JOHANNES JACOBUS VAN ZYL v DAVID JOHN BRUNI, N.O. AND 2 OTHERS

CASE NO. (P) I 1992/2001

2005/06/16

Maritz, J.

PRACTICE

Practice – abuse of civil process – inherent power to prevent – necessary not only to protect other litigants but also itself and the administration of justice – in interest of justice, fairness and transparency that no litigant should be allowed to manipulate procedures of ulterior purposes – concept cannot be uniformly and all-inclusively defined – takes place when procedures permitted by Rules are used in pursuit of extraneous objective – although court will not countenance such abuse, it will exercise powers in that regard sparingly, with great caution and only in clear cases

CASE NO. (P) I 1992/2001

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHANNES JACOBUS VAN ZYL

APPLICANT

and

DAVID JOHN BRUNI **FIRST**

RESPONDENT

(in his capacity as trustee
in the insolvent estate of
Stefanus Jacobus Maritz)

ASANTE SANA PROPERTIES CC **SECOND RESPONDENT**

BAREND NICOLAAS VENTER **THIRD RESPONDENT**

CORAM**:** MARITZ, J.

Heard on: 2004.07.08

Delivered on: 2005.06.16

JUDGMENT

MARITZ, J.: In an application brought on Notice of Motion, the applicant sought - (a) an order setting aside the exceptions of the respondents dated 17 March 2004 filed of record in the main action and (b) a declarator barring the respondents from pleading to the applicant's claim in that action. The application is based on the contention that, "whatever the merits of the latest number of exceptions are", they should not be allowed because they are part of a delaying tactic adopted by the respondents to frustrate the final adjudication of the main action. The applicant submits that they therefore constitute an abuse of the civil process of this Court and deprive the applicant of his constitutional right to a fair trial.

I pause here to point out that the applicant is the “plaintiff” in the main action and the first to third respondents are the “first to third defendants” as well as the “first to third excipients” in the exceptions filed in that action. After I had heard arguments presented by Mr Grobler, appearing on behalf of the applicant, and Mr Heathcote, on behalf of the respondents, I made an order dismissing the application; directing the applicant to pay one half of the cost of the respondents in the application; directing the respondents to obtain a date for the hearing of the exceptions within 7 days of the date of the order, failing which, the applicant was given leave to move an application for the striking of the exceptions (if necessary supported by an affidavit) and directing the Registrar of the High Court to enroll the exceptions as soon as possible. I indicated at the time that the reasons for the order would follow. I now provide them.

The procedural backdrop against which this application falls to be considered may be summarised as follows: The applicant issued summons against Investment Trust Company (Pty) Limited (as first defendant) and the second and third respondents (as second and third defendants respectively) on 25 July 2001. After they had entered Appearance to Defend the claim, Investment Trust Company (Pty) Limited and the second and third respondents filed a Request

for Further Particulars. The applicant complains that the request was made on the very last day allowed for such a pleading under Rule 21. He conveniently neglects to mention that the Further Particulars in response thereto were only filed on 24 October 2001 – well outside the time period within he should have done so. When the no plea was filed by 8 January 2002, the applicant delivered a notice in terms of Rule 26 requiring the then defendants to deliver a plea within 5 days, failing which, they would be barred from pleading.

The notice was met by an exception taken by all three the then defendants on 21 January 2002 (the "first exception"). One of the grounds on which the first exception was taken, was that the applicant had sued Investment Trust Company (Pty) Limited in it nominal capacity as trustee in the insolvent estate of Mr S J Maritz whereas a company is disqualified under s. 55(h) of the Insolvency Act, 1936, to be appointed as a trustee in the insolvent estate of any natural person. The applicant conceded that that exception had been well taken but nevertheless delayed delivery of his Notice of Intention to Amend the Particulars of Claim until 18 April 2002. The Notice of Intention to Amend contemplated not only the substitution of one party (Investment Trust Company (Pty) Limited) for another (the first respondent) and consequential amendments but also sought to amend quite a number of other averments made in the

Particulars of Claim and to introduce at least a further four paragraphs thereto. The then defendants objected to the amendment and the substitution contemplated thereunder. As a consequence, the applicant brought an application for the substitution and the amendments sought. The application was opposed and, after the exchange of affidavits, heard on 6 December 2002 when I made the following order:

> "1. The first respondent, cited as first defendant in the main action commenced by way of summons between the parties, is substituted for the fourth respondent in this application.
> 2. The applicant is allowed to amend the Particulars of Claim in the main action dated 19 July 2001 as set out in the Notice of Amendment dated 18 April 2002 as amended.
> 3. The applicant is directed to pay the costs of the first respondent in this application occasioned by its citation as first defendant in the main action from the date of issuing of summons to date.
> 4. The fourth respondent, as first defendant in the main action, shall be entitled to request Further Particulars, file any exception or any further pleadings as he may in law be advised or wishes to do.
> 5. The applicant is directed to pay the costs of this application, including the costs of the respondents' opposition thereto."

The applicant filed the amended Particulars of Claim and amended Further Particulars on 13 December 2002 and, when the respondents failed to deliver a Plea by 24 February 2003, the applicant again filed a Notice of Bar in terms of Rule 26. This notice

was again met by an exception dated 12 March 2003 (the "second exception"). The exception was based on the provisions of sections 80*bis* and 82 of the Insolvency Act, 1936. It alleges that the applicant failed to aver that the sale of the immovable property in the insolvent estate had been authorised by the Master of the High Court and/or the creditors of the insolvent.

The exception was set down for hearing on 20 October 2003 but, on 2 October 2003, the applicant filed a Notice of Intention to Amend to remove the cause of the exception. As a result, the exception was removed from the roll by agreement and the respondents filed a Request for Further Particulars on 21 November 2003. The applicant replied thereto more than two months later, i.e. on 6 February 2004. When the period expired for the respondents to file their pleas, the applicant was quick to file yet again a Notice of Bar. This Notice was again met by a number of exceptions (the "third exception") - to which I shall refer to more extensively hereunder. It is the third exception which prompted the applicant to launch this application. The gravamen of the applicant's complaint is contained in paragraphs 6 and 7 of his counsel's Founding Affidavit (which I quote *verbatim*):

> "6. It is clear that the defendants are busy with a delaying tactic causing considerable hardship for the plaintiff that wants the matter to be finalised. In this regard the following:

6.1 All the exceptions that were taken on 12 March 2003 and on 17 March 2004 could have been taken when the defendants took the first exceptions on 21 January 2002.

6.2 Although the defendants were entitled to file an exception in the time allowed to file the next pleading, I do not believe the object of Rule 23(1) is to allow a defendant to wait each time till he is barred to plead, to string out a number of exceptions.

6.3 I submit that whatever the merits of the latest string of exceptions are, the defendants are abusing the process of Court, which they shall not be allowed to do.

7. Apart from abusing the process of Court, the defendants also infringe on the constitutional right of the plaintiff to have a fair trial in terms of Section 12 of the Namibian Constitution: In this regard the following-

7.1 The matter is dragging on since 25 July 2001, that is nearly 3 years.

7.2 The parties have not advanced beyond the stage of Further Particulars. The Defendants have not pleaded yet and wait each time till they are barred to string out a number of exceptions."

The inherent power of this Court to prevent an abuse of its process is deeply entrenched in civil litigation (See: *Western Assurance Co v Caldwell's Trustee*, 1918 AD 262; *Corderoy v Union Government*, 1918 AD 512 at 517 and H*udson v Hudson & Another*, 1927 AD 259

at 267; *Nedcor Bank Limited & Another v Gcilitshana & Others*, 2004(1) SA 232 (SE) at 241D. In exercising that power, the Court does not only protect the other litigants in the suit but also itself (See: *F Beinash v Wixley*, 1997(3) SA 721 (SCA) at 734D and the administration of justice.

Its rules and procedures are designed for the better administration of justice by facilitating the expeditious ventilation and hearing of disputes at as little cost to the litigants as possible (see: *SOS Kinderdorf International v Effie Lentin Architects,* 1993(2) SA 481(Nm) at 491E) In the interest of justice, fairness and transparency, no litigant "should be allowed to manipulate the procedures of Court in a way which would cause a palpable injustice to another" (*per* Horn AJ in *Hart & Another v Nelson*, 2000(4) SA 368 (E) at 375E-F). Precisely which conduct may be characterised as an abuse of the civil process of court cannot be uniformly and all-inclusively defined. In *Phillips v Botha*, 1999(2) SA 555 (SCA) at 565E-F, Hoexter JA referred to the following "terse but useful definition" by Isaacs J in the Australian High Court case of *Varawa v Howard Smith Co. Ltd.*, (1911) 13 CLR 35 at 91:

> " ... (T)he term 'abuse of process' connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the

> legal claim upon which the Court is asked to adjudicate, they are regarded as an abuse for this purpose ..."

This was also recognised by Mahomed CJ in *Beinash v Wixley*, *supra* at 374F-G:

> "What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective."

Whilst the Court will not countenance such an abuse and has a duty to prevent it without hesitation where necessary, it will nevertheless exercise that power sparingly, "with great caution and only in a clear case" (*per* De Villiers JA in *Hudson v Hudson & Another*, 1927 AD 259 at 268) and "in the light of all the relevant facts and circumstances, and with due regard to the intention of the legislature as reflected in the statutory provisions, if any, pertaining to the particular proceedings" (*per* Erasmus, J in *Nedcor Bank, Limited and Another v Gcilitshana and Others*, *supra*, at 241D-F) whilst bearing in mind the cautionary remarks of Nienaber JA in *Brummer v Gorfil Brothers Investments (Pty) Limited & Andere,* 1999(3) SA 389 (SCA) at 414I-J:

> "Die blote aanwending van 'n bepaalde hofprosedure vir 'n doel anders as waarvoor dit primêr bestem is, is tiperend, maar nog nie voldonge bewys, van *mala fides* nie; daarvoor is die verdere afleiding nodig dat die resultaat wat beoog is, ... onbehoorlik was. 'n Sodanige aanwending (vir 'n doel anders as waarvoor dit primêr bestem is) is dus 'n kenmerk, eerder as die definisie, van *mala fides*."

And further at 416B-F:

> "Oogmerk of motief, selfs 'n moedswillige of kwaadwillige motief, is oor die algemeen nie 'n onregmatigheid- of ongeldigheidskreterium nie. (vgl. *Dress Designs (Pty) Limited v G Y Lounge Suite Manufacturers (Pty) Limited & Another*, 1991(2) SA 455(W) 475C - 476A). Vandaar die *dictum* in *Tjose v Minister of Justice*, 1951(3) SA 10A te 17G-H:
>
> > 'For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal', ...
>
> 'n Onbehoorlike motief kan, soos reeds gesê, egter wel 'n faktor wees waar misbruik van die hofproses ter sprake is. Die formele beeindiging van 'n geding is deel van die hofproses. Die uitbuiting, op 'n onbehoorlike wyse of vir 'n onbehoorlike doelwit, van 'n bepaalde hofreël wat op die beeindiging van die geding betrekking het, sou dus binne die verskynsel van misbruik van die hofproses val ..."

(*Trans: The mere application of a particular court procedure for a purpose other than that for which it was primarily intended is typical, but not complete proof, of mala fides; for that a further inference is needed, that the intended result … was improper. Such an application of a court procedure (for a purpose other than what it was primarily intended) was thus a characteristic, rather than a definition, of mala fides (at 414I-J).*

A purpose or motive, even a mischievous or malicious motive was not in general a criteria for unlawfulness or invalidity (compare: Dress Designs (Pty) Limited v G Y Lounge Suite Manufacturers (Pty) Limited and Another, 1991(2) SA 455(W) 475C - 476A). Hence, the dictum in Tjose v Minister of Justice, 1951(3) SA 10A at 17G-H:

> *'For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal', ...*

An improper motive, as already said, could well be a factor where the abuse of court process was in issue. The formal termination of an action was part of the court process. The exploitation, in an improper way or for an improper purpose, of a particular Court Rule which relates to the termination of an action would thus fall within the concept of abuse of the Court process..." (at 416B and D/E-F)).

It is with this approach in mind that I turn to consider the applicant's complaints as they appear in paragraphs 6 and 7 of the Founding Affidavit which I have quoted earlier in this judgment.

I do not agree that the second and third exception could have been taken together with the first exception on 21 January 2002. The first respondent was not even a party to the action on that date! He only substituted the party previously cited as first defendant (i.e.

Investment Trust Company (Pty) Limited) when the Court granted the substitution on 6 December 2002 in terms of paragraph 1 of the order quoted earlier. When the substitution was ordered, the Court expressly declared that the first respondent would be "entitled to request further particulars, file any exception or any further pleadings ...." (my emphasis). Only after the first respondent had become a party to the main action did he acquire the right to except to the amended Particulars of Claim.

The second exception (which was the first one taken by the first respondent) also appears to have been well taken. I am not impressed by the applicant's explanation that the second exception "had no substance" and that he only agreed to compromise by amending his Particulars of Claim to remove the ground of objection because he "had no money to waste for another day in Court". I do not deem it necessary for purposes of this application to deal with the import of sections 80*bis* and 82 of the Insolvency Act, 1936. Suffice it to say that the applicant amended his Particulars of Claim by the insertion of a sub-paragraph in which he avers that the first respondent, in his capacity as Trustee, was authorised to sell the immovable property by the Master of the "Supreme Court" and/or the creditors of the insolvent estate.

It will be noted that the applicant is seeking to set aside the third exception “whatever the merits (thereof) ... are”. If that was indeed the basis on which the applicant was seeking the relief prayed for, I would have dismissed the application without hesitation – and I would have done so for a number of reasons.

I accept that the third exception could have been filed at the same time as the second exception, i.e. on 12 March 2003. The third respondent, however, explained the reason for his failure to raise it at an earlier point in time: due to an oversight, his counsel did not identify the grounds of that exception at an earlier point in time. When he later did, he advised that the exception would have to be taken without delay. He cautioned that if it would be delayed until the main action go to trial, the respondents would in all likelihood be penalized with costs for having delayed it.

The third exception, as will become apparent soon, raises rather complicated issues of law and addresses alleged shortcomings in the pleadings which are not immediately apparent – they require careful perusal and close scrutiny whist bearing a number of legal principles in mind. Although counsel for the respondents might be criticised for having failed to identify those grounds of exception at the same time as he did those raised as part of the second exception, some degree of latitude should be allowed for missing a less obvious point

on a first, albeit careful reading, of the pleadings. Any legal practitioner, who, reflecting on years of practice, can honestly say that he or she has never missed a point which could have had an important bearing on a case, is either most fortunate or has practiced in blissful ignorance of the finer points of law. Whilst respondents may well have to bear the consequences of their counsel's failure to raise those grounds of exception together with those of the second exception, he is to be commended for having raised them when he did, rather than delaying the exception until shortly before the commencement of the trial.

I understand the applicant's frustration with the lack of progress in this case. He must realise, however, that he or his counsel, is to be blamed for much thereof. Many of the pleadings and notices filed by or on behalf of the applicant, were filed well - sometimes months - outside the periods prescribed by the Rules of Court. One of the most significant delays was the one of approximately 7 months after the respondents had taken the second exception. Had the applicant amended his Particulars of Claim in March of 2003 instead of October 2003, the exchange of pleadings would have been expedited significantly. Furthermore, applicant is also to be blamed for not having kept the respondents to the periods prescribed in the Rules of Court. Lastly, and most importantly, given the amendments which the applicant was constrained to effect to his Particulars of

Claim after the first and second exceptions and delays caused by the application for substitution of one of the initial defendants, it is apparent that the cause lying at the heart of the delay is to be found in his counsel's failure to draft the Particulars of Claim in accordance with the requirements of law from the outset. The applicant therefore, bears the brunt of the responsibility for the slow progress of the case. That being the case, he can hardly complain that he is being denied his right to a fair trial because of the lack of progress.

Notwithstanding the applicant's contention that the third exception should be dismissed irrespective of the merits thereof, I must nevertheless consider in the context of the "abuse of civil proceedings" whether the exception has been taken frivolously, vexatiously or *mala fides*.

According to the amended Particulars of Claim most recently filed, the plaintiff's principle claim is for (a) rectification of the terms of a Deed of Sale relating to an immovable property from the insolvent estate administered by the first respondent; (b) the cancellation of the Deed of Sale entered into between the first respondent and the second respondent and the cancellation transfer of the property purportedly sold in terms thereof into the name of the second respondent and (c) an order directing that the property should be transferred to the applicant against payment of the purchase price

of N$200 000-00 in terms of the rectified Deed of Sale. In the alternative, the applicant claims from the first, second and third respondents, jointly and severally, the one paying the others to be absolved, damages for the unlawful repudiation of the Deed of Sale by the first respondent and the *mala fides* sale thereof to the second respondent.

Summarised, the first ground of the third exception is one based on the *exceptio non adampleti contractus;* the second ground is that N$235 535-20 of the alternative claim of N$265 525-20 as damages constitutes “special damages” without any averment having been made in the Particulars of Claim that those damages were within the contemplation of the parties at the time that the contract was concluded and that the contract was entered into on the basis of such knowledge; the third ground is that the alternative claim is not preceded by any allegation that it is only brought in the event of the principal claim being dismissed and that the Particulars of Claim therefore lacks an allegation which “triggers” the applicant’s entitlement to the alternative relief; the fourth ground is that the applicant seeks to hold the respondents jointly and severally liable for payment in terms of the alternative claim whereas the applicant’s claim against the first respondent is based in contract and that against the second and third respondents in *delict* and,

therefore, they cannot in law be sued as joint wrongdoers who are jointly and severally liable.

The applicant's counsel took issue with the sustainability of the exception. He referred the Court to numerous authorities on principles which are rather trite in the adjudication of exceptions, causes of action and the differences between *facta probanda* and *facta probantia*. I need not discuss those authorities and principles for purposes of this judgment – lest I compromise the Court which will in due course be called upon to consider the merits of the exceptions. Suffice it to say that, his contentions about the merits of the exception (or rather the lack thereof) notwithstanding, I do not understand him to say that the exception is frivolous or so patently lacks merit that it can be dismissed without more.

For these reasons I am satisfied that the third exception was not raised with an ulterior purpose - such as a delay of the proceedings – in mind. I accept that the failure to raise that exception together with the grounds of the second exception was as a result of an oversight on the part of the respondents' counsel. I accept that he did not deliberately hold it back as a proverbial "card up his sleeve" and played at a later stage with the intention of causing further delay in the hope that it would wear the applicant down and that he would lose "faith in his case". Because of the respondents failure to

raise the grounds of the third exception earlier and, having waited every time until a Notice of Bar had been served before they filed an exception, I deemed it appropriate to deprive them of some of the costs incurred in opposing this application.

It is for these reasons that I have made the following order on 8 July 2004:

"1. The application is dismissed.
2. The applicant is ordered to pay one half of the costs of the respondents in this application.
3. The respondents are directed to obtain a date for the hearing of the exceptions within 7 days of the date of this order, failing which the applicant shall be entitled to move an application for the striking of the exceptions on the same papers, if necessary, supported by an affidavit.
4. The Registrar of the Court is requested to set the exceptions down for hearing on the Court's roll as soon as possible."

_____

MARITZ, J.