IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

15/4/2016
DATE

SIGNATURE

15/4/2016.

Case Number: 24584/16

In the matter between:

FIRSTRAND LTD Applicant

and

BARRY KUPER SPITZ First Respondent

INTERNATIONAL LAW & TAX INSTITUTE (PTY) LTD Second Respondent

Case No: 88714/2014

In the application between:

FIRSTRAND BANK LTD	First Applicant
LAURITZ LANSER DIPPENAAR	Second Applicant
FIRSTRAND LTD	Third Applicant

and

BARRY KUPER SPITZ	Respondent

JUDGMENT

POTTERILL J

[1] The applicant is on an urgent basis applying that the action instituted by the first respondent against the applicant in the Gauteng Local Division under case number 43390/2014 be stayed pending the adjudication of the vexatious litigant

application instituted against the first respondent by the applicant in this court under case number 87714/2014.

[2] This application is opposed by first and second respondents.

[3] The first issue that this court is to determine is whether the application is indeed an urgent one. I find it necessary to set out the background facts before reaching a decision hereon:

Background facts

For ease of reference I continue to throughout refer to the applicant and respondents as *in casu.*

3.1 On 23 February 2001 the second respondent concluded a consultancy service agreement with Henry Ansbacher Trust Services ("HATS"), a Division of Firstrand Bank. Firstrand Bank is a wholly owned subsidiary of the applicant.

3.2 In terms of this agreement the second respondent through the endevours of the first respondent was to provide certain services to the HATS' Division of Firstrand Bank. For these services the second respondent was entitled to an annual basic fee of R1 million and to payment of commission if certain targets were met.

3.3 The agreement was for a fixed period of three years. Firstrand Bank however had the right to terminate the agreement earlier if defined performance targets were not met. Firstrand Bank on 23 February 2002 formally cancelled the agreement on the basis that the gross revenue threshold had not been attained.

3.4 The respondents instituted an action against Firstrand Bank in this court under case number 32230/2001 ("Bertelsmann J action"). The action was based thereon that the respondents disputed the validity of Firstrand Bank's cancellation.

3.5 Bertelsmann J made the following orders:

> *"1. The first plaintiff's action is dismissed.*
>
> *2. The first and second plaintiffs must pay the defendant's costs, jointly and severally, the one to pay the other to be absolved, such costs to include:*
>
> *(i) The costs of two senior and one junior counsel;*
>
> *(ii) The preparation and qualifying fees of defendant's expert witnesses Strydom and Breytenbach;*
>
> *(iii) The fees for the preparation of the Ernst & Young report;*
>
> *(iv) Costs on the scale of an attorney and client for seventeen court days; and*

(v) Costs on the party and party scale for the balance of the proceedings."

3.6 The respondents applied for leave to appeal against Bertelsmann J's judgment and the leave to appeal was refused. They petitioned to the Supreme Court of Appeal and as well as the Constitutional Court and both petitions were dismissed with costs.

3.7 On 28 November 2014 the respondents herein issued as plaintiffs summons in case number 43390/2014 against Firstrand Bank Ltd in the Gauteng Local Division ("the main action"). The respondents claim *inter alia* the following against the applicant as claim 1:

"1. Payment of the sum of R100 million in respect of delictual fraud.

2. Payment of the sum of R1 billion in respect of contractual fraud."

3.8 The contractual claim again relates to the contract that served before Bertelsmann J.

3.9 The respondents herein also instituted action against Mr. Dippenaar (Bank Manager) under case number 32635/2004.

3.10 A second defamation action was also instituted by the respondents also against Mr. Dippenaar under case number 37422/2014.

3.11 It is common cause that both these defamation actions are still pending.

3.12 On 12 December 2014 the attorneys on behalf of the applicant sent by e-mail a letter to the first respondent setting out that they are in view of the relief sought in the vexatious litigant proceedings not taking any further steps in the litigation under case number 43390/2014 ("the main action") until the outcome of the vexatious litigant proceedings.

3.13 On 23 January 2015 the first respondent requested the applicant to file its plea on or before the 30th of January 2015 failing which a notice of bar will be served and filed.

3.14 On 27 January 2015 the applicant's attorney responded to the first respondent's e-mail of 23 January 2015 inviting the respondents to retract the demand for the applicant's plea failing which the applicant reserved its rights to bring an urgent application.

3.15 On 28 January 2015 the first respondent reacted to this letter as follows:

"We are advised as follows:

1. *Opposition in law is correct.*
2. *However, no benefit can accrue to any of the parties from a dispute on the issue raised by you.*
3. *Hence I am willing to accept on my own behalf and on behalf of the International Law and Tax Institute (Pty) Ltd, the*

invitation contained in the final paragraph of your letter which acceptance takes place with effect hereof.

Kindly acknowledge receipt hereof by yourselves."

The last paragraph referred to is the invitation to retract the demand for the applicant's plea.

3.16 On the 28th of January 2015 the applicant's attorneys addressed an e-mail to the respondent acknowledging and confirming that the respondents would not proceed with the notice of bar.

3.17 On 1 September 2015 a notice of bar was delivered in this matter on behalf of the respondents.

3.18 On 1 September 2015 the applicant's attorneys addressed an e-mail to Zwiegers Attorneys inviting them to withdraw the notice of bar. This e-mail was not responded to.

3.19 The applicant then filed a plea.

3.20 In reaction to the plea the respondent filed an application for joinder.

3.21 On 1 February 2016 the applicant's attorney addressed an e-mail to the respondents' wherein they pointed out the deficiency in the joinder application but was willing to consent to joinder as the second defendant with

the proviso that the consent was provided in the interests of avoiding unnecessary interlocutory applications. They also reserved their right to urgently seek a stay of the Johannesburg action if the plaintiff indicated an intention to advance that litigation.

3.22 On 11 February 2016 the attorney on behalf of the respondents again advised that he was hoping to hear from his client regarding the draft order for the joinder application. As nothing was heard the applicant duly filed a notice to oppose the joinder application to protect its rights.

Applicant's case

[4] The applicant thus brought this urgent application to stay the proceedings as it is their submission that the respondents reneged on its agreement, at the very least as far as the notice of bar was concerned, to not proceed with the litigation in the main action. The matter is accordingly urgent as the respondents' conduct will result in significant irreparable harm to the applicant's reputation as well as the reputation of entities and individuals associated with it if the vexatious litigation application is not heard prior to the main action.

[5] The irreparable harm flows from the respondents' serving of a discovery affidavit. It was conceded by counsel for second respondent in this court that the discovery

affidavit does not correspond to a discovery affidavit in terms of the Uniform Rules of Court in that for the following is set out:

5.1 C. Documents

"A. Re: Money Laundering, Tax Evasion, Fraud, etc by Ansbacher Group (Pubished Documents)

B. Re: Money Laundering, Tax Evasion, Exchange Control Breaches by Defendant and/or Ansbacher Group (Unpublished Documents)

C. Re: Instructions to Second Plaintiff from Ansbacher in London

D. Re: Issues of Fraud in connection with the Defendant's Duisberg Scheme for Discovery Health Executives and/or Others

E. Re: "Round Tripping" Breaches of Exchange Control Regulations

F. Re: Confusion in Ansbacher Trust Services

G. Re: Advice and/or Encouragement by Defendant to Clients to Commit Criminal Acts

H. Re: Advices and/or Encouragement by Defendant to Clients to Set up Invalid Trusts ..."

5.2 Under Schedule A furthermore the following is *inter alia* stated:

"SCHEDULE A: Documents 1-281 of Annexure – First Part, C

RE: MONEY LAUNDERING. TAX EVASION, FRAUD, ETC BY ANSBACHER GROUP (published documents)

Copies of published documents, including affidavits by government officials and/or news reports and/or law reports and/or government journals and/or comptrollers' reports and/or auditor generals' reports and/or official government publications and/or publications of the United Nations, supporting Plaintiffs' allegations that the instructions by Michael Mayhew-Arnold, a director and/or officer and/or employee of Ansbacher & Co Limited, to Second Plaintiff in his capacity as independent advisor to Defendant in terms of the agreement dated 23rd February 2000, under the authority of Defendant, requiring Second Plaintiff to engage in money laundering activities on behalf of Defendant and/or the Ansbacher Group, were part of a course of conduct, by and/or on the part of Defendant

and/or of Ansbacher & Co Limited and/or of one or more of their subsidiaries and/or related companies and/or divisions and/or certain officers and/or officials of Defendant and/or Ansbacher & Co Limited and/or of their subsidiaries and/or related companies and/or divisions, involving acts of:

- *money laundering; and/or*
- *tax evasion; and/or*
- *breaches of company law; and/or*
- *carrying on banking business without a banking licence; and/or*
- *defrauding its own creditors; and/or*
- *defrauding creditors of third party individuals and companies with whom it dealt; and/or*
- *holding accounts with intent to defraud creditors of other persons and/or for fraudulent purposes; and/or*
- *facilitating breaches of exchange control regulations; and/or*
- *unlawfully failing to comply with the requirements of an authorised government officer to produce to him specified books and documents; and/or*
- *unlawfully destroying and/or mutilating and/or being privy to the destructions and/or mutilation of books and documents; and/or*

- *holding unlawful payments to politicians in offshore accounts of Ansbacher & Co Limited and/or of its subsidiaries and/or of related companies and/or of divisions ..."*

5.3 *"SCHEDULE B: Documents 282-285 of Annexure – First Part, C*

RE: MONEY LAUNDERING, TAX EVASION, EXCHANGE CONTROL BREACHES BY DEFENDANT AND/OR ASNBACHER GROPU (unpublished documents)

Unpublished documents and/or copies of unpublished documents in support of Plaintiff's allegations that Defendant and/or Henry Ansbacher & Co Limited and/or one or more of their subsidiaries and/or related companies and/or divisions and/or certain officers and/or officials and/or employees of Defendant and/or of Ansbacher & Co Limited and/or of their subsidiaries and/or of related companies and/or divisions, were involved in unlawful and/or illegal acts, including acts of:

- *money laundering; and/or*
- *tax evasion; and/or*
- *facilitating breaches of the Exchange Control Regulations."*

5.4 SCHEDULE E: Documents 311-324 of Anenxure – First Part C

RE: "ROUND TRIPPING" BREACHES OF EXCHANGE CONTROL REGULATIONS

5.5 Under Schedule G the heading is "RE: ADVICE AND/OR ENCOURAGEMENT BY DEFENDANT TO CLIENTS TO COMMIT CRIMINAL ACTS"

5.6 Schedule V

Proofs by South African Reserve Bank and by the Financial Intelligence Centre Concerning Unlawful Activities of FirstRand Group

"1836	Announcements by the South African Reserve Bank	16	April 2014
1837	Announcements by the Financial Intelligence Centre	16	April 2014"

This despite the true announcement reading as follows:

"Stemming from the findings of the inspections, the SARB has imposed administrative sanctions, including the ordering of certain remedial action on the respective banks.

The administrative sanctions are not an indication that the banks in question have in any way facilitated transactions involving money laundering and the financing of terrorism."

[6] This discovery affidavit persists with the submissions that the applicant was part and parcel of money laundering, tax evasion, exchange control breaches etc. This was also the assertion before Bertelsmann J. Bertelsmann J found in paragraph 82 of his judgment as follows:

"As will be dealt with in greater detail in the relevant section of this judgment, there is absolutely no evidence of whatever nature that supports the repeated attacks upon the defendant or the Firstrand Group by the plaintiffs, accusing the former of being involved in Exchange Control violations, money laundering, dealing in embezzled funds, fraud, unlawful destruction of statutory records or maintaining bogus accounts. The gratuitous accusations levelled at the defendants' clients and the defendant itself, intended to tarnish captains of industry and defendant's employees and directors with the brush of dishonesty, were and remain baseless and unsubstantiated. The excuse that such conduct was the reason not to call essential and available witnesses must be rejected as false."

[7] The matter is thus urgent to stop the defamatory allegations that have previously been dealt with by Bertelsmann J and were either abandoned or found to be false. Notwithstanding this the respondents persist in making the same false, scurrilous and vexatious allegations in the main action.

[8] A further ground of the stay of the main action is that the respondents will simply continue abusing the Rules of Court to harass and defame the applicant. The respondents are persisting in taking further steps. The lengthy discovery affidavit filed by the first respondent on 18 March 2016 is a copy and paste version of the lengthy discovery affidavit delivered by the respondents in June 2002 in the Bertelsmann J matter. It is clear from the judgment of Bertelsmann J that the respondents abused the discovery rules in the main action. The applicant thus has a reasonable apprehension that the respondents will continue to abuse the Rules of Court including *inter alia* the discovery provisions of Rule 35.

[9] The relief sought is interim in nature as the vexatious litigant application is to be enrolled for hearing eminently. It is common cause that the Deputy Judge President of this Division was approached to provide a preferential date.

[10] The respondents' conduct causes significant irreparable harm to the applicant's reputation as well as the reputation of entities and individuals associated with it and will leave the applicant with an impossibility to quantify the extent of such damages to recover such damages from the respondents.

[11] The applicant requested that the costs of this application, although interim, be entertained by this court on the application before it. In the answering affidavit the respondents persisted with its vexatious averments against the applicant. *Inter alia:*

- *"FICA fraud by appellants on Reserve Bank and Financial Intelligence Centre;*
- *Mr. Botha's (attorney for the applicant) abuse of constitutional rights;*
- *Unprofessional conduct and perjury by Mr. Botha;*
- *Mr. Botha has engaged in doctoring a document ..."*

Respondent's case

[12] On behalf of the first respondent Mr. Spitz himself argued that the matter is not urgent. The discovery affidavit is simply a list of documents in his possession and he has made no accusations. He further argued that the court could never find him

to be a vexatious litigant as he has not persistently litigated. This is the first time since the main action that he has instituted action. Furthermore there are reasonable grounds for bringing the main action in Johannesburg. He also raised the fact that the applicant is forum shopping and although it is not a big point it is still a point that affects the costs. He further submitted that he is a human being with a right to be heard. The applicant is acting in anger against him as he assisted in criminal investigations against the applicant.

[13] Mr. O'Donovan argued on behalf of the second respondent that bringing the application was a gross abuse of the Rules and in fact opportunistic. This is further so as in law the applicant is barred from bringing an application for vexatious litigation proceedings because the pleadings have already closed. I was referred to ***Ryklof Beleggings (Edms) Bpk and Another v Du Plessis*** **[2006] 4 All SA 474 (C)** wherein the court found that because the matters had reached the *litis contestation* stage the result was that the parties had agreed to leave the disputes in the hands of the court and the matter could not be stayed. The court also emphasised that persistence was not only the factor which was important for a proceeding to qualify under the Vexatious Proceedings Act, Act 3 of 1956, but there was also to be no basis for the actions instituted. The court found that this was not in that matter the case as the court found that there was a basis for the actions to be instituted.

[14] It was further argued that the discovery affidavit may be offensive, but it is in public interest that this matter proceeds otherwise the applicant has a subtext to hide documents. The discovery document although a public document, was not provided to the press and is not publicised.

[15] On behalf of the second respondent *lis pendens* was also raised as in the vexatious litigation application prayer 6 also requests stay of the main action. This matter can thus not be argued in this court.

[16] The court must look to the prospects of success of the vexatious litigation process. Because there are new facts pursuant to the finding of the Reserve Bank there are no prospects of success in that the main action differs from that from Bertelsmann's matter and there is thus not a persistence in bringing this action. There are no other pending actions between the applicant and the respondents.

[17] There is no basis for the applicant to ask for costs on an attorney and client scale. This application should be dismissed with costs. An interim court order should not be followed by a costs order as it cannot be reversed.

[18] As a last resort Mr. O'Donovan also raised the point that the deponent to the founding affidavit, being the attorney of the applicant has no *locus standi* and everything contained therein is hearsay evidence.

[19] It was his submission that the applicant is trying to *"muzzle an old man"*.

Reasons for decision

[20] This application to stay proceedings until an application for vexatious litigation proceedings is adjudicated is premised upon an interlocutory interdict staying any further procedures in the main action until the proceedings in terms of the Act has been adjudicated. Under our constitutional dispensation a stay of proceedings due to vexatious litigation is confirmed in ***Benash and Another v Ernst & Young and Others*** **1999 (2) SA 116 (CC).** It is common cause that the hearing of this application is eminent, due to the Deputy Judge President in this court granting a preferential court date. This also addresses the argument that the stay would prejudice the first respondent who is 83 years old; justice is to be delivered speedily.

[21] I find the matter to be urgent in that although a date has not been allocated for the hearing of the matter any further procedural steps need to be stayed pending the application. This is so because the discovery affidavit of the respondents *ex facie* the document, admittedly so by the second respondent, contain at the very least irrelevant, inappropriate and shocking comments. Despite this being admitted the respondents did not tender to remove the comments. Despite counsel for the second respondent and the first respondent being invited to apologise for the incorrect "verbatim quoting of the finding of the Reserve Bank" none was forthcoming. The applicant thus has a well-grounded apprehension that this conduct will continue.

[22] A High Court has the inherent power at common law to stay vexatious, frivolous or oppressive proceedings. In addition it has the power to stay under the Act. The reason for the stay of the main action is thus not bad in law.

[23] Courts also possess the inherent jurisdiction to prevent the abuse of court processes. One of the means to prevent abuse is to stay the proceedings.

[24] In both instances referred to above the power to stay must be exercised sparely since the courts of the land are open to all and the doors will only be closed in

exceptional circumstances. This principle however must be considered in the vexatious proceedings application itself.

[25] The application before me, i.e. a stay of the proceedings pending the hearing of another matter is a matter of discretion – ***Fisheries Development Corporation v Jorgensen and Another*** **1979 (3) SA 1331 (WLD)** at 1339B-C. This discretion is exercised upon the applicant fulfilling the requirements for an interlocutory interdict.

[26] For interim relief the court has to use the following test, ***Reckitt & Coleman SA (Pty) Ltd v S C Johnson & Son (SA)(Pty) Ltd*** **1995 (1) SA 725** on 730B:

> *"When the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issues, the Court's approach in determining whether the applicant's right is prima facie established, though open to some doubt, is to take the facts set out by the respondent which the applicant cannot dispute , and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on those facts, obtain final relief at the trial in the main action. The facts set out in contradiction by the respondent must then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed."*

There is accordingly no serious doubt thrown upon the case of the applicant.

[27] Such conduct of the respondents will result in significant irreparable harm to the applicant's reputation – ***Absa Bank Ltd v Olivia Properties*** **1999 (4) SA 554 (T)** at p555.

[28] The balance of convenience favours the applicant. On the one hand the respondent's argue that they are not defaming or making accusations, yet in the same breath they argued that they must proceed with the main action to bring the actions of the applicant in the public domain as it is a matter of public interest. The only prejudice the respondents suffer is that the main action is stayed for a short period. The balance of convenience thus favours the applicant.

[29] The issue of forum shopping was raised. There was no response thereto from the applicant's counsel. It is true that one would assume that while the main action is pending in Johannesburg this application would be brought in Johannesburg. However, as the Local Division and this Court has concurrent jurisdiction this court cannot chase the applicant away. Nothing further rides on this submission.

[30] The respondents lastly argued that the deponent could not depose to the affidavit as he was the attorney for the plaintiff and did not have the necessary *locus standi* and that his assertions in the affidavit are accordingly hearsay. In ***Gaines v Telecom Namibia Ltd*** **2004 (3) SA 615 (SCA)** at 624G-H the court found that the deponent to the affidavit need not be authorised by the party concerned to depose thereto. It is the institution of the proceedings and the prosecution thereof which must be authorised. If the required allegations of the authorisation are made in their founding affidavit proof of authorisation and/or ratification can be annexed to the replying affidavit.

[31] I am satisfied that on the facts of this matter I can entertain a costs order. Although it is an interim order I can grant costs on the application as it stands before me. The reason for this is that the respondents are persisting with a pattern of abusing the court process to insult, defame and malign the applicant and its attorney. This process started before Bertelsmann J, was proceeded with by the comments in the discovery affidavit as well as in the answering affidavit before me. The next question to be answered is whether the costs must be on a punitive scale. For a court to grant a punitive costs order special grounds must exist. I find the special grounds in this matter to be that the conduct of the litigant is reprehensible, reckless

and vexatious. Under those circumstances a court can grant a punitive costs order – ***Wrypex (Pty) Ltd v Barnes*** **2011 (3) SA 205 (GNP)** at 205I-207G.

[32] I accordingly make the following order:

32.1 The action instituted by the first respondent against the applicant in the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 43390/2014 is stayed pending the adjudication of the vexatious litigant application instituted against the first respondent by the applicant in this court under case number 87714/2014.

32.2 The respondents are to pay the costs of this application on an attorney and own client scale, jointly and severally, the one paying the other to be absolved, such costs to include the costs consequent upon the employment of two counsel where applicable.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 24584/2016

HEARD ON: 12 April 2016

FOR THE APPLICANT: ADV. B. SWART SC

INSTRUCTED BY: Norton Rose Fulbright South Africa Inc.

FOR THE 1st RESPONDENT: IN PERSON

FOR THE 2nd RESPONDENT: MR O'DONOVAN

INSTRUCTED BY: Zwiegers Attorneys

DATE OF JUDGMENT: 15 April 2016