

IN NORTH GAUTENG HIGH COURT

[REPUBLIC OF SOUTH AFRICA]

29/7/16.

Case No.: 11802/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
29/07/2016	
DATE	SIGNATURE

In the matter between:

ZEHIR OMAR

Applicant

and

MORCHENE OMAR

1st Respondent

RABIA NOORDMOHAMED

2nd Respondent

JUDGMENT

MNGQIBISA-THUSI, J:

[1] The respondents have instituted proceedings against the applicant in which they are seeking, *inter alia*, that the applicant return to

them all files and documents relating to matters which the applicant handled for them as their attorney.

[2] As a result of the respondents' application ("the main application"), the applicant launched these proceedings.

[3] The applicant is seeking relief, in terms of Rule 47 of the Rules of Court, on the following terms:

3.1 an order directing the respondents (applicants in the main proceedings) to furnish security of costs in the amount of R100 000.00;

3.2 an order staying the main application pending payment of the security for costs;

3.3 that should the respondents fail to pay the claimed security for costs, the applicant should be allowed to supplement his papers in the main application and apply for the dismissal of the respondents' application; and

3.4 costs.

[4] The general rule is that a party to an action or application who is domiciled in South Africa cannot be called upon to furnish security for costs. The fact that the party against whom a claim is made to furnish security for costs appears not have sufficient funds to meet a potential cost order is not by itself reason to call upon him or her

to furnish security for costs. The court in exercising its discretion whether or not to order a party to an action or application to furnish security for costs, has to take into account the circumstances of the case, equity and fairness between the parties and the right of access to court as provided for section 34 of the Constitution. However, if the court comes to the conclusion that the main proceedings are vexatious, it may order the party against whom security for costs is sought to furnish such security.

[5] It is applicant's contention that the respondents do not own any immovable property which is not mortgaged nor do they own any movable property sufficient to satisfy any cost order against them should their application fail. The applicant further submitted that the respondents' application is vexatious in that it relates to matters dating back 10 years ago. Further that even if the respondents succeed in the main application, the debt has prescribed. The applicant also raised the financial prejudice he would suffer if he succeeds in the main application and the respondents are unable to pay his costs.

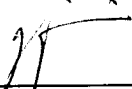
[6] The respondents are opposing the application. It is submitted on behalf of the respondents that they do own property which is not burdened by a mortgage bond. In his answering affidavit the first

respondent contends that he owns a 20% share in a company in which he, the applicant and their other siblings are members. It is the first respondent's contention that the company owns a farm on which both the applicant and the first respondent have built their family homes. Further it is first respondent's contention that he is a businessman in the motor industry with sufficient equity to afford any costs order granted against him and the second respondent.

[7] Having read the documents filed of record and heard argument by counsel, I am of the view that an order compelling the respondents to furnish security for costs would have the effect of precluding the respondents from proceeding with the main application against the applicant. Taking into account the facts in the main application, I am of the view that the respondents' main application is not vexatious and that equity, fairness and the interest of justice require that the respondents be allowed to exercise their right to access court.

[8] In the premises, the following order is made:

1. The application is dismissed.
2. Costs to be costs in the cause.



N. P. MNGQIBISA-THUSI

Judge of the High Court

Appearances:

Zehir Omar Attorneys for Applicant and Saleem Ibrahim Attorneys for Respondents