R550 000, the plaintiff transferred the funds from Mrs. Roos's bond account to Alwic, which then paid the amount to the defendant on his behalf. According to the plaintiff, this method was used to maintain clear and accurate financial record-keeping.

[6] Pursuant to the defendant receiving the loan funds, he made four payments into the plaintiff's personal account, and thereafter ceased payment. As a result of this breach, the plaintiff instituted action proceedings claiming the recovery of the outstanding balance. The defendant denies liability and argues that the plaintiff failed to establish a *prima facie* case justifying him to institute these proceedings.

Submissions by Defendant

[7] In support of the application for absolution, the defendant submitted that the plaintiff's evidence is insufficient to sustain a finding in his favour. If granted, the application would result in the dismissal of the plaintiff's claim, albeit without barring the plaintiff from reinstituting the action afresh, as absolution does not give rise to *res judicata.*

[8] The defendant submits that the plaintiff has no *locus standi* to institute these proceedings, arguing that the proper plaintiff is either Mrs. Roos, as a bond account

holder or Alwic, which effected payments. In support of this argument, the defendant relies on *Hlumisa Investment Holdings (RF) Ltd and Another v Kirkinis and Others*[1].

[9] The defendant contends that the plaintiff acknowledged making transactions from Mrs. Roos's bond account, including withdrawals for construction projects and improvements at [...] A[...] Street, Boksburg, Gauteng. He further contended that the funds used were bank funds rather than the plaintiff's personal money. On this basis, the defendant contended that the outstanding balance of R1 019 741 on Mrs. Roos's bond account resulted from the plaintiff's own use of the facility, and the payment of R1 million he made merely reduced the existing debt owed to the bank.

[10] The defendant further submitted that the divorce agreement provides that each party is responsible for their own debt. On this basis, he argued that the plaintiff had relinquished any claim for repayment of amounts connected to the property at [...] A[...] Street. The defendant contended that, because the plaintiff did not make payments from his personal account, he suffered no financial loss and therefore has no valid claim. He accordingly sought an order granting absolution from the instance, together with costs, including costs of counsel on scale B.

Submissions by Plaintiff

[11] In opposing the application, the plaintiff submitted that the issues before this Court are confined to whether any contract exists between the parties and, if so, whether the defendant breached it, thereby causing the plaintiff to suffer damages. The plaintiff contended that a valid and binding loan agreement exists between the parties, which the defendant breached by making only four repayments and then failing to perform further. The plaintiff further contended that he suffered financial loss as he transferred R1 million into Mrs Roos's bond account, which was debited against his loan account with Alwic.

[12] The plaintiff further submitted that the defendant's reliance on divorce settlement is misplaced, as he was not party to those divorce proceedings. The plaintiff sought dismissal of the application with costs.

[1] [2020] ZASCA 83; [2020] 3 All SA 650 (SCA); 2020 (5) SA 419 (SCA).

Legal principles

[13] It is trite that absolution from the instance is regulated by Rule 39(6) of the Uniform Rules of Court. The rule provides as follows:

> *"At the close of the case for the Plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate."*

[14] The test for absolution from the instance at the end of the plaintiff's case has long been established. It was articulated in *Gascoyne v Paul* and Hunter[2], where De Villiers JP formulated it as follows:

> *"the test to be applied is not whether the evidence established what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should or ought to) find for the plaintiff."*

[15] The test has been consistently applied in various decisions over several decades. In *Gordon Lloyd Page and Associates v Rivera and Another*[3], the Supreme Court of Appeal reaffirmed the test as follows:

> *"The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neone Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409G-H in these terms:*
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> *". . . when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul; Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T.)".*

[2] 1917 TPD 170 at 173.
[3] 2001 (1) SA 88 (SCA) at 92E-93A.

[16] Harms JA in *Gordon Lloyd Page supra* warned that absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the interests of justice." (Emphasis added.)

[17] The test was later confirmed by the Constitutional Court in *Carmichele v Minister of Safety and Security*[4], where Ackermann and Goldstone JJ held:

> "*An order for absolution from the instance is an appropriate order to make at the end of the plaintiff's case where a court, applying its mind reasonably to the evidence, could not or might not find for the plaintiff. The underlying reason is that it is ordinarily in the interests of justice to bring the litigation to an end in such circumstances. A determination of what is in the interests of justice necessarily involves the exercise of a discretion."*

Analysis

[18] In deciding whether absolution from the instance should be granted at the close of the plaintiff's case, the Court is not required at this stage to decide whether the plaintiff has proved its case on a balance of probabilities. Furthermore, the question of credibility should not normally be investigated at this stage of the proceedings, except "where the witness as have palpably broken down, and where it is clear that what they stated is not true.[5]" It suffices to enquire whether the plaintiff has presented evidence establishing a *prima facie* case that calls for an answer from the defendant. If a *prima facie* case has been made out, then the application for absolution from the instance must fail. If not, the application must succeed. In doing so, this Court is guided by the test set out in *Claude Neon Lights (SA) Ltd v Daniel supra.*

[19] Significant emphasis was placed by the defendant on the plaintiff's alleged lack of *locus standi*. The defendant argued that the plaintiff is not the proper party to institute these proceedings, suggesting that the proper plaintiff is either Mrs Roos as

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[4] [2001] ZACC 22; 2001 (4) SA 938 (CC) para 79.

[5] Erasmus: Superior Court Practice, 2nd Edition; Van Loggerenberg D1-531.

the bond account holder or Alwic which effected payments. In determining whether the plaintiff has *locus standi,* the starting point will be to identify the source of the dispute, namely, the loan agreement. It is therefore necessary to establish the actual parties to that agreement, which forms the foundation of the present action.

[20] The evidence established is that the plaintiff and the defendant concluded a loan agreement in terms of which the plaintiff advanced R550 000 to the defendant. Notably, the agreement was signed by both parties, and the defendant does not dispute its existence. Neither Alwic nor Mrs Roos is identified as a contracting party in the agreement, nor is there any indication that either played a role beyond witnessing the document by Mrs Roos.

[21] The defendant, despite being invited by the Court to address the question of the identity of parties on the loan agreement, failed to do so. This indicates that the defendant was at all material times aware that he concluded an agreement directly with the plaintiff. This is supported by the fact that Mrs Roos, now alleged to be the proper plaintiff, signed the agreement merely as a witness, demonstrating that there was no uncertainty regarding who advanced the loan. Further, the defendant's nomination of the plaintiff as the beneficiary in his policy strengthens the idea that he understood the plaintiff to be the lender. Had he believed otherwise, there would have been no reason to nominate plaintiff as a beneficiary of his policy upon his death.

[22] The defendant's assertion that either Mrs Roos or Alwic is the proper plaintiff is unfounded, in my view. No loan agreement was ever concluded between the defendant and either of them. Had any agreement existed, it would have been between Alwic Construction and the plaintiff, who was the person engaging with it. Likewise, if an agreement had been concluded with Mrs Roos, she would not have signed the loan agreement as a witness. The suggestion that either Mrs Roos or Alwic is the proper plaintiff is therefore without merit.

[23] The defendant's reliance on the *Hlumisa case supra* is misplaced. In *Hlumisa*, the applicants instituted the proceedings in their capacity as shareholders of ABIL,

effectively asserting a claim on behalf of ABIL without legal authority to do so. The Supreme Court of Appeal held that they were not proper plaintiffs for that reason. In the present matter, plaintiff does not act in any representative capacity, whether on behalf of Alwic or Mrs Roos. He instituted these proceedings in his personal capacity as the contracting party to the loan agreement. Accordingly, I find that neither Mrs Roos nor Alwic has *locus standi* to bring this action.

[24] I now turn to the issue of loss suffered. The defendant argued that the plaintiff suffered no loss and that loss was borne either by Mrs Roos or Alwic. As previously established, neither Mrs Roos nor Alwic was party to the loan agreement. The evidence shows that Alwic made payment to the defendant on the plaintiff's instruction, and that was never disputed. As the terms governing Alwic's advancement of funds to the defendant on his behalf are unknown, and Alwic is not before this Court, there is no basis on which to conclude that Alwic suffered any loss as a result of making payment on plaintiff's behalf.

[25] Turning to Mrs Roos, the defendant contends that she suffered a loss because the loan funds were paid from her bond account. However, the evidence shows that although the property was registered in her name, she made no contributions towards bond repayment; the plaintiff alone serviced the bond at all relevant times. While the two mortgage loans, totalling approximately R1 million, were taken in her name, there is no evidence that she repaid any portion of them. The defendant's contention that the outstanding balance of R1 019 741 resulted from the plaintiff's use of access facility is unsupported. Given that the plaintiff transferred R1 million into the bond account using his own funds, the payment did not constitute a loss for her. It follows that she could not have suffered a loss in respect of funds that were not hers.

[26] The divorce is a matter exclusively between the plaintiff and Mrs Roos, and not before this court. It has no bearing on the present dispute. Both parties voluntarily signed that settlement agreement; any challenge to its terms must be pursued in the appropriate forum, not in this application.

[27] Having considered the evidence, I am satisfied that defendant has a case to answer. The plaintiff has established a *prima facie* case requiring a response. This finding does not amount to a conclusion that the plaintiff has proved its case.

[28] In the results, I make the following order:

1. The application is dismissed.
2. The defendant is ordered to pay costs, including costs of counsel on scale B.

S. YAKE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Plaintiff: Adv L. O' Connor
Instructed by: Werkmans Attorneys

For the Defendant: Adv N. Strydom
Instructed by: Andre Kirsten Attorneys