REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 5654/2011

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE: 21/04/2021
SIGNATURE .....

In the matter of:

BEE FOUNDATION (PTY) LTD	First Plaintiff
LEDWABA, LAZARUS MAPONYA N.O.	Second Plaintiff
MCKENZIE, WERGELE STAFFORD N.O.	Third Plaintiff
KOKA, JERRY SEKELE N.O.	Fourth Plaintiff

and

IDADA TRADING 108 (PTY) LTD t/a IDADA PLASTICS Defendant
(Reg No: 2005/041623/07)

J U D G M E N T

MAUMELA, J

1. This application concerns three interlocutory aspects namely:

   1.1 The question whether or not IDADA is entitled to costs for having pursued an interlocutory Rule 30A application. In this regard, reference is made to paragraph 11.2 of the 'Joint Minute for the First Case Management Conference on 11 October 2019, before this court.

   1.2 The admissibility, in the prospective trial proceedings, of the founding and answering affidavits served and filed during the course of motion proceedings under the same case number (5654/2011) which preceded this dispute being referred to trial. In this regard, reference is made to paragraph 13 of the 'Joint Minute for the First Case Management Conference on 11 October 2019 before this court.

   1.3 The admissibility of a transcript concerning evidence given at a section 415 insolvency inquiry in respect of BEE`s insolvent estate, which transcript is annexed to its founding affidavit in the former motion proceedings and has been separately discovered in the subsequent trial proceedings. In this regard, reference is made to paragraph 13 of the 'Joint Minute for the First Case Management Conference on 11 October 2019 before this court.

THE THREE ASPECTS

2. The applicant proceeded to deal with the three aspect as follows: The **first** interlocutory aspect concerns: The question whether IDADA

Is entitled to costs arising from its rule 30 application: Concerning this aspect, the applicant submits that on the 27th of March 2019, BEE served a notice of bar on IDADA, which gave rise to IDADA's Rule 30(2)(b) complaint and subsequent Rule 30(2) application. The applicant submits that BEE`s "irregular' notice of bar was the result of an erroneous interpretation of Rule 28(8).

The relevant procedural background

3. On the 7th of February 2019, BEE served and filed a notice of intention to amend its POC in terms of Rule 28(1). IDADA did not object to this and subsequently, BEE served and filed its amended pages on 22 February 2019. Pursuant to BEE having served and filed its amended pages in terms of Uninform Rule 28(7), it was incumbent upon IDADA to decide whether it would consequentially amend/adjust its plea within 15 court days, as provided for in terms of Uniform Rule 28(8) or not. This 15-day period expired on the 15th of March 2019. After IDADA failed to adjust its plea in terms of Rule 28(8), BEE served and filed a notice of bar on the 27th of March 2019, requesting IDADA to consequentially adjust its pleading within 5 days.

4. BEE accepts that on a proper interpretation of Rule 28(8), it does not envisage compelling a party to adjust its pleading by way of a notice of bar. It is clear that a party under Rule 28(8) i.e. IDADA, has the prerogative to decide if it wishes to adjust. BEE's notice of bar subsequently gave rise to IDADA's notice in terms of Rule 30(2)(b). After BEE opted not to withdraw its notice of bar, IDADA pursued a substantive interlocutory application, seeking to strike out/set aside the notice of bar. After service of IDADA`s substantive interlocutory application, BEE proceeded to withdraw its notice of bar, without

tendering costs.

The prevailing law on Rule 30 notices and applications

5. Despite BEE accepting that its notice of bar can be regarded as "irregular", it persists in its view that IDADA's Rule 30(2)(b) notice and subsequent substantive application was wholly inappropriate and unnecessary. BEE's argument is based on the following:

5.1 A *sine qua non* for the delivery of a notice in terms of Rule 30 and any subsequent substantive application in terms of the said rule - is that the applicant, in this instance IDADA, must show that it has or will suffer actual prejudice relating to the continuation of the litigation at hand, if the so-called irregularity is not removed;

5.2 The fact that IDADA does not even mention the word prejudice in its founding affidavit renders its application fatally defective, considering that it circumvents the entire purpose of a founding affidavit in Rule 30 proceedings[1] and;

5.3 It is trite law that IDADA must stand and fall by its founding affidavit.[2]

6. The applicant submits that at best for IDADA, its attorney of record could have contacted the attorney of record for BEE and

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1. To this end, the reason why the application is brought on affidavit, in the first place, is that it allows a litigant to detail in the founding affidavit the procedural prejudice which the complaining litigant has or will suffer if the complaint is not removed or set aside.
2. *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D). See also *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at p 635H-636A.

communicated that the notice of bar serves no procedural purpose and could not compel the subsequent adjustment or amendment of its plea already filed. Applicant submits that such a suggested approach, would have accorded with the *locus classicus* in this Court on Rule 30 applications and specifically considering the concept of prejudice. In the matter of *De Klerk v De Klerk*[3], which also concerned an irregular notice of bar, Flemming J held as follows at 425 and 426:

"There was the aforesaid absence of prejudice worthy of serious mention; and very limited effort would have been involved in raising a query with the defendant's representative. The combined effect of those considerations called for the taking of non-litigious remedial steps or steps to obviate litigation. Such steps could be taken speedily, effectively and cheaply."[4]

"The prejudice which is relevant for the purpose of Rule 30(1) requires more than that. It is true that on receipt of the notice of bar the attorney had to read it, to consider it, and to decide what to do next. But at the point where that decision was taken, he had to take the correct decision. At the point of making that decision (why which time most of the effort and costs already alluded to had come into being), he had to be led by the prejudice which his client would suffer if he did not bring a Rule 30 application. He had to decide whether his client would be prejudiced in the further conduct of the case if an irregular step, which I will take the present notice to be, is not set aside. When the matter comes before Court that is the nature of prejudice which the Court in turn, should assess."

"It must again be emphasised that Rule 30(1) applications should succeed only if there is prejudice related to proceeding with the litigation. After the plaintiff's attorney

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3. 1986 (4) SA 424 (W).
4. Read with *SA Metropolitan Lewensversekeringsmaatskappy BK v Louw N.O.* 1981 (4) SA 329 (O) at 333G-H and 334.

in the present case had read and considered the notice of bar the correct decision was not to deliver a Rule 30(1) application. The limited prejudice that was recognisable should have been coped with in another fashion. It is not necessary for the decision of this application to speculate whether a different conclusion might become possible because of additional facts, example, if defendant insisted upon receiving a plea despite being informed of the plaintiff's allegation that same had already been delivered. The application being unjustified and an order of Court not being required to remove or prevent prejudice or injustice, the application is refused."

7. The applicant makes the point that there is no prejudice, if the further conduct of the case is not affected by the irregularity and the irregular step, so to speak, can simply be ignored.[5] The applicant points out that IDADA simply elected not to amend or adjust its plea pursuant to it, (the applicant), having effected its amendment in terms of Uniform Rule 28(7). It argues that this conscious election meant that the "irregular" notice of bar brought no negative or prejudicial effect to bear on IDADA. It did not prejudice IDADA in conducting further litigation, considering that IDADA had no intention of consequentially adjusting or amending its pleading.

8. According to the applicant, on this score, BEE could never have argued that IDADA in any way, shape or form, would be precluded from adjusting or amending its pleading in terms of Rule 28(8), considering that it had no intention to do so. The applicant submits therefore that the Rule 30 notice and subsequent substantive application was pursued as a result of a misconceived attempt to prove a point, without considering the actual purpose of Rule 30 and

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[5]. *Afrisun Mpumalanga (Pty) Ltd v Kunene N.O. and Others* 1999 (2) SA 599 (T) at 611B-F.

whether or not IDADA stands to suffer actual or procedural prejudice in continuing its litigation.

9. The applicant cites following *dicta* in the case of *SA Metropolitan Lewensversekeringmaatskappy Bpk v Louw N.O*[6] where the court confirms the stated position as follows: *"Even if this generalization needs qualification, the exercise of the Court's discretion has been consistently led by the presence or absence of prejudice in relation to the exercise of a party's procedural right or duty to respond to a communication received, or to the taking of a next step in the sequence of permissible procedures to ripen the matter for proper orderly hearing. Where such prejudice is absent, a decision to set the irregular proceeding aside will not be given. On the contrary, the irregularity may be overlooked.*[7]*"*

"With the picture of absence of prejudice which has been sketched, no other order "seems meet" (Rule 30(3)) than to dismiss the application or at most to go through the formality of condoning the irregularity. In such circumstances defendant could not have expected an order with any substantially different effect. In this context any hopes that may have lived for delay or for harassment by way of an order as to costs (for which objects opposition to the amendment application may have been the key for a Rule 30(1) application) are irrelevant. The Rule 30(1) application of defendant was accordingly not justified.

Insofar as the Court's discretion as to costs is concerned, it would in any event seem to be inappropriate to regard a party who has achieved nothing more substantial (and could never have hoped to achieve anything more) than the Court's concurrence with a submission that the other party's procedure was not technically

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6. 1981 (4) SA 329 (O).
7. See *Herbstein and Van Winsen*, The Civil Practice of the Superior Courts in SA (3rd ed), at 386 and in particular the decisions cited therein.

correct, as a "successful" party. It appears to be more correct to ask whether a necessity to incur the costs of the Rule 30 (1) application was caused by plaintiff. See Texas Co (SA) Ltd v Cape Town Municipality[8]*. I believe that in the circumstances that was not the case.*

10. On the basis of the above, the applicant argues that IDADA's Rule 30 application and/or its persistence for costs should be refused. It argues further that IDADA should be ordered to pay BEE's costs of pursuing this argument in these proceedings considering that its Rule 30 application is inherently flawed for absence of any actual procedural prejudice.'

11. The **second** interlocutory aspect has to do with: <u>The admissibility of the founding and answering affidavits</u>: The applicant submits that for purposes of determining the admissibility of the affidavits, this court should consider the following:

    11.1 The pleadings and witness statements filed of record insofar as it speaks to the fundamental requirement of relevance in respect of admissibility and

    11.2 The contents of the affidavits in issue, considering this court`s inherent discretion to consider the contents of any documentary evidence forming the subject matter of a dispute regarding its admissibility.

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[8]. 1926 AD 467 at 488.

12. The applicant submits that the obligation by IDADA to its signed and commissioned founding affidavit and its answering affidavit was opportunistic. It points out these documents were served and filed within the context of motion proceedings. As a result, the dispute was referred to trial. Applicant submits that the relevant affidavits and their contents addressed the exact same issues which now serve before this Court in terms of the pleadings and witness' statements filed of record. According to the applicant, the affidavits constitute documentary evidence which is directly relevant towards:
(i). the primary facts pleaded by the respective parties and
(ii). the secondary evidence sought to be detailed in the witnesses' statements.

13. The applicant argues that there could be no procedural prejudice to either party, or any prevailing legal rationale for not allowing this Court to take cognisance of what has been stated under oath by the respective parties prior to this matter having been referred to trial and affording each of the respective parties the option to either cross-examine on the contents of the affidavits or refer to the evidence contained therein for purposes of legal argument. Applicant makes the point therefore, that the test for admissibility of the relevant affidavits is the same for any other documentary evidence and that it remains relevant.

14. According to the applicant, relevance is essentially a matter of reason and common sense, based upon a blend of logic and experience lying outside the law.[9] It views that on this score, it is

[9]. *R v Mathews* 1960 (1) SA 752 (A) at 758 and *Ex part Rosch* [1] All SA 319 (W) at 227.

highly relevant that the witnesses it seeks to call at the trial, each of which will file a witness's statement, as well as the solitary witness on behalf of IDADA, Mr. Bennie Du Plessis, who will also file a witness's statement, were the deponents to the affidavits signed and commissioned on behalf of the respective parties when this dispute initially fell to be decided within the context of motion proceedings. Amongst other things, BEE seeks to rely on the allegations and statements of fact made by IDADA in its answering affidavit, through its sole director, shareholder and controlling mind Du Plessis, to either potentially:

(i). persuade this Court, as a result of its relevance, to draw certain inferences and make certain findings; or

(II) to showcase certain contradictions in the evidence of IDADA which either discredits, disproves or disadvantages IDADA's version.

BEE argues that in the circumstances, there can be no question as to the admissibility of the affidavits signed and commissioned and filed of record for purposes of the prospective trial court hearing.

15. The **third** interlocutory aspect concerns: <u>The admissibility of the 415 insolvency inquiry transcript</u>. BEE submits that for purposes of determining the admissibility of the 415 insolvency inquiry transcripts, this court should consider the following:

15.1 The pleadings and witness statements filed of record insofar as it speaks to the fundamental requirement of relevance in respect of admissibility,

15.2 The contents of the affidavits in issue and the contents of the 415 insolvency inquiry transcripts in issue, considering this court`s inherent discretion to consider the contents of any documentary evidence forming the subject matter of a dispute regarding its admissibility and

15.3 BEE seeks to utilise the transcripts to potentially achieve the following:

15.3.1 to test the credibility of IDADA`s version as proffered by its proposed witness Du Plessis, ("the first purpose").

15.3.2 to prove the truth of certain facts and admissions made by Du Plessis during the course of the inquiry ("the second purpose").

16. On the main, BEE submits that the section 415 insolvency inquiry transcripts and its contents are admissible for both its stated first and second purposes at the prospective trial hearing, considering the following:

16.1 That as a matter of law, the transcripts are not hearsay.

16.2 That even if this court finds that the transcripts are hearsay, it, (BEE), hereby seeks its admission in terms of section 3 of the Law of Evidence Amendment Act[10], ("the Evidence Amendment Act") and

[10]. Act Number 45 of 1988

16.3 That IDADA itself under oath, in terms of the signed and commissioned answering affidavit of Du Plessis, within the context of the former motion proceedings, already stated that it, (IDADA), does not dispute the evidence which Du Plessis gave at the 415 insolvency inquiry.[11]

17. BEE asserts that IDADA's stated position under oath, that the evidence given by Du Plessis at the 415 insolvency inquiry is not disputed, inherently undermines its, (IDADA's), attempt to dispute its admissibility in these proceedings.[12] The transcripts are not hearsay and therefore admissible as a matter of law.

18. BEE submits that the rationale behind certain authorities[13], ("the dissenting authorities"), having refused to admit evidence into subsequent civil proceedings, given within the context of an insolvency inquiry, (specifically insofar as BEE`s stated *second purpose* is concerned), was the following:

18.1 The general principle is that evidence given by a witness in his/her personal capacity at an insolvency inquiry, could only be admissible at subsequent civil proceedings against that person himself/herself. This was in line with the common law rule against hearsay.

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11. Para 23 of IDADA`s answering affidavit.
12. What it does showcase is that the proffered evidence given by Du Plessis and reflected in the transcripts of the 415 insolvency inquiry is damning for IDADA insofar as its indebtedness towards BEE is concerned.
13. *Simmons NO v Gilbert Hamer & Co Ltd* 1962 (2) SA 487 (D); *Du Plessis NO v Oosthuizen; Du Plessis NO v Van Zyl* 1995 (3) SA 604 (O); *O`Shea NO v Van Zyl NO & Others* [2011] ZA (SCA) 156; *Rhodesian Corporation Ltd v Globe and Phoenix Gold Mining Co Ltd* 1934 AD 293 at 304.

18.2 This general principle would similarly apply to the scenario where an agent makes admissions in an insolvency inquiry, which admissions are then sought to be used against his principal, in subsequent civil proceedings. This is also in line with the common law rule against hearsay.

19. BEE submits that it should be uncontroversial that the *dissenting authorities* do not preclude it, (BEE), seeking to use the transcripts for its stated *first purpose* and therefore the real dispute regarding the admissibility of the transcripts, should only concern its, (BEE), stated *second purpose*.[14] BEE submits further that the evidence given by Du Plessis at the 415 inquiry, does not fall under any secrecy provisions in terms of the Insolvency Act, and the use of such evidence in these subsequent civil proceedings against IDADA, is subject to the ordinary rules of evidence, i.e. relevance and hearsay.[15]

20. BEE submits that the facts of this dispute confirm the following:

20.1 Du Plessis is the sole director and shareholder of IDADA and therefore the only individual who can speak on behalf of IDADA, meaning that it constitutes IDADA's controlling mind.[16]

20.2 Du Plessis signed the written sale agreement forming the subject matter of Claim 1 and authored the AOD forming the

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[14]. On this score BEE relies on the dicta in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (4) SA 389 (D) at 397.
[15]. On this score BEE relies on the dicta in *Van Zyl and Another N.N.O. v K N.O. and Another* 2014 (4) SA 452 (WCC) at [41] – [44].
[16]. Para 1 of IDADA's answering affidavit. pp 33 of 415 transcript marked "Item 2.14".

subject matter of Claim 2 which serve before this court for determination.

20.3 The sole purpose of the 415 insolvency inquiry held on the 18th of September 2009 and 23 October 2009 respectively, was to question Du Plessis *qua* representative of IDADA, regarding IDADA`s acquisition of Dotcom`s liability towards BEE.[17]

21. BEE submits therefore that in contradistinction with the facts of the *dissenting authorities* in this matter, Du Plessis is the only individual who can speak for IDADA and he has always been aware that his evidence given at the 415 insolvency inquiry on the 18th of September 2009 and the 23rd of October 2009, was on behalf of IDADA. Therefore, the mischief which the hearsay rule is aimed at preventing, the inability to test under cross-examination the probative value of the statements made by Du Plessis at the 415 inquiry, is not present, considering that IDADA is able to cross-examine Du Plessis, (a witness whom IDADA itself seeks to call on its behalf regarding the statements and admissions made by him at the 415 insolvency inquiry. In the circumstances, the facts of this matter can be distinguished from the *dissenting authorities*, which in turn negate against the evidence contained in the transcript which is regarded as hearsay.[18] Even if the court finds that the transcripts are hearsay in respect of BEE`s stated second purpose; it is admissible under s 3 of the Evidence Amendment Act.

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17. See BEE`s witness statements filed of record. See also the line of questioning in the transcripts marked "Item 2.14" and "Item 2.16".
18. This matter constitutes an exception to the rule stated in *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 223 at 225-6.

22. BEE submits that in terms of this alternative argument, it views that the transcripts should be admitted under s 3 of the Evidence Amendment Act[19], either; (i). provisionally in terms of s 3(1)(b) read with s 3(2) or (ii). finally in terms of s 3(1)(c).[20]

23. It was submitted that the factors which support the admission of the transcripts for BEE`s stated *second purpose* in terms of s 3(1)(c) can be summarised as follows:

23.1. The joint liquidators, to no fault of their own, come as strangers to the estate of BEE and are primarily reliant on documentary evidence to prove its claim against IDADA [See: 3(1)(c)(i)].

23.2. The evidence at the 415 inquiry was focussed solely on the transaction between IDADA and Dotcom leading to IDADA acquiring Dotcom`s indebtedness towards BEE [See: 3(1)(c)(ii)].

23.3. The evidence is tendered for BEE`s stated *first purpose* – to potentially discredit Du Plessis as a witness, if required – and BEE`s stated *second purpose* - to prove the truth of certain statements and admissions made by Du Plessis at the 415 inquiry [See: 3(1)(c)(iii)].

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19. Supra.
20. On this score, BEE relies on the judgment in *ICM Clearing and Forwarding Pty Ltd and Another v Croninent Chrome SA Pty Ltd* [2017] ZAGPJHC 245 (12 June 2017).

23.4. The probative value of the evidence is substantial considering that the transcript records IDADA`s only representative recounting its transaction with Dotcom approximately 2 years thereafter – instead of – witnesses giving evidence at the prospective trial, approximately 12 years after the relevant transaction [See: 3(1)(c)(iv)].

23.5. BEE has already indicated its intention to call Du Plessis as a witness under a subpoena *duces tecum* for purposes of introducing his evidence given at the 415 inquiry and reflected in the transcripts [See: 3(1)(c)(v)].[21]

23.6. IDADA cannot be prejudiced considering it does not dispute the contents of the transcripts nor is it unable to cross-examine Du Plessis on the contents of the transcripts which may establish or infer its indebtedness to BEE [*vide*: 3(1)(c)(vi)] and

23.7. Du Plessis is the controlling mind of IDADA and the main protagonist in this dispute [See: 3(1)(c)(vii)].

24. BEE submits that this Court has one of three options insofar the admissibility of the 415 transcripts are concerned:

24.1. Rule that the transcripts are not hearsay and therefore admissible without further ado; or

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[21]. It is noteworthy that IDADA could only ever be represented by Du Plessis. Therefore, Du Plessis is the only individual who could instruct IDADA`s attorneys of record. Despite this, IDADA`s attorneys of record recalcitrantly refuse to facilitate the service of a subpoena *duces tecum* for Du Plessis, who is to give evidence on behalf of IDADA in any event, through their offices.

24.2. Rule that the transcripts are hearsay insofar as BEE`s stated *second purpose* is concerned, however, admissible under s 3 of the Evidence Amendment Act either provisionally or finally; or

24.3. Rule that the transcripts are hearsay - only insofar as BEE`s stated *second purpose* is concerned - and also refuse its admission under s 3 of the Evidence Amendment Act.

25. The respondent submitted that the aspect of costs depends on the success or otherwise in the substantial matter. The applicant submits that costs for this application can only be recouped through an order made herein. However, the applicant submits that because the defendant admits the anomaly, then costs should be ordered to be paid at a punitive scale. It submits that the costs should have been tendered from the beginning. The court finds no course for costs to be ordered to be paid at a punitive scale and it is inclined to order costa at an ordinary scale.

26. BEE contends that it has made its case for an order to be granted which provides for the interlocutory aspects here in raised. On the basis of all the facts stated above, the court finds that the applicant made its case for the order sought, save that if finds no sufficient basis for costs to be granted at a punitive scale. In the result, the following order is granted.

ORDER

26.1 The defendant`s rule 30 application is dismissed with costs.

26.2 The papers filed of record in the motion proceedings preceding this trial action under case number 5654/11 and reflected on pages 116-245 of the plaintiff`s essential documents bundle order to be admissible for purposes of the trial hearing without qualification.

26.3 The section 415 transcript reflected on pages 25-78 and 82-109 of the plaintiff`s essential documents bundle is declared to be admissible without qualification for purposes of the trial hearing.

26.4 It is ordered that the costs of this interlocutory hearing is to be paid by the defendant.

T.A. Maumela.
Judge of the High Court of South Africa.