IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 67003/2010

In the matter between: 29/8/2014

ISAAC ISAKOW Applicant/Plaintiff

and

MARIUS ERASMUS Respondent/Defendant

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
28/8/2014
DATE SIGNATURE

DAVIS, AJ

INTRODUCTION:

[1] In an interlocutory application in terms of Rule 30A of the Uniform Rules, the Applicant (being the Plaintiff in the main action) applies that the court orders as follows:

"*1. Ordering that the Defendant's (Respondent's) defence in case no. 67003/10 be struck out.*

2. Ordering that the Defendant (Respondent) pay the costs of this application on the scale as between attorney and client.

3. Claim 1:

3.1 Granting judgment in favour of the Plaintiff (Applicant) in the sum of R190 186,27;

3.2 Granting interest on the sum of R190 186,27 a tempore morae;

3.3 Alternatively to 3.1 above, ordering the Defendant (Respondent) to deliver to the Plaintiff (Applicant) the following items and equipment namely:

An orbital sander
A mono pump with reduction gearbox
2 x 1½ metre wooden clamps
2 quick release clamps
1 scribe jigsaw
8 trestle tables
2 5-ton treacles
1 400 litre pottery mixer
1 100 litre pottery mixer
1 diesel heater
1 small hammer mill
3 bicycles mountain bikes
1 100 litre compressor
1 18 inch scribe Fret saw
1 krost wall-mount toolset
25 complete metal shelves
Bench grinder
Free-standing 3-phase grinder
2 metal tables (work benches)
1 desk

1 grinder
1 gas bottle and standing
1 pedestal drill
5 ton based trolley jag (sic)
1 welder
1 Chubb safe
2 steel cabinets

4. Claim 2:

4.1 Granting judgment in favour of the Plaintiff (Applicant) in the sum of R37 000,00;

4.2 Granting interest on the sum of R37 000,00 at the rate of 15,5% per annum from 2 October 2009;

4.3 Ordering the Defendant (Respondent) to pay the costs."

For sake of convenience and ease of reference the parties shall hereafter be referred to as the Plaintiff and the Defendant respectively.

MAIN ACTION:

[2] In the Particulars of Claim in the main action the Plaintiff alleged that he was the lawful owner of the list of movable items included in the abovementioned quotation and that the value thereof amounts to

R190 186,27. Individual amounts have been allocated to each of the individual items. It was further claimed that the Defendant was in possession of the Plaintiff's property.

[3] As a second claim it is pleaded in the Particulars of Claim that the Plaintiff had loaned and advanced to the Defendant the sum of R40 000,00 which would be repayable on demand but in respect of which only R8 000,00 had been paid leaving the balance of R37 000,00 still outstanding.

[4] In his plea the Defendant denied the Plaintiff's ownership of the 1 400 litre mixer, 1 100 litre mixer, the diesel heater and the small hammer mill and the Defendant pleaded that these items had been donated to him by the Plaintiff.

[5] Similarly, the Defendant denied that the Plaintiff was the owner of the three mountain bicycles and that they had been donated by the Plaintiff to the Defendant, his spouse and one Fanie Schoeman as gifts.

[6] The Defendant also denied that the Plaintiff was the owner of the 25 metal shelves which the Defendant pleaded was purchased at an

auction by the Plaintiff for and on behalf of the Defendant and for which he has paid in full.

[7] The Defendant further pleaded that he had no knowledge of the first 7 of the listed items claimed by the Plaintiff. All the remaining items, save for those listed in paragraphs [4], [5] and [6] *supra*, the Defendant pleaded belonged to a company known as Greenflash Trading (Pty) Ltd.

[8] Save for those items pleaded in paragraphs [4], [5] and [6] *supra*, the Defendant denied that he was in possession of any of the other items claimed by the Plaintiff.

[9] In respect of the loan, the Defendant pleaded that the cause of action had prescribed and further denied the remainder of the allegations (including the allegation of the payment of the aforementioned R8 000,00).

[10] The main action had already twice been enrolled and postponed and the Plaintiff complains that the Defendant was in both instances instrumental in the postponement. The parties have subsequently also attempted case management measures, all of which the Plaintiff

alleges the Defendant frustrates. The main action is accordingly still pending and has not been finalised.

INTERLOCUTORY APPLICATION:

[11] After pleadings had been closed, the Defendant delivered his discovery affidavit on 10 September 2012. The Plaintiff states the following in his present Founding Affidavit:

> "*The Defendant made no discovery of any of the items contended by me to be in his possession.*"

I take this to mean that the Defendant has not discovered any documents relating to these items.

[12] Be that as it may, on 24 August 2012 the Plaintiff served on the Defendant a Notice in terms of Rule 36(6) of the Uniform Rules, calling upon the Defendant to make available for inspection and for examination "*... the property which forms the subject matter of the triable issues ...*". (All of the items previously listed were included in the Notice in terms of Rule 36(6).)

[13] On 10 September 2012 the Defendant delivered a reply to the notice in which reply the Defendant tendered for inspection the following items at the following addresses: At 1st Avenue, 99 Rietkol, Sundra: 1 x 400 litre mixer, 1 x 100 litre mixer, 1 x diesel heater, 1 x small hammer, 5 x 25 steel shelving and at 12 Flambojant Street, Delmas the following: 1 x drill, 1 x 5 ton trolley jack, 1 x welding machine, 1 x steel cabinet. (It appears that the "*small hammer*" in fact referred to the small hammer drill listed and the "*drill*" referred to the pedestal drill.)

[14] In addition hereto the notice repeats the plea to the effect that the Defendant was never in possession of the first seven items on the list. He also stated that he is not in a position to make the remainder of the items available for inspection as they are also not in his possession. Regarding the three bicycles, he stated that they had been stolen. The issue regarding this theft has not been taken further by the Applicant, save for the general effect of the relief now claimed.

[15] After several communications between the respective attorneys for the Plaintiff and the Defendant as to when inspection and examination should take place, the Defendant's attorneys confirmed in writing on 24 April 2013 as follows:

> *"We refer to the abovementioned matter and confirm that our client has indicated that the goods may be inspected on 8 May 2012 (sic) at 09:00 at 1ste Laan 99 Rietkol, Sundra where he will be present after which you can accompany him to 12 Flambojant Street, Delmas."*

[16] After the Plaintiff's attorney had confirmed the abovementioned invitation, an inspection was conducted on 8 May 2013 by the Plaintiff and a candidate attorney of a correspondent attorneys' firm. At the inspection, only the diesel heater, the small hammer mill and the 25 steel shelves were made available for inspection.

[17] The Defendant's explanation regarding the non-availability of the remainder of the items is unsatisfactory in many respects. He apparently alleged at the time of inspection that the items had been stolen. He alleges in his Answering Affidavit that photographs were taken at the Delmas address, depicting a burglary. Both the depiction and the taking of photographs are in dispute. He alleges that he is now accused of not making available two out of five items when in fact a total of nine items were tendered for inspection, five at the Sundra address and four at the Delmas address. Whilst alleging that the four items at the Delmas address had been stolen, he proffers no explanations for the non-making available of the outstanding two items at the Sundra address. He is also, and in my view rightly so,

criticised by the Plaintiff for not having disclosed the alleged theft prior to confirmation of the inspection on 8 May 2013. He has neither then nor subsequently in correspondence nor in papers before the court furnished any particularity of the date of the alleged theft, the circumstances relating thereto, whether the matter had been reported to the police or whether an insurance claim had been lodged or any of the customary particularity or steps which a person whose property has been stolen would be able to furnish or would have taken.

[18] Disgruntled with this situation, the Plaintiff delivered a Notice in terms of Rule 30A(1). In this notice the Plaintiff claimed as follows:

"*Take notice that as a result of the Defendant's failure to comply fully with the Plaintiff's Notice in terms of Rule 36(6), the Plaintiff calls upon the Defendant to comply fully with the Plaintiff's said notice within 10 days from date of delivery of this notice, failing which the Plaintiff will make application in terms of Rule 30A that the Defendant's defence be struck out with costs and that judgment be granted in favour of the Plaintiff.*" Thereafter the whole of the preceding sequence of events relating to the inspection, the exchange of correspondence and the partial inspection was related in the notice.

[19] The Defendant failed to respond to the Rule 30A(1) notice prompting the Plaintiff to launch the present interlocutory application.

[20] This interlocutory application was launched in July 2013, was opposed at a late stage and reliance was also at a previous date placed on the trial date of 4 February 2014 as a reason for not entertaining the interlocutory application separately as the merits would have been dealt with on trial.

[21] At the postponement of the trial on 4 February 2014 Fabricius J made an order as follows:

> *"1. That the trial be postponed sine die;*
>
> *2. No order as to costs;*
>
> *3. That within 30 days from date hereof, the parties are to file a pre-trial document setting out the following:*
>
> *3.1 Facts that are common cause;*
>
> *3.2 Facts that are in dispute and need to be decided by trial court;*

3.3 Details of any evidence which may be opinion evidence together with the reasons for such opinion evidence if it is intended to be tendered."

[22] Apparently, all that has transpired in respect of further pre-trial procedures, is the fact that the Defendant has accepted the amounts ascribed by the Plaintiff to the items as listed in the Particulars of Claim, so I have been informed from the Bar.

[23] Despite his apparent frustration in not having the trial finalised and which frustration he blames on repetitive obstructive conduct by the Defendant, the Plaintiff bases his current claim solely on the fact that, of the nine items which had been tendered for inspection by the Defendant, only three items had ultimately been made available for such inspection. The interlocutory application is not based on a total non-compliance of the initial Rule 36(6) notice relating to the totality of the listed items. This interpretation has been confirmed by counsel for the Plaintiff, Mr Cohen, and is further apparent from the following statements in the Founding Affidavit:

*"34.4 At the inspection held on 8 May 2013 the Respondent stated that the goods '**had been stolen in December 2012**'. This alleged theft predates the date of the Respondent's 36(6) reply as well as his own attorneys' letter dated 24 April 2013.*

35.

The letter from the Respondent's attorneys flies in the face of the Respondent's own representation and his attorneys' letter of 24 April 2013. Such assertion by the Respondent displays contempt for the integrity of this Honourable Court and constitutes an abuse of process. It is an attempt on the part of the Respondent to exculpate himself from his own admissions by making an excuse. No explanation has ever been given why the Respondent in his 36(6) reply as well as his attorneys' letter of 24 April 2013 did not disclose that certain equipment had allegedly been stolen. This is an indication of mala fides on the part of the Respondent and can only be described as disingenuous.

36.

It is respectfully submitted that the Respondent has no sustainable defence to my claim and that his conduct in tendering inspection of equipment sought and then reneging thereon constitutes an abuse of process and a violation of the Rules of this Honourable Court and his conduct in contending that the goods were stolen in December 2012 with no evidence being given to support such assertion. This is submitted draws an inference adverse against the Respondent.

37.

It is respectfully submitted that I am entitled to the relief sought in the Notice of Motion."

[24] It is clear that the Rule 36(6) Notice and the procedures calling for inspection of the listed items, relate notionally only to the Plaintiff's first claim. Neither the notice nor the listed items bear any relation to the second claim. I debated this issue with Mr Cohen on behalf of the Applicant and he could take the matter no further other than to argue that once the Defendant had failed to comply with a rule of Court he should suffer the consequence of the striking out his defence relating to all claims. I find no substance in this submission and there is no rational connection between the evidentiary issues regarding the two claims. In my view an interpretation of Rule 30A to the effect that, if a party defaults on one aspect of the rule, his defence in relation to an unrelated cause of action should also suffer, would be too wide an interpretation.

[25] In similar fashion, where the Applicant's basis for the present interlocutory application relates only to the non-availability of items for inspection contrary to what had previously been tendered, the alleged non-compliance with the Rule then only pertains to the 1 x

400 litre mixer, the 1 x 100 litre mixer, the 1 (pedestal) drill, the 5-ton trolley jack, the 1 welding machine and the 1 steel cabinet.

[26] I reiterate that there is no claim by the Plaintiff that due to the fact that the Defendant had not made available for inspection the remainder or the items on the list, therefore his defence should be struck out. In similar fashion therefore as with claim 2, there is accordingly no notional or rational connection leading to the striking out of the defence relating to items other than that referred to in paragraph [25] *supra*.

[27] Insofar as the Defendant had tendered inspection of the diesel heater, the small hammer mill and the 25 steel shelves and had indeed made good such tender, there is then no basis to allege non-compliance with the Rules of the Court in respect of these items. I therefore see no reason why the Defendant's defence in respect of these items should be struck out and issues such as ownership or donation should not be allowed to proceed to trial.

[28] Accordingly the remaining issue is whether the Defendant's defence in respect of the Plaintiff's claim for the items in respect of which the Defendant had tendered inspection but could not honour such tender, should be struck out.

[29] In respect of the 1 x 400 litre mixer and the 1 x 100 litre mixer (and on the papers it is not clear whether it is a 1 x 1400 litre mixer and 1 x 1100 litre mixer or a 1 x 400 litre mixer and 1 x 100 litre mixer, but despite all the other difficulties regarding the listed items, at least the parties appear to know which two mixers are referred to) and of which the Defendant has in his plea admitted possession and in respect of which no cogent reason had been given for the non-discovery, the Defendant is clearly in breach of his obligations in terms of the Rules of Court. About this, there can at least be little doubt.

[30] I agree with the Plaintiff's contentions that, in respect of the "*other items*", being the four items which had allegedly been kept by the Defendant at 12 Flambojant Street, Delmas, the Defendant's versions regarding possession are both contradictory and unsatisfactory. In his plea the Defendant denied that he was in possession of these items. In his reply to the Plaintiff's Notice in terms of Rule 36(6) he then tenders inspection of these items at an address apparently also under his control. His allegation that the items had been stolen also presupposes that they had been in his possession. I am further of the view that the paucity and timing of his disclosure regarding the alleged theft are such that it cannot be

accepted at face value or at least to the level of constituting a "*real dispute*".

[31] In this regard the Supreme Court of Appeal has made the following findings in a matter dealing *inter alia* with issues relating to possession in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008(3) SA 371 (SCA):

> "*[12] Recognising that the truth almost always lies beyond mere linguistic determination, the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers:* ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** *1984(3) SA 623 (A) at 634E-635. See also the analysis by Davis J in* ***Ripoll-Dausa v Middleton NO and Others*** *2005(3) SA 141 (C) at 151A-153C with which I respectfully agree...*
>
> *[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed ...*"

[32] In my view the Defendant's allegations regarding the non-availability for inspection due to theft of the items tendered for inspection on the Delmas property fall short of raising a real and *bona fide* dispute.

[33] Whilst mindful of the Plaintiff's expressed frustration at the finalisation of the main action, there are other real disputes of fact which had been raised in pleadings and which did not directly form the subject matter of this interlocutory application and had not been addressed in affidavits. To wipe these disputes regarding ownership and possession from the table without the hearing of oral evidence which is envisaged to take place on the next trial date of 28 May 2015, would, in my view, stretch the applicability of the sanction contained in Rule 30A to an extent not envisaged in the rule. In my mind there should be a legitimate, rational and direct link between the extent to which a rule has not been complied with and the sanction for such non-compliance. As I have stated, in this instance, this sanction would then only be applicable to those items in respect of which the tendered inspection could not take place.

[34] In applying the sanction and insofar as the Defendant may not be in possession of the items I shall rely on the values ascribed to the times in the Particulars of Claim.

[35] I wish to make a last observation regarding the issue of costs. Although the action had been instituted in 2010 already, it has been conceded in court that the values of the claims are not substantial, at least not by High Court jurisdiction standards. The parties would do well to consider the transfer of this case to the Regional Court, both from a time and cost perspective. Having regard to the history of the matter however, I do not intend to limit the costs order to the scale as applicable in the Regional Court. As to the scale of costs further, it is common cause that the Defendant's attorney who was present in court had been furnished with scant instructions by the Defendant, had only recently been able to brief counsel who had not been able to or briefed to prepare Heads of Argument and in fact had very little instructions which could assist the enquiries of the court regarding the various listed items, values or possession thereof. In the exercise of my discretion I am of the view that the Plaintiff is entitled to costs on a scale as between attorney and client.

[36] In the premises the order which I make is the following:

1. The Defendant's defence in the main action pertaining to the following items claimed in the Plaintiff's first claim is struck out:

   1 x 400 litre mixer;

1 x 100 litre mixer;

1 x pedestal drill

1 x 5-ton trolley jack

1 x welder

1 x steel cabinet

2. The Defendant is ordered to make delivery of the aforementioned items to the Plaintiff within 7 days after service on him of this order, failing which he is ordered to pay the Plaintiff the amounts ascribed to each of the aforesaid items in paragraph 5.2 of the Plaintiff's amended Particulars of Claim.

3. The Defendant is ordered to pay the Plaintiff's costs of the interlocutory application on the scale as between attorney and client.

N DAVIS
ACTING JUDGE OF
THE HIGH COURT