IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 67546/2018

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

20/11/2019
DATE

SIGNATURE

In the matter between :

NDLOVU: DABANE ISAACK	**APPLICANT**
and	
BOTHMA: HERMANUS JOHANNES WESSELS	**FIRST RESPONDENT**
BOTHMA INCORPORATED ATTORNEYS	**SECOND RESPONDENT**
THE LAW SOCIETY OF THE NORTHERN PROVINCES	**THIRD RESPONDENT**

JUDGMENT

A.J. LOUW AJ

[1] The application to be adjudicated upon is an application under Uniform Rule 30. I refer to this application hereinfurther as "the Rule 30 application".

[2] The Rule 30 application is brought by the First and Second Respondents in the main application wherein the Applicant in the main application applies on notice of motion that a certain loan agreement that was entered into on the 19th November 2013 be declared null and void and that the First and Second Respondents be ordered to pay the sum of R3 450 000.00 to the Applicant in the main application and for ancillary relief. The main application was issued and served upon the First and Second Respondents on the 10th December 2018.

[3] The First and Second Respondents then filed a notice in terms of Rule 30 on the 4th January 2019 that reads as follows:

*"**BE PLEASED TO TAKE NOTICE** that the Notice of Motion proceedings instituted by the Applicant is an irregular or improper proceeding for the purpose of deciding real and substantial disputes of fact which properly fall for decision by way of action proceedings.*

***TAKE FURTHER NOTICE** that Respondents submit that a real and bona fide foreseeable dispute of fact between the parties exists ex facie the contents of the founding affidavit and the annexures in support of the application and is bound to develop into a number of material questions of fact, not resolvable merely on affidavit.*

***TAKE FURTHER NOTICE** that the Applicant is hereby afforded an opportunity of removing the irregular or improper motion proceeding, within*

10 (ten) days from date of service hereof, failing which the Respondents shall apply for an order that the motion proceeding be set aside."

[4] The main application is for the annulment of the loan agreement by the Applicant, Mr Ndlovu, and will be referred to as the "main application". The Rule 30 application by the First and Second Respondents in the main application (Mr Bothma and Bothma Incorporated Attorneys) will be referred to, as stated before as "the Rule 30 application". I however continue to refer to the parties as in the main application. Accordingly Mr Ndlovu the Applicant is referred to as the Applicant and Mr Bothma and Bothma Incorporated Attorneys are referred to as either the Respondents or the First and Second Respondents where necessary.

[5] The main application alleges that the Applicant was represented by the Second Respondent in the person of the First Respondent in a motor vehicle accident claim under the Road Accident Fund Act. In a settlement under the Road Accident Fund Act an amount of R4 million was awarded to the Applicant. Then on the 19th November 2013, the very day of the trial in the Road Accident Fund matter, the Applicant and an entity known as Brakspruit Boerdery Trust therein represented by the Second Respondent in his official capacity as the apparent only trustee of the Brakspruit Boerdery Trust, the Applicant as lender lent and advanced to Brakspruit Boerdery Trust as the borrower the sum of R4 million. The gist of the loan agreement is that Brakspruit Boerdery Trust borrows R4 million at the rate of 4% per annum from the Applicant. Brakspruit Boerdery Trust will pay a monthly sum of R4 500.00 to the Applicant, which amount may be

increased to a maximum of R5 000.00 per month. The term of the loan is 10 years from the date on which the capital sum is in fact paid to the Brakspruit Boerdery Trust. There is no provision for any security.

[6] For purposes of the Rule 30 application I need not dwell unduly on the main application. Suffice to say that the Applicant says he was not informed as to what documents he had to sign and if he had known that he was loaning the money to the Brakspruit Boerdery Trust he would not have singed the loan agreement. It is also alleged that the Third Respondent was approached for assistance but that the Applicant was turned away on grounds thereof that he had signed the loan agreement.

[7] Before dealing with the issue for adjudication I need to point out the following:

7.1 I am concerned by what is contained in this court file. I fully accept that there might be a perfectly logical explanation for what has occurred here as regards the loan agreement. However, the soft terms of the loan, the lack of security; the fact that the Applicant is a boilermaker who, on the papers in the main application, is unable to work arising from the injuries that he had sustained and that lends for all intents and purposes the whole of his R4 million award for 10 years to the Brakspruit Boerdery Trust are all facts that make me extremely uncomfortable.

7.2 The conduct of the Third Respondent in turning away the complaint of the Applicant on the basis that there is nothing to be done as the Applicant had signed the loan agreement, is disconcerting to say the least. I directly say that the Third Respondent simply did not properly consider the facts. This is a matter that must be investigated. If the First Respondent, Second Respondent and the Brakspruit Boerdery Trust (as represented by the First Respondent in his official capacity as trustee thereof) acted properly, then so be it. However, the facts of the matter scream out for at least an investigation.

[8] At the outset and before hearing the parties I called the legal representatives to my chambers and requested argument specifically on why the matter must not be referred to the National Prosecuting Authority for investigation and to the Legal Practice Council for investigation. I will deal with these issues in the judgment.

[9] The court file that was presented to me did not contain the notice in terms of Rule 30 dated the 4th January 2019. In the circumstances it appeared to me as if the Rule 30 application in itself is defective because the Respondents would not be entitled to issue a Rule 30 application if there was not compliance with Rule 30(2)(b) affording the Applicant 10 days of removing the cause of complaint. Both legal representatives were in agreement that if that is the case, then the Rule 30 application would in itself be irregular. However, after the argument the representatives of the parties attended at my chambers and Mr Ascar, for the First and Second

Respondents, rectified the apparent irregularity of the application itself by presenting me with the notice in terms of Rule 30 dated the 4th January 2019. It now is in the court file.

[10] Mr Ascar widened the basis of the Rule 30 application in argument by referring thereto that apart from the fact that, as the notice states, factual disputes are foreseen and that an action should be instituted instead of an application as regards the setting aside and a declaration of voidness of the loan agreement in the main application, he also argued that the Brakspruit Boerdery Trust is not properly cited and before the court.

[11] In the argument I raised the issues of referral to the Legal Practice Council and to the National Prosecuting Authority. Mr Ascar argued that the Legal Practice Council already declined to assist. On the National Prosecuting Authority his argument was that the Applicant never laid a charge. Mr Ascar did not press for the special costs order as applied for in the Rule 30 application and requested, should the Rule 30 application be granted, for costs on the party and party scale.

[12] Mr Matladi argued that the Law Society should not have rejected the request for their involvement. He argued that the Applicant has belief in the soundness of the main application and that no oral evidence would be required.

[13] In reply Mr Ascar argued that should the Rule 30 application be dismissed, the Respondents require time to file an opposing affidavit. I indicated that

should the application be dismissed I indeed intend to afford the Respondents an opportunity to file an opposing affidavit in the main application. Mr Matladi agreed with this approach.

[14] The possible issue of the irregularity of the Rule 30 application fell away in view of the fact that the Rule 30(2)(b) notice dated the 4th January 2019 was produced.

[15] I do not make any finding on whether the approach to file a Rule 30 notice in the circumstances of the matter is a correct application of the provisions of Rule 30. However, for purposes of the judgment I will assume that the Respondents could have filed the Rule 30 notice and will assume that Rule 30 accordingly applies in the circumstances of the matter. (I must say that I have grave doubt whether Rule 30 could have application but need not decide this issue).

[16] Only the main application with its founding affidavit has been filed in the main application. No answering affidavit wherein the allegations made by the Applicant in the main application are dealt with, has been filed by the First and Second Respondents. Accordingly, at this time, it is at best speculation to say that there will be factual disputes or that there will be factual disputes to the extent that the matter cannot be adjudicated on the papers.

[17] The Rule 30 application is based purely and simply on the allegations as quoted above. It is limited to an attack on the main application on the basis

that factual disputes should have been foreseen and that action procedure instead of motion procedure was accordingly called for. This is done before any answering affidavit in the main application has been filed. Assuming that Rule 30 could possibly apply in the circumstances, the Rule 30 notice and application is premature.

[18] Accordingly I do not entertain the additional references to the fact that the trust is not properly cited. It is unquestionably so as Mr Bothma (the First Respondent) is only cited in his personal capacity. Accordingly the Brakspruit Boerdery Trust is not a party to the main application. I cannot advise the Applicant how to conduct his case but I am convinced that the Brakspruit Boerdery Trust as represented by its trustee in his official capacity as trustee of that trust, ought to be a party to the main application. That is however not the basis upon which the Rule 30 application was brought and is not the basis upon which any judgment in these proceedings are called for. The joinder of the said trust is also not necessary for purposes of finalisation of this interlocutory application. It does not have a direct and substantial interest in this interlocutory application between the Applicant and the Respondents.

See: ***Amalgamated Engineering Union v Minister of Labour*** 1949 (3) SA 637 (A).

[19] The normal approach in motion court proceedings where factual disputes arise, is set forth in the *locus classicus* judgment of ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** (3) SA 1155 (T) at 1163 and 1165

and numerous cases thereafter confirming the approach. This approach must be read with Rule 6(5)(g) which says that where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular and without affecting the generality of the previous statement the court may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or other person to be subpoenaed to appear and be examined and cross-examined as a witness or may refer the matter to trial with appropriate directions as to pleadings or definition of issues or otherwise.

[20] Even if a case is made out under Rule 30 the court retains a discretion whether or not to grant the application. I am convinced that no case under Rule 30 has been made out but even if it might in any circumstances be found that the Respondents made out a proper case under Rule 30 I am of the opinion that this is a matter where I must exercise my discretion in favour of not granting the Rule 30 application and direct that the parties continue with the main application. I will provide my reasons for this hereunder.

See: ***Northern Assurance Company Ltd v Somdaka*** 1960 (1) SA 588 (A) at 595 A – C as well as

Soundprops 1160 CC v Karlshaven Farm Partnership 1996 (3) SA 1026 (N) at 1033 A – C.

[21] I immediately concede that the contents of the main application consist of allegations that normally would elicit factual disputes and that normally should rather be canvassed in action proceedings.

[22] However, the Applicant is the *dominus litis* and decides in what court and what type of proceedings to institute. It is the Applicant's right and also his peril and it is not for me to speculate at this time as to what allegations will be in dispute.

[23] A number of observations are necessary. The Applicant in his Heads of Argument refers to a purported "Limitation Act 1980". I am convinced no such an act exists. Possibly it is intended to be a reference to the Prescription Act 68 of 1969 but it is not for me to speculate on this issue. No argument was presented in this respect. In the First and Second Respondents' Heads of Argument the complaint *inter alia* is that if motion proceedings are utilised in the main application, then their opportunity to cross-examine the Applicant and for the presentation of oral evidence are flaunted. That will depend on the contents of the answering affidavit and secondly on whether the matter is referred to trial or to oral evidence on specific issues. The Applicant also is subject to the possible dismissal of his application if a factual dispute was foreseen. Accordingly none of the parties' rights are taken away if the Rule 30 application is not successful.

[24] A submission was made that under Rule 6 cancellation of a contractual agreement cannot be ordered in motion proceedings. No authority for this submission was provided and I am convinced no authority for this categoric

view will be found. Unquestionably cancellation of agreements can and are ordered in motion proceedings.

[25] The Respondents must be afforded the opportunity to file an answering affidavit in the main application. I propose to give them such opportunity.

[26] In the circumstances the Rule 30 application does not succeed and costs must follow the event.

[27] I make the following order:

1. The application in accordance with the provisions of Uniform Rule of Court 30(1) dated the 31st January 2019 is dismissed.

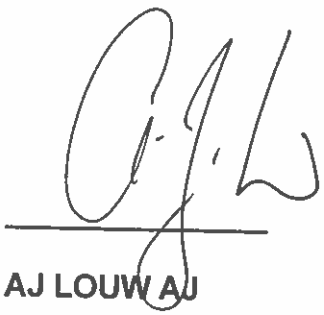
2. The First and Second Respondents are afforded 15 days from the day on which they have knowledge of this order to file an answering affidavit in the main application (if they are so advised) or to file a notice under Rule 6(5)(d)(iii) (if they are so advised).

3. The main application is to be dealt with under the provisions of Rule 6 after expiry of the 15 day period referred to in prayer 2.

4. It is directed that the Registrar must be requested to furnish a copy of the contents of this file to the Legal Practice Council and in particular the Professional and Ethics Committee of the Legal Practice Council. Similarly a copy of the contents of this file must be provided to the Gauteng Provincial Legal Practice Council and in particular its Professional and Ethics Committee. The Registrar

is requested to request these bodies to investigate whether the conduct of the First and Second Respondents as regards the loan agreement referred to in the main application comply with the ethical rules and standards as prescribed under the Legal Practice Act.

5. The First and Second Respondents jointly and severally are ordered to pay the costs of the Rule 30 application on party and party scale.



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