



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 14212/2023

In the matter between:

UNICREDIT BANK AUSTRIA A.G.

Plaintiff

and

MAXIMILIANE ELISABETH HUBER

Defendant

Neutral citation: *Unicredit Bank Austria A.G. v Huber* (Case no 14212/2023)
[2026] ZAWCHC ____ (09/09/2026)

Coram: Davis, J

Heard: 7 September 2026

Delivered: 8 September 2026

Summary: When a defendant delivers a special plea, a plea over on the merits must also be delivered – application of rule 39(2) of the Uniform Rules of Court where a defendant has been barred from delivering a plea on the merits – interests of justice – not in the interests of justice on the facts of the case to permit the defendant to appear personally at the hearing to contest the merits.

ORDER

1. Judgment is granted against the defendant in favour of the plaintiff for:
 - i. payment of the amount of € 259,750.55;
 - ii. payment of the amount of € 73,475.44;
 - iii. interest on the aforesaid amounts calculated at the rate of 16.5% per annum from 1 February 2021 to date of payment;
 - iv. costs of suit, including the cost of counsel payable on scale B.

JUDGMENT

DAVIS, J:

Introduction and background

- [1] The plaintiff, Unicredit Bank Austria A.G., sued the defendant, Ms Huber, in terms of two written loan agreements concluded with the defendant and her father in 2005 and 2006, for payment of the amounts of €259,750.55 and €73,475.44, plus interest on the said amounts calculated at the rate of 16.5% per annum from 2 February 2021 to date of payment.
- [2] The defendant, who was represented by an attorney at the time, delivered

a special plea disputing this Court's jurisdiction to entertain the action. She did not plead over on the merits.

- [3] The plaintiff delivered a notice of bar calling upon the defendant to plead over. The defendant's attorney responded with a Rule 30 notice, alleging that the notice of bar was an irregular step.
- [4] The plaintiff's attorneys wrote to the defendant's attorneys, pointing out that it had been decided by Mr Justice Binns-Ward in the matter of *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) (a judgment delivered on 14 March 2022), that it would no longer be permissible for a defendant not to plead over on the merits when delivering a special plea, and that the Cape practice in this regard, which differed from that of the other divisions, was to be discontinued.
- [5] Pursuant to this correspondence, the defendant's attorneys did not deliver a plea on the merits on behalf of the defendant; nor did they deliver an application in terms of Rule 30 to set aside the notice of bar. The notice of bar therefore remained effective, and the defendant was consequently barred from delivering a plea on the merits.
- [6] Some months later, in March 2026, the defendant's attorneys withdrew. The defendant elected not to obtain legal representation and appeared in person at the trial. I questioned her in this regard, and she indicated that she could not afford legal representation. She did not request a postponement of the matter in order to enable her to obtain legal representation.
- [7] At the commencement of the hearing, counsel for the plaintiff requested me to give a ruling on whether or not Rule 39(2) of the Uniform Rules of Court would apply. The rule provides that, *'[w]hen a defendant has by his*

default been barred from pleading, and the case has been set down for hearing, and the default duly proved, the defendant shall not, save where the court in the interests of justice may otherwise order, be permitted, either personally or by an advocate, to appear at the hearing.'

- [8] Ms Gilfelleon, the attorney of record for the plaintiff, gave evidence regarding the defendant's failure to deliver a plea on the merits in response to the plaintiff's notice of bar. She also testified regarding correspondence sent by the defendant's attorney, on 7 August 2025, in which it was indicated that the defendant intended to file a plea, that counsel had been instructed to consider whether the defendant could establish a defence under Austrian law, and that, if so, the defendant's plea would be filed by way of an amendment to her existing plea. However, no plea on the merits was filed on behalf of the defendant. (Although the letter was labelled without prejudice, the contents were not such as to amount to a genuine without prejudice communication.)
- [9] The defendant did not challenge Ms Gilfelleon's evidence, and the defendant's default was duly proved for purposes of Rule 39(2). As to the question of whether or not it would be in the interests of justice to permit the defendant to appear at the hearing and to challenge the plaintiff's case on the merits, I determined, in the exercise of my discretion, that it would not be in the interests of justice for the reason that:
- a) the defendant had enjoyed legal representation throughout the time when pleadings were exchanged, but had failed to deliver a plea on the merits;
 - b) the defendant, by her own admission, did not understand legal matters and would not have been in a position to challenge the plaintiff's case on the merits;

- c) the defendant had had ample opportunity to secure legal representation to assist her, but had elected not to do so.

[10] I therefore made a ruling that the defendant's default had been duly proved, and that the trial would proceed in accordance with Rule 39(2) with the defendant confined to challenging the Court's jurisdiction and prevented from contesting the plaintiff's case on the merits.

[11] I should add, for the sake of completeness, that Ms Morgan, who appeared for the plaintiff, referred me to the judgment of Van Zyl AJ, as she then was, in the matter of *R Data (Pty) Ltd v Nordic Light Properties (Pty) Ltd* (17865 / 2020) [2022] ZAWCHC 137 (6 June 2022). In that matter, the learned judge referred to the divergent practice in the Western Cape Division with regard to the need to plead over on the merits when delivering a special plea, and held that, '*I have not found judgments in this Division deviating from the approach taken in Myerson, and I am not inclined to disagree with it. In the circumstances, the defendant cannot be faulted for delivering a special plea without a plea on the merits. Should its special plea be unsuccessful in due course, it is entitled to approach the court for leave to plead over.*'

[12] It appears that the attention of Van Zyl AJ was not drawn to the judgment of Binns-Ward J in *Absa Bank v Meiring*, which was delivered some three months earlier, but was not reported until later in the year. In *Meiring*, Binns-Ward J expressly departed from the approach in *Myerson*. He expressed a preference for the view of Flemming J in *Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275, that Rule 22 does not provide for the piecemeal pleading of defences, and pointed out that this approach had received the endorsement of the Constitutional Court in *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* 2022 (1) SA 317 (CC) para 33, where Mhlantla J

stated that, generally, when a special plea is raised, all defences on which a defendant intends to rely must be raised at the same time.

[13] In my view, the reasoning of Binns-Ward J in *Meiring* is cogent and compelling. I have little doubt that, had Van Zyl AJ been made aware of the judgment, she would not have held that it was unnecessary to plead over when delivering a special plea. In my view, therefore, *Nordic Light* must be regarded as having been decided in error, and the decision in *Meiring*, which follows an approach endorsed by the Constitutional Court, must be regarded as the correct exposition of the law in this division.

The evidence for the Plaintiff

[14] Pursuant to my ruling on Rule 39(2), the plaintiff proceeded to present its case. I mention at the outset that, although the defendant was entitled to challenge the plaintiff's case with regard to jurisdiction, she had failed to deliver notice of intention to call an expert on Austrian law, and she arrived at court alone, evidently having no intention of calling an expert to testify in regard to the matter of jurisdiction.

[15] The plaintiff called two witnesses, namely:

- a) Professor Thomashausen to testify as an expert on Austrian law, to assist the court in determining the defendant's special plea of lack of jurisdiction;
- b) Mr Daniel Kolar, an employee of the plaintiff, to testify regarding the merits and quantum of the claim.

Professor Thomashausen

- [16] The defendant's sole pleaded defence was her special plea alleging that this court had no jurisdiction, that the Austrian courts had jurisdiction and that the matter should be adjudicated in terms of Austrian law.
- [17] The plaintiff replicated to the special plea, agreeing that Austrian law governed the loan agreements including the General Terms and Conditions upon which the defendant relied, but disputing that the South African court has no jurisdiction. It was pleaded that, in terms of clause 14 of the loan agreements, the plaintiff reserved for itself the right to take legal action against the defendant at any other "*general place of jurisdiction*", and that, to the extent there was a conflict between the provisions of the General Terms and Conditions regarding jurisdiction and the provisions of clause 14 of the loan agreements themselves, the provisions of the loan agreements prevailed.
- [18] It is well-established that the content of foreign law is a question of fact to be placed before the South African court by expert witness/es (see *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd* 2003 (6) SA 69 (C) at 79E-F; *Schlesinger v Commissioner for Inland Revenue* 1964 (3) SA 389 (A) at 396G; *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei GmbH of Bremen* 1986 (4) SA 865 (C) at 874F.)
- [19] Although the defendant bore the onus and duty to begin with regard to the special plea, it made practical sense to have the plaintiff call begin by calling Professor Thomashausen, since the defendant had not arranged to call an expert witness regarding Austrian law.
- [20] Professor Thomashausen is a German jurist and member of the Frankfurt Bar, a professor emeritus of comparative law at Unisa, and an expert on *inter alia* Austrian law (with the freedom of the E.U. to appear in Austrian

courts in terms of Federal Statute of Free Movement of Services and Establishment of European Lawyers). He is a Professor of Foreign and Comparative Law at Unisa, and has written many opinions regarding foreign law, including Austrian law. He is therefore well qualified to testify as an expert with regard to Austrian law.

[21] Professor Thomashausen testified that:

- a) the defendant relied on sections 19, 20 and 21 of the General Terms and Conditions to the effect that the Austrian branch office has jurisdiction;
- b) the plaintiff, by contrast, relied on section 14 of the loan agreements which entitled the plaintiff to take legal action against its debtor “at any other general place of jurisdiction”;
- c) the conflict between the General Terms and Conditions and the loan agreements was to be resolved with regard to section 1 of the loan agreements, which provided that, in the event of a conflict, the particular terms in the loan agreements would prevail over the General Terms and Conditions;
- d) it is trite in Austrian law that parties are free to stipulate in an agreement a particular choice of jurisdiction and to confer on one of the parties the right to elect the place of jurisdiction;
- e) Clause 14 of the loan agreements was a reference to section 104(2) of the Austrian Code on Jurisdiction of 1895 (*“the Code”*), in terms whereof parties may submit by agreement to a particular jurisdiction. Accordingly, section 14 established the domestic court in Salzburg as the first alternative place of jurisdiction, subject to a second alternative being “*any other general place of jurisdiction.*”

- f) The wording “*any other general place of jurisdiction*” in clause 14 of the loan agreements refers to section 66 of the Code, which gives a party the freedom to choose courts of jurisdiction at a party’s habitual residence or place of domicile, not being limited to Austria.

[22] Professor Thomashausen opined that clause 14 of the loan agreements conferred on the plaintiff the right to choose a place of jurisdiction based on the defendant’s domicile or place of ordinary residence. It being common cause that the defendant resides at 5 Klein Constantia Road, Cape Town, Professor Thomashausen concluded that, in accordance with Austrian law, this court has the requisite jurisdiction to entertain this action to enforce the loan agreements.

[23] The defendant was afforded an opportunity to cross-examine Professor Thomashausen, but she declined to do so. His evidence was therefore uncontroverted.

[24] I have no hesitation in accepting Professor Thomashausen’s opinion. Not only are his qualifications impressive, but the reasoning in his opinion is impeccable and cannot be faulted. Moreover, the defendant, having had every opportunity to call an Austrian law expert and having failed to do so, provided no evidence to contradict that of Professor Thomashausen.

[25] On the basis of Professor Thomashausen’s evidence, I find that this court does indeed have jurisdiction to entertain this action.

Mr Kolar

[26] The plaintiff bore the onus to prove the loan agreements and the amounts owing in terms thereof.

- [27] The facts and circumstances pleaded in the plaintiff's particulars of claim relating to the loan agreements were not placed in dispute by the defendant.
- [28] Mr Kolar, who has worked in the plaintiff's restructuring department for 18 years and who is the person in charge of dealing with the defendant's account, gave evidence with regard to the meaning of the terms of the loan agreements in Austrian law, and the quantum owing under the two loan agreements. He has access to all transactional data of the plaintiff bank and is in a position to confirm the amount currently owing by the defendant.
- [29] Mr Kolar confirmed that the liability of the defendant and her late father under the loan agreement is joint and several.
- [30] Kolar confirmed that the amounts claimed by the plaintiff in the particulars of claim remain outstanding, and that the amounts are correct, based on the bank's statements. The amounts bear interest at the rate of 16.5% per annum with effect from 1 February 2021.
- [31] Kolar's evidence was credible and stands uncontroverted by the defendant's failure to deliver a plea on the merits.
- [32] The defendant did not cross-examine Mr Kolar, and his evidence stands uncontroverted.

[33] I accept the evidence of Mr Kolar, which was credible, clear and satisfactory in all respects. In the circumstances, the plaintiff has proved its case and is entitled to judgment.

Conclusion

[34] In the result, the defendant's special plea of lack of jurisdiction falls to be dismissed, and judgment granted as prayed. The plaintiff is entitled to its costs of suit in accordance with the ordinary rule that the costs follow the result. The plaintiff requested the cost of counsel on scale C. In my view, however, the matter was not so complex as to warrant the cost of counsel on scale C, and scale B would be more appropriate.

[35] I therefore make the following order:

Judgment is granted against the defendant in favour of the plaintiff for:

- v. payment of the amount of € 259,750.55;
- vi. payment of the amount of € 73,475.44;
- vii. interest on the aforesaid amounts calculated at the rate of 16.5% per annum from 1 February 2021 to date of payment;
- viii. costs of suit, including the cost of counsel payable on scale B.

D M DAVIS
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant : Adv C Morgan
cmorgan@capebar.co.za

Instructed by : Bowman Gilfillan Inc.
Ms Nicole Gilfelleon

Counsel for the Respondent : In Person