



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 42542/2018

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

30 September 2022

KENNETH DAVID BRAUDE N.O.

First Applicant/First Defendant

JULIAN RICHARD POLATINSKY N.O.

Second Applicant/Second
Defendant

MORIA BRUYNS N.O.

Third Applicant/Third Defendant

and

JAMES BLACKWOOD-MURRAY

Respondent/Plaintiff

In re:

JAMES BLACKWOOD-MURRAY

Plaintiff

and

KENNETH DAVID BRAUDE N.O.

First Defendant

JULIAN RICHARD POLATINSKY N.O.

Second Defendant

MORIA BRUYNS N.O.

Third Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 30 September 2022.

JUDGMENT

MALINDI J:

Introduction

[1] This matter has been a subject of a previous order and judgment of Dippenaar J on 19 October 2021. Consequent to that judgment, in particular paragraph 37 thereof, the matter has been subject to case management.

[2] The first case management conference (CMC) was held on 28 February 2022.

[3] The second CMC was called for 26 August 2022. The CMC was not held as I had issued directives on the same day that the defendants bring this application.

[4] The application to compel the furnishing of security for costs (“security”) was heard on 27 September 2022.

The issue

[5] The issue for determination is whether the defendant has irregularly launched the application under Rule 47(3) instead of Rule 47(6). The plaintiff did not pursue its Rule

30(2)(b) application and it stands to be dismissed with costs as between attorney and client, excluding the costs of the second counsel.

Submissions

[6] Counsel for the defendants, Mr R Shepstone, submitted that because the plaintiff failed to furnish security as previously agreed in the amount of R200 000.00, alternatively that if such security was indeed paid in the plaintiff's attorney's account, it was not issued to the defendants before this application was launched. He contested the plaintiff's submission that security was issued on 26 August 2022 before the launching of the application.

[7] Ms N Nyembe, for the plaintiff, submitted that since security was furnished in the amount of R200 000.00, the current application should be for the increase of such security to R500 000.00 and the application should be brought in terms of Rule 47(6). She submitted that even if the defendants effect an amendment to the notice of motion at this stage, the supporting affidavit would not meet the Rule 47(6) requirements which are that the amount originally furnished is no longer sufficient. She submitted further that the defendants seek relief that is different from the one agreed upon regarding in which account payment is to be made.

Analysis

[8] Ms Nyembe submitted that the defendant essentially seek what they already have and must justify why R200 000.00 is not sufficient, and why security should be paid into a third party's trust account contrary to the previous agreement that it be paid into the plaintiff's attorneys' trust account.

[9] The defendants submit that the application was launched because there is no evidence that security was furnished and deny being informed to this effect. They point to the correspondence of 1 July 2022 to the effect that although payment of R200 000 was agreed for security on or before 5 April 2022. They plead that they were not furnished with proof of such payment. The contents of this letter have not been put in dispute. The same letter contains a demand for the payment of defendants' taxed costs for a previous demand on 30 March 2022. If the plaintiff deposited the R200 000.00 into his attorney's account as alleged with reference to the proof of payment dated 7 April 2022, those costs would have been paid long ago. There is not even a tender to settle these costs.

[10] I am of the view therefore that the R200 000.00 had not been received as security for costs. If I be wrong in this regard then at least by 1 July 2022 the defendants had not been furnished with security for costs. Annexures "A" and "B" to the answering affidavit referring to the R210 000.00 deposited by J2-D2 Limited are scantily described as proof of payment and proof of receipt into the plaintiff's attorney's trust account of the amount. No averment is made that it had been received as security in respect of the agreement between the parties.

[11] The agreement on security was subject to the plaintiff furnishing proof of payment into the plaintiff's trust account by no later than 5 April 2022. Uploading the unsatisfactory proofs of deposit and receipt of the amount of R210 000.00 did not comply with Rule 47(5).

[12] The authorities referred to by the plaintiff to deflect the award of the relief are not helpful in view of the findings that I have made. They need not be traversed.

[13] Generally *peregrine* are obliged to provide security for costs of litigation in which they are involved, as opposed to *incolae*.¹

[14] That the plaintiff has a prospect of success does not disturb this principle unless in a specific case exceptional circumstances have been demonstrated and it would not be in the interests of justice to exclude a plaintiff merely on their inability to provide security for costs.

Costs

[15] Costs on the attorney and client scale are warranted. The Rule 30(2) notice, dedicating a lot of vigour into averments that this application should have been launched by the long form (Form 2(a) to the Schedule to the Rules) was vexatious.

[16] Furthermore, already in October 2021, Dippenaar J observed and acknowledged the defendants' frustration that the plaintiff was engaging in a stratagem to stall the prosecution of this case. It is also my observation. This tactic should be discouraged by imposing appropriate costs orders against the truant party.

Conclusion

[17] I have decided to exercise my discretion in favour of ordering the furnishing of security for costs by the plaintiff. The application is not moot. The plaintiff failed to comply with the previous agreement on security for costs.

[18] The following order is therefore made:

¹ *Barker v Bishops Diocesan College & Others* 2019 (4) SA 1 (WCC) at 26; *Magida v Minister of Police* 1987 (1) SA 1 (A).

1. The respondent is compelled to furnish security for costs in the amount of R500 000.00 into a third-party attorney's trust account within 10 (ten) days from the date of this order.
2. The respondent is ordered to furnish the applicants with the proof of payment of the security for costs in terms of paragraph 1 above.
3. Failing compliance with the order in paragraph 1 above, the applicants are granted leave to set down their application in terms of Rule 47(4) on a date to be determined by the Honourable Justice G Malindi.
4. The Respondent is ordered to pay the applicants' costs of this application, including the costs of the Rule 30(2) application, on the scale as between attorney and client.

G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

FOR THE FIRST, SECOND AND THIRD APPLICANTS: R Shepstone
N Jongani

INSTRUCTED BY: Fairbridges Wertheim Becker Attorneys

COUNSEL FOR RESPONDENT: N Nyembe

INSTRUCTED BY: Noa Kinstler Attorneys

DATE OF THE HEARING:

28 SEPTEMBER 2022

DATE OF JUDGMENT:

30 SEPTEMBER 2022