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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 52376/16

DATE: 22 July 2016

WILLEM ALBERT ADRIMN DREYER

Applicant

INGRID DREYER

First Respondent

SMIT & MAREE ATTORNEYS & PROPERTIES

Second Respondent

JUDGMENT

MABUSE J:

[1] This is a claim for payment of money and for other ancillary relief.

[2] By a notice of motion issued by the registrar of this Court on 4 July 2016, the applicant, a major male building contractor with business and residential addresses situated at Farm Duplex

Tzaneen, Limpopo Province, seeks against the first respondent, a female teacher with resident address at [5...]Little John Street, Robindale, Randburg and the second respondent, a firm of attorneys practising as such at [1..] Schoeman Street, Polokwane, Limpopo Province:

1. an order in terms whereof this matter is heard on an urgent basis as determined by the provisions of Rule 6(12);
2. an order declaring that the applicant is entitled to payment forthwith from the funds held in trust with the second respondent in the amount of R343,312.23 and R200,000.00, together with interest on both the aforementioned amounts at the rate of 15.5% per annum reckoned from 15 November 2015 to the date of final payment against payment by the applicant to Standard Bank in the sum of R202,685.00;
3. an order in terms of which the second respondent is directed to forthwith effect payment from the funds kept in such trust account pursuant to the court order under case number 74739/2013, to the trust account of the applicant's attorneys of record, Du Bruin Oberholzer Attorneys, Polokwane, in the amount of R343,312.23 and R200,000.00 together with interest on both the aforesaid amounts at the rate of 15.5% per annum reckoned from 15 November 2015 to date of final payment;
4. that the second respondent be ordered to retain the balance of the funds in trust, after payment of the amount in terms of prayer 3, pending taxation of the costs orders granted against the first respondent in favour of the applicant;
5. that the applicant's attorneys of record be ordered to effect payment to Standard Bank, account number [030...], held in the name of Comclin CC, in the amount of R202,685.00 from the funds paid to the payment referred to in paragraph 3. This application is opposed by the first respondent.

[3] The applicant's cause of action arises from the following set of facts. On 15 November 2015 this Court granted the following order against the first and second defendants. The first and second

defendants in the said matter which was case number 9695/14 are the first and second respondents respectively. The judgment was granted as follows:

- Claim 1
1. Payment of the sum of R343,312.23;
 2. Interest at 15.5% from date of judgment to date of payment;
- Claim 2
1. Payment in the sum of R200,000.00;
 2. Interest at 15.5% from date of judgment to date of payment; and
 3. Cost of action regarding both claims 1 and claim 2.

[4] On 1 March 2016, the respondents brought an application before Legodi J for leave to appeal against the judgment of 15 November 2015. The said application was refused with costs. The respondents thereafter petitioned the Supreme Court of Appeal for leave to appeal. The petition was lodged with the aforementioned Court on 3 May 2016. On 10 June 2016 the Supreme Court of Appeal dismissed the petition on the ground that there was no reasonable prospect of success if leave to appeal was granted and on the ground, furthermore, that there was no compelling reason to hear the appeal.

[5] On 27 June 2016 the applicant's attorneys wrote a letter to the first respondent concerning the respondent's petition to the SCA and the sum of R595,917.08. The said letter read as follows:

- "1. Ons heg hierby 'n afskrif van die bevel van die hoogste hof van appel gedateer 24 Junie 2016 en bevestig dat die aansoek om spesiale verlop afgewys is met koste.
2. In die lig daarvan het ons instruksies om u nou aan te maan tot betaling van die kapitaal en rente van die vonnis soos hierin ten gunste van ons klient verleen en werk as volg:
- 2.1 Eis 1: Kapitaal R343,312.23, rente R33,240.35 (15.5% vanaf 15/11/2015 to 27/6/2016), totaal R376,552.58.
- 2.2 Eis 2: Kapitaal R200,000.00, rente R19,364.50 (15.5% vanaf 13/11/2015 to 27/6/2016), totaal R219,364.50.

3. *Die totaal ten opsigte van die kapitaal en rente, dus uitgesluit koste wat getakseer staan te word, beloop dus R595,917 08, welke nou onmiddellik betaalbaar is. Ons sat so spoedig moontlik voortgaan met taksasie en met die restant van die fondse tans op trust by u kantore ingevolge die hofbevel daar gelaat word tot na betaling van die getakseerde koste hierin.*
4. *Betaling van voormelde bedrag moet aan hierdie kantoor gestuur word by wyse van direkte deposito/elektroniese oorplasing, in ans trust rekening voor die sluit van besigheid vandag 27 Junie 2016, die besonderhede wat as vo/g ... "*

[6] The respondents failed to pay the aforementioned amount and instead on 28 June 2016 the second respondent wrote a letter to the applicant's attorneys. Part of the said letter reads as follows:

'V klient he! skuld aangegaan om Camelin BK h/a Brutwe Projects met Standard Bank tot die bedrag van R300,000.00 sander ans klient se medewete.

Die vonnis teen ans klient is toegestaan skynbaar op die aanvanklike borgstelling deur ans klient voor die egskeidingsgeding.

U klient he! ten spyte van die klousule in die egskeidingsbevel, soos hieronder uiteengesit, nogtans voortgegaan en na die egskeiding skuld aangegaan en die voordeel daarvan vir homself toegeeien tot ans klient se nadeel...

Ons opdrag is om die bedrag nou deur ans klient verskuldig aan Standard Bank, plus rente en koste, welke deur u klient verkry is at te trek van die vonnis bedrag en aan u oar te betaal met rente tot op hede. Die uitstaande balans deur u klient verskuldig op 4 Junie 2014 he! die bedrag van R366,451.00 beloop en sat ans eersdaags voorsien van die volte uitstaande balans.

Indien u klient nie die reeling wil aanvaar nie moet u ans asseblief inlig of u instem dat ans die voile kapdale bedrag op trust hou hangende ans klient se hofaksie teen u klient vir die verhaling daarvan.

Ons heg hiermee aan die vonnisbesonderhede ..."

- [7] On 29 June 2016 the applicant managed to communicate with the attorneys acting on behalf of Standard Bank and the collection of this debt due to their client and mainly discussed the matter with one Celeste Booysen ("Booyesen"). Booysen indicated to the applicant that they had been instructed to act on behalf of their client that they were at liberty to give a 50% settlement discount on the account and that they were prepared to accept an amount of R201,685.00 in full and final settlement on condition that the settlement was paid once-off before 30 June 2016.

- [8] The applicant requested Booysen to send confirmation of the said settlement to the attorneys of record and which was in fact done on 29 June 2016.

- [9] Now we know that Standard Bank had sued the first respondent in her capacity as surety for the debts of the Close Corporation of which the applicant was the sole member. The claim was for payment a sum of R366, 451.72, interest on the said amount at the rate of 17.5% calculated daily and computed monthly in arrears from 25 November 2013 and for further ancillary relief.. Standard Bank obtained default judgment against the first respondent for payment of the said amount. The first respondent did not want to settle the debt. Accordingly her reason for refusing to pay the judgment debt by Legodi J was to retain the said amount of R543,312.23 until the applicant had paid Standard Bank the said amount of R366, 451.72 or to use the part of the money to pay Standard Bank's debt. That this was so is clear from the following paragraph:

"In opdrag is die bedrag nou deur ans klient verskuldig aan Standard Bank plus rente en koste welke deur u klient verkry is at te trek van die vonnisbedrag en aan u oar te betaal met rente tot

op hede. Die uitstaande balans deur u klient verskuldig op 4 June 2014 het die bedrag van R366,451.00 beloop en sal ans u eersdaags voorsien van die voile uitstaande balans."

[10] As indicated earlier upon receipt of the aforementioned letter, the applicant contacted the Standard Bank's attorneys and negotiated a settlement of the debt owing and payable by the first respondent to it. In terms of the settlement agreement, Standard Bank was prepared to accept the once-off payment of R202,685.00 in full and final settlement of the debt of R405,361.11 provided the said amount was paid on or before 22 June 2016. The applicants requested the Standard Bank attorneys to send a written confirmation of the settlement to his attorneys and Standard Bank's attorneys obliged.

[11] On 29 June 2016 the applicant's attorneys sent a letter to the first respondent's attorneys. In the said letter the applicant demanded payment of an amount of R394,232.09 being the amount of R595,917.08 less the sum of R202,685.00. In the same letter the applicant gave the first and second respondent's letter an authority to settle, from the funds they had, the Standard Bank debt. In the alternative the applicant demanded payment of the full amount with the undertaking that he would settle the debt of Standard Bank and having done so provide them with proof of payment. Despite the applicant's attorney's demand for payment of the said amount by close of business day on 20 June 2016, the respondents still failed to comply with the court order or the demand.

[12] Instead of complying with the terms of the applicant's attorneys' letter dated 29 June 2016, the first respondent's attorneys, in their reply dated 29 June 2016 to the applicant's attorneys' letter dated 29 June 2016, attached a copy of the summons issued by Standard Bank of South Africa Limited against the first respondent but still refused or failed or neglected to comply with the court order and the demand made by the applicant's attorneys on 29 June 2016. This time the reason they gave for failing to do so was as follows:

'V klient het ans klient se goeie naam en eer skade aangedoen met sy hande/ing en word daar voile regte voorbehou hierin.

Ons sal nie afwyk van ans voorstel van 28 Junie 2016 nie en moet u nou aandui of u die stappe wat u beoog teen ans firma oar te hou aanhangende die betekening van die dagvaarding en hangende van die saak ,alternatiewelik, of u verlang dat ans die interdik bring vir opskorting van stappe ten einde ans klient se eis teen u klient af te dwing. "

[13] On 30 June 2016 the applicant's attorneys wrote a letter to the first respondent's attorneys. In their said letter, the applicant's attorneys pointed out to the first respondent's attorneys that:

"4. Op 29 deser skryf ans aan u en fewer bewys dat Standard Bank 'n bedrag van R201,685.00 sal aanvaar fer voile en finale vereffening mits die bedrag teen 30 Junie 2016 betaal word. In hierdie skrywe merk ans dat die bedrag van R201,685.00 afgetrek kan word van die bedrag verskuldig aan ans klient, a/ternatiewelik, dat ans die bedrag sal betaal uit die fondse wat u aan ans klient moet betaal ten opsigte van die kapitaal en rente van die vonnis skuld.

5. Ons skrywe van 29 deser is dus in /yn met die wese van u skrywe van 28 deser en dat die Standard Bank sku/d afgetrek word van die kapitaal en rente verskuldig aan ans klient, alternatiewe/ik dat hierdie skuld vereffen sa/ word.

6. Verder is dit gemene saak dat daar drie kostebevele teen u klient verleen is en welke koste nou getakseer staan te word en welke koste betaalbaar is uit die fondse wat deur u ingevolge die hofbevel op trust gehou word. Hierdie kostebevele is ten opsigte van die aksie, die aansoek om verlof tot appel en ten opsigte van die aansoek op spesiale verlof tot appel. Alhoewel die kosteberekening nag nie gefinaliseer is me, sal daardte kostebeve/e 'n astronomiese bedrag beloop en heel waarskyn/tk meer as R250,000.00 (konserwatiewe rowwe skatting).

7. *Daar is dus met respek, gegewe die voormelde, geen rede waarom u nie aan ans aanmaning en voorstel van 29 deser kan voldoen nie. U word nou finaal versoek om die betalings (op enige van die twee alternatiewe basisse soos vervat in ans skrywe van 29 deser) te bewerkstellig voor 13:00 vandag, 30 Junie 2016 by versuim waarvan ans instruksie by die klient sal bekom insake verdere aksies."*

[14] Instead of complying with the court order or acting in accordance with the demand contained in the applicant's attorneys letter dated 29 July 2016, the first respondent's attorneys demanded payment from the applicant of a sum of R500,000.00 being in respect of damages allegedly suffered by the first respondent *"as herm good name and a fama was destroyed as well as her ability to buy movable and fixed property in future ..."*

Furthermore they stated as follows in the same letter:

"Further our client is indebted to Standard Bank to the amount of R366,451. 72 together with interest and cost plus future cost towards the amount of R30,000.00 in order to rescind the judgment entered against her name.

We hereby demanded (sic) from you to pay the total of R896,451. 72 into our bank account as specified below within 10 days from the date hereof

Failing which summons will be issued."

[15] It was when all else had failed that the applicant approached this court for the relief that he seeks in the notice of motion.

[16] Needless to say, the first respondent launched against the applicant, a counter-claim in which she seeks an order in terms of which the funds already kept in the trust account of the second respondent are detained in the said trust account pending the finalisation of the litigation

between Standard Bank of South Africa Ltd and the first respondent as well as the litigation proceedings between the first respondent and the applicant which she will institute within 30 days of the order, if granted. The first respondent also opposes the application of the applicant by way of a document she calls an answering affidavit, (and I will explain later why I say a document that the first respondent calls an answering affidavit).

[17] The first respondent states that the judgment that Standard Bank obtained against her was obtained in her absence and without her knowledge. She contends that the said judgment stands to be rescinded on various grounds. She proceeded in the said document to set out the grounds on which the said judgment will be attacked. The said judgment had, according to the said document, seriously prejudiced and negatively affected her credit worthiness, her good name and reputation.

[18] Furthermore she states in the said document that once the said judgment was rescinded Standard Bank would be entitled to continue with its action against her and the close corporation; that she would have to file a plea to the claim. For that reason her ability in respect of which she might be held liable by Standard Bank in terms of the particulars of claim was an amount of far higher than the amount claimed by the applicant or to be transferred to the applicant. Then she contends that she has recourse for the undetermined amount that she has to pay Standard Bank in respect of the applicant's debts, in terms of the deed of settlement and that at their divorce action in which the applicant undertook to be liable for all the debts of the close corporation and in terms of which furthermore, the applicant indemnified her from any liability in respect of the debts of the close corporation. For this reason she states that under the circumstances the amount that is currently in her attorney's trust account should remain in trust pending that action as the applicant may have to pay her if she is found to be liable.

[19] Secondly, she states that she may have to institute an action against the applicant for defamation and the prejudicial effect the judgment has had on her good name and reputation as well as her credit worthiness. She claims to sue the applicant on the foregoing basis for R500,000.00.

[20] Thirdly, she has a further claim against the applicant of R160,000.00 in respect of the outstanding maintenance.

[21] Fourthly, she has been advised that the settlement agreement she entered into with the applicant and which was confirmed by the divorce court did not reflect their true intention and for that reason it should be rectified. She will approach the court and seek rectification of the said settlement agreement.

[22] Fifthly, and lastly, the first respondent states in the said document that on his own version, the applicant points herself in a precarious financial position; that he is suffering from financial hardships and that most probably he will not be able to pay any amount of the claim of Standard Bank in respect of Standard Bank or in respect of any other claims to be instituted against him.

[23] In his replying affidavit the applicant took the points firstly, that the first respondent's "answering affidavit" has not been commissioned, which is correct and secondly, that the verifying affidavit of Eben Smith was signed and ostensibly commissioned by a commissioner of oath in Polokwane, already on 11 July 2016 before the date on which the first respondent would have signed her founding affidavit. It is crucial to point out that although these points were raised in the replying affidavit, Mr. du Plessis who appeared for the first respondent did not, both in his argument and heads of argument deal with these two crucial aspects. There are material defects in both the document filed on behalf of the first respondent and the affidavit of Eben Smith. I have persistently referred to the document that the first respondent referred to as an answering

affidavit as a document. It is a document that was designed to be an affidavit. It is not an affidavit because it has not been commissioned. In the absence of a properly commissioned affidavit there is no evidence before the court. See in this regard **Wingaartd vs Grabler 2010(6) SA 148 ECG at 150 par. 8** thereof.

"An affidavit is a written statement sworn to before a commissioner of oath. The oath is administered in terms of the recommendations made in terms of s. 10 of the Justices of the Peace Commissioners of Oath Act 16 of 1963. In terms of Rule 61 of the rules of this Court a notice of motion must be supported by "an affidavit as to the facts upon which the applicant relies for relief". As such, an affidavit constitutes the factual evidence before a court, upon which matter is to be adjudicated. See Minister of Land Affairs and Agriculture and Others vs D & F Weve/1 Trust and Others 2008(2) SA 184 SCA at 200 D. The same principle applies in the magistrate's court. See Joes and Barca/ Civil Procedure of the Magistrates Court of South Africa 9th Edition, volume 2 at 55-12A. It follows that if there is no affidavit before a court in application proceedings in support of the relief claimed, there is no evidence upon which the relief can be granted.

8. *It is trite that in certain circumstances a court has the discretion to condone strict compliance with the regulations prescribing the administration of oaths, but, where no oath were administered, there is no evidence before the court and the unattested statement is pro nonscripto, and incapable of condonation. The second and third appellants are accordingly not before this court, and they were also not before the court a quo."*

Secondly the affidavit of Eben Smith is useless in the light of the fact that it contains untruths. On this basis alone there is no reason why this application should not succeed and the counter-application should not be dismissed. Thirdly, even if the document filed by the first respondent was an affidavit it would be bad in law because it contains numerous conclusions and not facts.

[24] Even if the affidavit were properly commissioned, the respondents were clearly in contravention of a court order. An order of court rightly or wrongly granted must be obeyed. The respondents opt to have shown respect not only for the order of this court but also for the fact that the Supreme Court of Appeal has dismissed their petition. The attorney acting for the first respondent ought to have advised her that it was only proper for her to comply with the court order. We live in a country where the Rule of Law reigns supreme. Our courts cannot accommodate people who flaunt the law openly. The respondents have intentionally defied the court order. Their defiance of the court order by raising excuses after excuses to frustrate the applicant were not lawful and justifiable. *"All orders of this Court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside."* See **Culverwell vs Beira 1992(4) SA 419 WLD at page 494 A.**

[25] Accordingly I make the following order:

1. the application is granted;
2. it is hereby declared that the applicant is entitled to payment forthwith from the funds held in trust with the second respondent in the amount of R343,312.23 and R200,000.00, together with interest on both the aforesaid amounts at the rate of 15.5% per annum reckoned from 13 November 2015 to date of final payment, against the payment by the applicant to Standard Bank in the amount of R202,685.00;
3. the second respondent are hereby directed to forthwith effect payment from the funds kept in trust account pursuant to the court order under case number 74739/2013, to the trust account of the applicant's attorneys of record, De Bruin Oberholzer Attorneys, Polokwane in the sum of R343,312.23 and R200,000.00, together with interest on both the aforesaid amounts at the rate of 15.5% per annum reckoned from 13 November 2015 to date of final payment;

4. the second respondent be and are hereby ordered to retain the balance of the funds in trust, after payment of the amount referred to in prayer 3 supra, pending taxation of the cost orders granted against the first respondent;
5. the applicant's attorneys are hereby ordered to effect payment to Standard Bank, account nr. 030101735, held in the name of Comclin CC, in the amount of R202,685.00 from the funds paid pursuant to the applicant referred to in paragraph 3 supra;
6. the first respondent is hereby ordered to pay the costs of this application on attorney and client scale;
7. the counter-application is hereby dismissed with costs.

P.M.MABUSE

JUDGE OF THE HIGH COURT

Appearances
:

Counsel for the applicant:

Adv. SG Gouws

Instructed by:

De Bruin Oberholzer Attorneys

c/o AL Maree Inc.

Counsel for the first

Adv. R du Plessis (SC)

respondents: Instructed by:

Smit & Maree Attorneys

***c/o Joubert & Scholts
Attorneys***

Date Heard:

19 July 2016

Date of Judgment:

22 July 2016