IN THE HIGH COURT OF SOUTH AFRICA

[NORTH GAUTENG HIGH COURT, PRETORIA]

CASE NUMBER: 53177/13

19/2/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

19/2/2016
DATE

SIGNATURE

In the matter between :

MAGDALENA ALETTA SAAIMAN NO	**FIRST APPLICANT**
MAGDALENA ALETTA ENGELBRECHT NO	**SECOND APPLICANT**
HERCULUS PHILLIPPUS SAAIMAN NO	**THIRD APPLICANT**
SUSANNA JOHANNA BIRKHOLTZ NO	**FOURTH APPLICANT**
NICOLAAS JACOBUS SAAIMAN NO	**FIFTH APPLICANT**
MADALENA ALETTA SAAIMAN	**SIXTH APPLICANT**

and

ANETTE ELIZABETH SAAIMAN	**FIRST RESPONDENT**
PETRUS JAKOBUS VAN SCHALKWYK NO	**SECOND RESPONDENT**
ANETTE ELIZABETH SAAIMAN NO	**THIRD RESPONDENT**

PETRUS JAKOBUS VAN SCHALKWYK NO **FOURTH RESPONDENT**

MASTER OF THE HIGH COURT, PRETORIA **FIFTH RESPONDENT**

JUDGMENT ON THE APPLICATION FOR LEAVE TO APPEAL

A.J. LOUW AJ

[1] When the application for leave to appeal was called on the 11th February 2016 the First to the Fourth Respondents raised an objection to the proceedings based on the provisions of Rule 7(1) of the Uniform Rules of Court. In terms of the notice in terms of Rule 7(2) that was served on the Applicants on the 4th November 2015 the authority of the Applicants' attorney of record is attacked. I dealt with this objection summarily and gave an oral judgment in terms whereof the application for a postponement of the application for leave to appeal so that the Plaintiff could comply with the Rule 7(2) notice was refused and I similarly refused to entertain the notice in terms of Rule 7(2) on the grounds set forth in the oral judgment. Thereafter the application for leave to appeal proceeded.

[2] The gist of the attack on the judgment by the Applicants is that, in summary, I failed to take proper cognisance of when a real, genuine and

bona fide dispute of fact exists. Mr Van der Merwe SC approached the matter with reference to the judgment of ***Wrightman trading as JW Construction v Headfour (Pty) Ltd and Another*** **2008 (3) SA 371 at 375 G – 376 B (par 13).** The complaint essentially is that the answers given to the specific information that the Applicants required from the Respondents were lacking in particularity. I was again referred to the questions raised in paragraphs 65.1 to 65.11 of the founding affidavit in support of this submission.

[3] Mr Van der Merwe SC argued that the answer in the answering affidavit on behalf of the Respondents was vague, bold and sketchy and in particular did not address the questions raised by the Applicants in paragraphs 65.1 to 65.11 of their founding affidavit. In ***Wrightman – supra*** **at 376B** Heher JA says the following:

"There is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit."

[4] A list of questions are not facts that must be answered to. The Respondents were obliged to answer to the Applicants' founding affidavit. The answer that was given might not be what the Applicants expected or might not satisfy the Applicants in that the questions posed were not answered. However, the Respondents did meet the case made out by

giving an answer that a payment was made. That payment is confirmed under oath and an explanation was given regarding what had been done with the funds. (I again say that the application did not concern the wisdom of what was done, the only question was whether there was compliance with the order of Vorster, AJ).

[5] I am still of the view that a sufficient answer was provided. In this matter it must be borne in mind that the Applicants, throughout, had the obligation to prove contempt of court beyond reasonable doubt.

[6] A sufficient answer was given and the onus was not discharged by the Applicants.

[7] Again I have to say that I refrain from deciding the question whether non-compliance with prayers 1 and 2 of the order of Vorster, AJ could constitute contempt of court in view of the difference of approach to *ad pecuniam solvendam orders* as opposed to *ad factum praestandum orders*. In view of the approach that I followed in the judgment and in this application for leave to appeal no finding in that regard needs to be made.

[8] The complaint is raised in the application for leave to appeal and in argument that there was a short payment of the interest as a payment of R2 137 000.00 was made on the 17th June 2012 whereas the correctly

calculated amount of the judgment and interest at the time amounted to R2 372 094.04. No such case was made out in the founding papers and the question with regard to short payment was thus not pertinently raised, nor argued when the matter was argued and is something that is a new issue in the application for leave to appeal. In the circumstances I refuse to entertain this ground for leave to appeal.

[9] I find no reason to doubt that the Second Respondent was entitled to invest the funds, as he did. I accordingly cannot find in favour of the Applicants on ground 4.2 of the application for leave to appeal. No authority indicating that my judgement in this regard was wrong was referred to and I am still of the opinion that the Second Respondent could have acted as he did.

[10] I am not persuaded that the explanations referred to in paragraph 2.3 of the grounds for leave to appeal are indeed irreconcilable with one another.

[11] There was no request to refer the matter to evidence by either party and I therefore found that the matter must be dealt with in terms of the well-known so-called ***Plascon-Evans***-approach to factual disputes. Essentially that means that the application was adjudicated on the version of the Respondents. When the Applicants took the decision to bring an application for contempt of court instead of issuing summons or

to ask for the application to be referred to evidence, the Applicants took the risk arising from such approach. I am still convinced that it cannot be said, on the papers as they stand, that the answer is not *bona fide* and therefore I could not find in favour of the Applicants and still cannot so find.

[12] In paragraph 7 of the application for leave to appeal it was stated that I erred because I did not refer the matter to oral evidence *mero motu*. At the hearing of the application for leave to appeal Mr Van der Merwe SC did not persist with this ground of leave to appeal. This concession is undoubtedly correct in light of the judgment of ***Santino Publishers CC v waylite Marketing CC 2010(2)SA53(GSJ)*** **p56 – 57, par 5**.

[13] There is no reasonable prospect that another Court might find in favour of the Applicants. In the circumstances I find that leave to appeal must be refused.

[14] The application for leave to appeal is refused with costs.

AJ LOUW AJ