



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

2018.01.26
DATE

[Signature]
SIGNATURE

26/1/17

CASE NUMBER: 36842/16

DATE: 26 January 2018

HENDRIK CHRISTOFEL DE BEER

Applicant

V

HEINRICH VON LANDSBERG

First Respondent

UNIVERSAL PULSE TRADING 367 (PTY) LTD

Second Respondent

ALEXIPROX (PTY) LTD

Third Respondent

JUDGMENT

MABUSE J:

- [1] This matter conflates two major applications. One is an application in terms of Rule 30(2) of the Uniform Rules of Court. Strictly speaking it was erroneously referred to by the parties as an application in Rule 30(2) instead of an application in terms of Rule 30(1). This Rule 30(1) states that:

“A party to a cause in which an irregular step has been taken by any other party may apply to Court to set it aside.”

On the other hand Rule 30(2) deals with the steps that must be followed before an application in terms of Rule 30(1) can be launched. It provides as follows:

“An application in terms of sub-rule (1) shall be on notice to all the parties specifying the particulars of the irregularity or impropriety alleged, and may be made only if –

- (a) the Applicant has not himself taken a further step in the cause with the knowledge of the irregularity;*
- (b) the Applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent and opportunity of removing the cause of complaint within ten days;*
- (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of sub-rule (2).”*

- [2] On the basis of the provisions of the said Rule 30(1), the Applicant sought, by the Notice of Motion issued by the Registrar of this Court on 16 August 2017, against the First and Second Respondents, the following order:

“1. An order declaring the combined summons instituted by the Respondents against the Applicant and Alexiprox (Pty) Ltd, (the Third Respondent), dated 12 July 2017 under case number 36842/2016 under an already existing action with case number 36842/2016 between the Applicant and the First and Second Respondents) issued on 9 May 2016 an irregular step;

2. *The combined summons issued by the First and Second Respondents under case number 36842/2016 dated 12 July 2017 is set aside;*
3. *The First and Second Respondents are ordered to pay the costs of this application on the scale as between attorney and client;*
4. *Further and/or alternative relief.”*

[3] In this application [in terms of Rule 30(1)], the parties are as follows. The Applicant is Hendrik Christofel de Beer. He is the plaintiff in an action he himself has instituted against the First and Second Respondents. The First and Second Respondents are in that particular action the Applicant has instituted, the First and Second Defendants respectively. The case is number 36842/2016.

[4] The First Respondent in this application, Heinrich Von Landsberg, is an adult businessman and the director of companies with his address located at 282 Maggs Street, Waltloo, Pretoria. The Second Respondent, Universal Pulse Trading (Pty) Ltd, is a company with limited liability with its place of business located at 282 Maggs Street, Waltloo, Pretoria. The Third Respondent, Alexiprox (Pty) Ltd, is a company with limited liability. Its registered office is located at 25 Fish Eagle Street, Silver Lakes Estate, Pretoria. The Applicant's son and wife are the directors of the Third Respondent. The Third Respondent has neither filed any papers nor is it represented in this application.

[5] The Applicant, in his capacity as the Plaintiff, instituted an action against the First and Second Respondents as the First and Second Defendants respectively under case number 36842/2016 on 9 May 2016. In the course of the said action, the Applicant, as the Plaintiff, applied for summary judgment. Based on the opposing affidavit of the First Respondent as the First Defendant, the First Respondent and the Second Respondent opposed the said application for summary

judgment. On 26 July 2016 the Court granted summary judgment in favour of the Applicant against the First and Second Respondents, the one paying and the other to be absolved, in the amount of R2,989,208.00 plus interest and costs.

[6] The First Respondent had made the following allegations in the said opposing affidavit:

- “41. In the weeks that followed I approached Absa Bank and Nedbank and negotiated substantially reduced settlements with both banks. By way of example, Absa Bank alleged to have a claim in the amount of R8,5 million over the Willow Acres property. I purchased this claim for a cash amount of R2,5 million. The saving generated through this transaction exceeded R6 million.*
- 42. Absa Bank claimed payment in an amount of approximately R15 million related to the Plaintiff’s property in Silver Lakes Golf Estate. I have settled this claim with Absa’s Attorney in a cash amount of R4.5 million. The saving generated through this transaction exceeded R10.5 million.*
- 46. The complaints concerning commissions paid third parties by the Second Defendant is also misplaced. Firstly, I had exclusive control over the affairs of the Second Defendant and did not require the Plaintiff’s approval to make payment of legitimately owed commissions. Secondly, all commissions were paid on the strength of valid invoices received by the Second Defendant.”*

[7] On 28 July 2016, the Applicant delivered a Notice in terms of Rule 35(12) on the First and Second Respondents. By this Notice the Applicant requested the First and Second Respondents to produce for inspection, within five (5) days of service of the said Notice, certain documents referred to in the said Opposing Affidavit. The said documents were:

- 7.1 copies of all settlement and purchase agreements referred to in paragraphs 41 and 42 of the said Opposing Affidavit; and,

7.2 copies of all invoices payable to third parties received by the Second Respondent and documents pertaining to the payment thereof referred to in paragraph 46 of the said Opposing Affidavit.

[8]

8.1 Notwithstanding the effluxion of a period of five days from 28 July 2016, the First and Second Respondents failed to comply with the Applicant's Notice in terms of Rule 35(12). On 10 August 2016 the Applicant served the First and Second Respondents with a Notice in terms of Rule 30A. In this Notice, the Applicant required the First and Second Respondents to comply with his Notice in terms of Rule 35(12) within 10 days from the date of service of the said Notice in terms of Rule 30A.

8.2 In addition, the said Rule 30A Notice warned the First and Second Respondents that should they fail to comply with the Applicant's Notice in terms of Rule 35(12), within the period referred to in the Rule 30A Notice, the Applicant would on Notice apply to compel the First and Second Respondents to comply with Rule 35(4) Notice or for the dismissal of the First and Second Respondents' defence to the Applicant's claim.

8.3 Still the First and Second Respondents failed to heed the Applicant's Notice in terms of Rule 30A. Consequently, the Applicant approached the Court to enforce compliance by the First and Second Respondents with the Applicant's Rule 35(12) Notice. The Court, per Adams AJ, granted the Applicant the following order on 30 September 2016:

"1. The Respondents are ordered to comply with the Applicant's Notice in terms of Rule 35(12) dated 28 July 2016 and the Applicant's subsequent Notice in terms of Rule 30A dated 10 August 2016 within 7 days from the date of this order."

[9] On 23 February 2017 the First and Second Respondents approached the Court with an application for leave to appeal the granting of the summary judgment in favour of the Applicant.

Judge Kollapen refused the application for leave to appeal. After the Court had dismissed the application for leave to appeal, the First and Second Respondents then approached the Supreme Court of Appeal with a petition for leave to appeal against the said summary judgment. On 15 May 2017 the Supreme Court of Appeal dismissed the said petition.

[10] The First and Second Respondents failed to comply with the order of Adams AJ. This prompted the Applicant to approach the Court with another application to compel the First and Second Respondents to comply. On 19 May 2016 Mali J granted the Applicant the following order, among others:

- “1. The Respondents are hereby ordered to comply with the order of this Court granted on 30 September 2016 under case number 26842/16 within 7 days from the date of this order by making the documents referred to the Plaintiff’s Rule 35(2) Notice dated 28 July 2016 available for inspection and allow the Plaintiff to make copies thereof.*
- 2. ...*
- 3. ...*
- 4. The Respondents are ordered to pay the Applicant’s wasted costs for 19 May 2017 on opposed attorney and client scale.”*

[11] Against the foregoing background, on 12 July 2017, the First and Second Respondents instituted an action by way of a combined summons against the Applicant and the Third Respondent. The said action was instituted under case number 36842/2016. In the said action, the First Plaintiff is Heinrich von Landsberg, the current First Respondent, Universal Pulse Trading 367 (Pty) Ltd, the current Second Respondent, is the Second Plaintiff. The Applicant, in the instant application, is the First Defendant in that action and the Third Respondent in this application is the Second Defendant in that action. It is this combined summons that is the target of this application.

[12] For the following three reasons, the Applicant was unhappy with the steps taken by the First and Second Respondents. He thereupon took the necessary steps set forth in Rule 30(2).

[12.1] The Applicant complains that the First and Second Respondents have instituted an action by way of a combined summons under case number 36842/2016 against the Applicant and Third Respondent. He complains, furthermore, that the summons was issued under an existing case number for the purpose of rescinding and setting aside the summary judgment and the Court orders granted against the First and Second Respondents dated 26 July 2016, 30 September 2016 and 19 May 2017.

[12.2] The second complaint that the Applicant raised against the combined summons issued by the First and Second Respondents is that a copy of the combined summons with case number 36842/2016 dated 12 January 2017 was not served by the sheriff on the Applicant or the Third Respondent as required by Rule 17(1) of the Uniform Rules of Court. Instead a copy of the said summons was merely emailed by the First and Second Respondents' attorneys to the Applicant's attorneys.

[12.3] Thirdly and lastly, the institution of the second action under the already existing action and the citation in the same case of the Third Respondent as a Second Defendant constitutes, according to the Applicant, a highly irregular step which is not in compliance with the Rules of Court. That step, so complained the Applicant further, amounts to an abuse of the Court process and is aimed solely at emasculating the Applicant's judgment.

[13] In their answering affidavits, the First and Second Respondents, having taken note of the Court orders, submitted that compliance with such Court orders was subject to the outcome of this action that has been instituted and that because of the allegations contained in its summons the effect of such order has been suspended. Accordingly, the First and Second Respondents argue that this Court should take the allegations they have raised in their quest to set aside the summary judgment granted by Kollapen J and confirmed by the Supreme Court of Appeal and

decide on such allegations. On the basis of such allegations they apply that this Court should dismiss the Applicant's application with costs.

[14] The First and Second Respondents' contention is as follows. On 9 May 2016 the Applicant instituted action under case number 36842/2016 against the First Respondent and the Second Respondent for certain relief pertaining to an alleged joint venture agreement that was allegedly entered into between them, on one hand, and the Applicant, on the other. The relief in claim 1 of the said action was for payment of R85,431,721.00 together with interest thereon and in respect of claim 2 an order was prayed for a full account of the joint venture concluded between the parties, supported by vouchers and source documents for the period 1 November 2012 to date of this order as well as the debatement of the account and payment of whatever amount may be due and owing. The Applicant brought an application for summary judgment for part payment of the amount claimed.

[15] Mr de Beer, the Applicant herein, in the affidavit in support of the application for summary judgment, acted in his own name and there was no reference to any cession of any right, title and interest for him in respect of the joint venture agreement or the proceeds of the joint venture agreement at all in the said affidavit: The relevant affidavit was signed on 8 June 2016. Eventually summary judgment was granted on 28 July 2016. Certain interlocutory orders were also granted against the First and Second Respondents on 30 September 2016 and 19 May 2017.

[16] In an application brought by the Applicant against Absa Bank Ltd under case number 44498/2017 the deponent, namely the same De Beer, had stated the following in paragraph 45 of the founding affidavit in that application:

"I now deal with the cession of my right, title and interest in and to my decision against Von Landsberg and Universal Pulse Trading Alexiprox ..."

“... I concluded, on or about the middle of January 2014 an oral agreement with the respondent, Alexiprox (Pty) Ltd, of which entity my wife Lorraine is the sole shareholder and the director and which company is the registered owner of available and unencumbered immovable property situated at Fancourt Golf Estate, the gist of which agreement was of Alexiprox agreed to fund the litigation against Von Landsberg and Universal Pulse arising from the JV agreement and that in return I ceded and made over in favour of Alexiprox the proceeds of my claims against Von Landsberg and Universal Pulse arising from the JV agreement and that any litigation against Von Landsberg and Universal Pulse and as anticipated would be conducted in my name.”

It appeared to the First and Second Respondents that the same cession of agreement of the right, title and interest in the claims of the Applicant, the agreement, was concluded on 3 March 2017 by way of deed of cession dated 3 March 2017 which is in writing and which was annexed as Annexure ‘HE16’ to the founding affidavit of the Absa application. According to the First and Second Respondents this material fact was never disclosed to the Court *a quo* and the Supreme Court of Appeal in the summary judgment proceedings nor when the interlocutory orders were applied for. This discovery was made by the First and Second Respondents long after the application for leave to appeal was refused and the petition for leave to appeal against the summary judgment was refused by the Supreme Court of Appeal.

- [17] According to the allegations the oral cession that took place in 2014 referred to as well as the written cession agreement Annexure ‘AB16’ to the founding affidavit of the Absa application, the Plaintiff’s right, title and interest in and to his claims as cedent against the First and Second Respondents herein arising from the joint venture agreement and in respect of the proceedings between the Applicant and the First and Second Respondents in the Pretoria High Court case number 30742/2016 and 36842/2016 have been ceded, assigned, transferred and made over to the cessionary namely Alexiprox (Pty) Ltd. This took place in January 2014.

[18] On the strength of the foregoing it is submitted by the First and Second Respondents that there was a clear final cession, a complete cession and not a cession in *securitatum debiti*. According to them the Applicant's right, title and interest in the action and the proceeds of the joint venture agreement were therefore fully and completely ceded in 2014 to the Third Respondent. They rely on the preamble of a written deed of cession of 2014. According to them the effect thereof, notwithstanding any agreement to the contrary between the cedent and the cessionary, was that Alexiprox (Pty) Ltd should have become a party to the litigation proceedings. It should have been substituted as the Plaintiff in the place of the current Plaintiff as the Plaintiff in the action and only Alexiprox (Pty) Ltd would have been entitled to proceed with the litigation proceedings. Only Alexiprox (Pty) Ltd would have been entitled to apply for summary judgment or for any other Court orders. Accordingly, the Applicant, so they contend, has no *locus standi* in the matter. The Applicant was never entitled as the Plaintiff to proceed with the main action and litigation and most importantly he was never entitled to apply for summary judgment and to obtain judgment as referred to above against the First and Second Respondents. The fact and existence of the 2014 cession was never disclosed to the first and Second Defendants, their attorneys and counsel, nor to the High Court and the Supreme Court of Appeal during the proceedings pertaining to the Applicant's applications for summary judgment and interlocutory orders. This, according to the First and Second Respondents, constituted a fraud upon the Court which gives rise to a right that the First and Second Respondents now have, in terms of the common law, to seek rescission and setting aside of the summary judgment that was obtained by the Applicant as well as the interlocutory orders.

[19] The First and Second Respondents contend that it was clear from the fact that the intention of the Applicant and the Third Respondent was to cede the right, title and interest in the claim and such a finding can be made on the probabilities of the facts and the evidence. That means that the Applicant never had *locus standi* when the main action herein was instituted. Cession of a

right that will be enforced only in the future is of full force and effect immediately and that includes the right to proceed with the action. The cessionary is therefore the party thereto to enforce such a right such as the bank with a cession of debt. The cessionary is Alexiprox (Pty) Ltd. Therefore, it follows according to the First and Second Respondents, that if the right, title and interest were ceded, the Third Respondent had the right to institute action; that De Beer could not in law act as agent for the cessionary and did not obtain *locus standi* in the main action. On the basis of the foregoing the First and Second Respondents have applied for the dismissal, with costs, of the application on attorney and client scale.

[20] It is of paramount importance to point out that with regard to the Applicant's allegations as contained in the application in terms of Rule 30(1), apart from raising issues that relate entirely to the summary judgment, all that the First and Second Respondents could say was to submit that compliance with the Court orders that they failed to comply with, all such Court orders were subject to the outcome of this action that has been instituted by them and that the effect of such Court orders have been suspended.

[21] The question now is was the institution by the First and Second Respondents of an action against the Applicant and the Third Respondent dated 12 July 2017 under case number 36842/2016 under an existing action between the Applicant and the First and Second Respondents an irregular step? This question may be answered by breaking the whole question into segments.

[22] INSTITUTION OF COMBINED SUMMONS

Any person who requires, before the Court out of which a civil summons is issued, the appearance of any person against whom relief is sought or who is interested in resisting the grant of such relief has an unalienable right to issue such a civil summons. There are two classes of persons who are involved here and who may be affected. The first of those two classes of

persons is the person against whom relief is sought. This can be either the actual Defendant or Respondent to an application. The second class of such persons are persons who are interested in resisting the grant of the relief, in other words, who must show cause why the relief desired should not be granted.

[23] The choice as to the cause of action, the relief sought and, furthermore, who the Defendant or Respondent should be lies entirely with the person who seeks the relief. Therefore, the First and Second Respondents have the unalienable right to issue their civil actions commencing with a combined summons on and/or a Notice of Motion both of which have the object of demanding the appearance in Court of the Applicant. The Applicant can therefore not quarrel with the First and Second Respondents for issuing the summons as they did.

[24] It is accordingly open to the Applicant and the Third Respondent to raise any defence they deem appropriate against the First and Second Respondents' claim. It is of crucial importance to point out that in their combined summons, the First and Second Respondents seek the following relief:

- "1. That the summary judgment order that was granted by the above Honourable Court in favour of the First Defendant against the First and Second Plaintiffs dated 29 October 2016 and under case number 36842/2016 annexed hereto as Annexure 'N5' be rescinded and set aside.*
- 2. That the interlocutory order that was granted by the above Honourable Court on 30 September 2016 as well as the subsequent interlocutory order granted on 19 May 2017 under case number 36842/2016 be rescinded and set aside."*

[25] According to the particulars of claim, the First and Second Respondents seek the rescission of the said summary judgment on common law grounds. That being the case, the Applicant contend that the First and Second Respondents should not have, in their desire to rescind the summary

judgment, issued the summons under the same case number as the case number under which the summary judgment was granted. The Applicant refers to steps taken by the First and Second Respondents to have the summary judgment rescinded and set aside as being irregular.

- [26] A perusal of the following two authorities: *Santos Erec v Cheque Discounting Co (Pty) Ltd* 1986 (4) 752 (W) and *Motor Marine (Edms) Bpk v Thermotron* 1985 (2) 127 (SECLD) shows that the principle of the law set out in those authorities and in many others is against the Applicant. Both cases support the First and Second Respondents in that they both hold the view that a litigant who seeks, under common law, to have a judgment rescinded on the basis of fraudulent misrepresentation, should do so by way of an action. In *Santos* the Court, having turned to the point that relief should have been sought by way of action, stated at page 6753H – I the following:

“As a starting point to the discussion that follows, it can, I think, be stated that it is well established, that subject to special exceptions which are not presently relevant, a person may in general claim relief in this Court either by way of action or motion. There is no reason in principle why in the case such as the present, a litigant is bound to proceed by way of action. There are however authorities which indicate a different approach in cases such as the present. I shall discuss them in turn.”

In *Santos* the court recognised two propitious procedures that may be followed to rescind a judgment on the grounds of common law. The one such procedure is by way of an action, as currently followed by the First and second Respondents, and the other procedure is by way of motion proceedings.

- [27] Then the Court referred to the case of *Munshi v Naicker* 1978 (1) SA 1093 D, in which the court had to deal with the setting aside of a provisional judgment, and quoted with approval the following paragraph from page 1097 B thereof:

“The remaining basis upon which the Applicant can bring such a case is under the common law but there are authorities which suggest that such a case the procedure should be by way of action and not by way of application. (see, eg Athanassiou v Schultz 1956 (4) 357 (W) at 360E-F; Dreary v Dreary 1971(1) SA 227(C) at 230B; Bristow’s case supra at 507, and Hardroad’s case supra at 579H ”

[27.1] In The Civil Practice of The Superior Courts In South Africa, by Van Winsen et al, Second Edition, page 427, the learned authors state that:

“Where a judgment is sought to be set aside on ground of fraud or misrepresentation the proper procedure is by way of an action and not by way of motion. Where rescission is sought on one of the grounds set out in rule 42 then the party desiring relief shall make application therefor upon notice to all the parties whose interests may be affected by any variation sought.”

[25.2] In Dreary v Dreary 1971 (1) SA 227 (C) Baker AJ said the following at 230D:

“Had the Applicant continued to rely upon a fraudulent representation which induced the Court to grant summary judgment against him in the first instance, he would have had to proceed by way of action, to have the judgment set aside.”

And the said Judge continued as follows:

“Where a judgment is sought to be set aside on a ground of fraud or misrepresentation, the proper procedure is by way of action and not by way of notice of motion. In cases where the judgment of the Court has been sought to be set aside on the ground of discovery of new documents, or justus error, the general practice appears to be that the matter should be brought before the Court by way of action. This is by no means the invariable practice, and depending on the circumstances of the case - and also possibly the question of whether the matter is capable of decision on affidavit - the Court has entertained applications for relief on motion.”

[27.3] In *Bristow v Hill* 1975 (2) SA 50(N) Kriek J had to deal with an application for rescission of a judgment. At 547C he had the following to say:

“There are two obstacles in the Applicant’s way. In the first place, assuming as was done in Seme v Incorporated Law Society supra and Vista Estates (Pty) Ltd v Animal Breeders Co-op Ltd (supra), that the judgment of 3 July 1974 was a default judgment in the sense contemplated in Shilderley’s case, the procedure for obtaining restitutio is by way of action, not by way of motion proceedings.”

[27.4] Finally in *Santos* Eloff J had the following to say at page 755 C-G:

“Quite recently the decision in the case of Motor Marine (Edms) Bpk v Thermotron 1985 (2) SA 127 (SECLD) was given. The very point now under discussion had to be dealt with. Mullins J discussed an unreported decision of the full bench of that Division, this McPherson v Trust Bank of Africa Ltd (Case number 27/77, a decision by Solomon AJ, with Kannemayer J and Howie AJ concurring. The view taken by the full bench was that only procedure by way of action is competent in a case such as the present. Mullins J doubted the correctness of that decision but he was bound by it.”

[28] The authorities cited above demonstrate the principle that where a party wishes to challenge any judgment on the grounds of common law or in particular of fraudulent misrepresentation the competent procedure to follow is by way of action. Therefore the conclusion I have arrived at is that, based on the authorities referred to in paragraph [25] above, the procedure followed by the First and Second Respondents in issuing the combined summons, which the Applicant wishes to have set aside on the ground that it is an irregular step, in order to set aside, on the grounds of common law or fraudulent misrepresentation, the summary judgment granted in favour of the Applicant on 29 October 2016 is a competent one. Contrary to the view held by the Applicant such a combined summons is not an irregular step.

[29] Concerning the joining of the Third Respondent as a party in the combined summons issued by the First and Second Respondents, it is only fair and proper if the Third Respondent itself takes steps to defend its position. An argument propounded by the Applicant on this joinder was that it was improper for the First and Second Respondents to join the Third Respondent in the application to set aside the summary judgment in circumstances in which the Third Respondent was not one of the parties to the proceedings that led to such a summary judgment. I did not find in the papers before me any indication that the Applicant had been mandated in this action or in this application to act on behalf of the Third Respondent. I pointed out somewhere above that the Third Respondent has not filed any papers.

Accordingly, it goes without saying that the application for the relief set out in prayers 1 and 2 of the Notice of Motion cannot succeed.

[30] THE SECOND APPLICATION

The second application that the Court dealt with on 10 January 2018 was a contempt application in which, initially, the Applicant had sought a declaration that the First and Second Respondents are in contempt of three Court orders under case number 36842/2016 and following the granting of such a declaration that the First Respondent be sent to prison for contempt and, finally, to strike out the First and Second Respondents' defence and grant judgment in favour of the Applicant.

[31] The application referred to in paragraph [28] *supra* arose from the failure of the First and Second Respondents to comply with the Applicant's Rule 35(12) and Rule 30A Notices within seven days of the granting of such orders respectively. It was launched on 8 February 2017. On 23 February 2017 the First and Second Respondents filed their Notice of Appearance to oppose the contempt

of court Application but, however, failed to file, within the allocated time period, their answering affidavit. As a consequence of the said failure, the said application was placed on the unopposed roll for hearing on 19 March 2017.

[32] On 19 May 2017 a Consent Order was granted. The Court ordered the First and Second Respondents to comply with the Applicant's Rule 35(12) and Rule 30(A) Notices and to deliver their answering affidavit within seven days of 19 May 2017. A contempt of court application was, for the foregoing reason, postponed *sine die*.

[33] On 21 September 2017, after hearing the parties' legal representatives and at the case management hearing, I issued the following directive by agreement between the parties:

- "1. With reference to the Interlocutory Application in terms Rule 30(2) the following directives are made:
- 1.1 the Defendants are to file their answering affidavit on or before the close of business on Tuesday, 26 September 2017;
 - 1.2 the Plaintiff to file its replying affidavit, if any, on or before the close of business on Friday, 29 September 2017;
 - 1.3 the Plaintiff is to file its Heads Of Argument on or before the close of business on Friday, 13 October 2017.
 - 1.4 the Defendants are to file their Heads of Argument by the close of business on or before Friday, 27 October 2017;
 - 1.5 thereafter, the parties shall be entitled to approach Judge Mabuse for the allocation of a date for the hearing of the Interlocutory Application.
2. The Defendants undertake to comply with the Plaintiff's Rule 35(12) Notice dated 28 July 2016 on or before the close of business on Friday, 27 October 2017.

3. *The Defendants undertake to comply with the Court orders dated 30 September 2016 and 19 May 2017 on or before the close of business on Friday, 27 October 2017.*
4. *The Defendants undertake to comply with the Plaintiff's request for further particulars for trial dated 20 September 2017 on or before the close of business on Friday, 27 October 2017.*
5. *The Defendants undertake to comply with the Plaintiff's Notice in terms of Rule 35(3) dated 21 September 2017 on or before the close of business on Friday, 27 October 2017.*
6. *The adjudication of the Defendant's Special Plea will in the interim stand over for trial by Court."*

[34] On 31 October 2017 the Applicant delivered an application to file a supplementary affidavit to his founding affidavit in respect of the contempt of Court application. He also delivered a Notice Of Intention To Amend his Notice of Motion in respect of the application for contempt of court and the application to Strike Out the First and Second Respondents' defence. The application to deliver a supplementary affidavit was granted unopposed on 10 January 2018. As the First and Second Respondents had not objected to the Applicant's contemplated amendment of the Notice of Motion, on 15 November 2017 the Applicant delivered the amended pages of the Notice of Motion. In the amended Notice of Motion the Applicant had sought the following relief:

- "1. *An order declaring the Respondents to be in contempt of court order issued out of this Court on 30 September 2016 by the Honourable Acting Judge Adams under case number 36842/2016;*
2. *that the First Respondent be committed to prison for a period of 12 (twelve) months, or such period as the Court deems meet;*
3. *striking out the Defendant's/Respondent's defence to Claim 1 and 2 of the Applicant's claim set out in the Respondent's plea dated 16 January 2017 (as amended on 28 August 2017);*

4. *following the granting of prayer 3 supra had judgment be granted in favour of the Applicant in the proceedings with case number 36842/2016 and that the Respondent be ordered to pay, jointly and severally, the one paying, the other to be absolved, the amount of R97,842,513.00 (ninety seven million, eight hundred and forty two thousand, five hundred and thirteen Rand) plus interest thereon at the rate of 9.9% per annum calculated from 25 June 2014 to date of payment plus costs of the action on attorney and client scale;*
5. *that the Respondents, jointly and severally, the one paying the other to be absolved, pay the costs of this application on an attorney and client scale.”*

[35] Contrary to clause 1.1 of the said directive, the First and Second Respondents only delivered their answering affidavit on 8 January 2018, three months and a few days late. Although the Applicant delivered its replying affidavit on 8 January 2018, the same day on which the answering affidavit was delivered by his attorneys, it was late, all because of the First and Second Respondents failure to deliver their papers in accordance with the timeline set out in my directives. According to the directives, the said replying affidavit was supposed to have been delivered on or before 29 September 2017. Because primarily of the undue delay caused by the First and Second Respondents' conduct, the parties' Heads of Argument were also filed late in contravention of clause 1.3 and clause 1.5 of the directives.

[36] APPLICATION FOR CONDONATION FOR THE LATE FILING OF THE ANSWERING AFFIDAVIT

The First and Second Respondents' answering affidavit contained an application for condonation, without any notice of motion, for the late filing of the answering affidavit. The first Respondent made the following allegations in the answering affidavit:

- “7. *From the onset I deny that the non-compliance with the order of the Court was wilful and mala fide for reasons set out in this Affidavit.*
8. *I further strongly deny any intent to defeat the course of justice.”*

The First and Second Respondents were aware that, for having failed to deliver their answering affidavit in accordance with the Court orders and my directives, they were obliged to make an application for condonation of the late filing of their answering affidavit.

- [37] In the said application for condonation the First Respondent explained that he was faced with logistical constraints in terms of financing legal costs. He continued and stated that it was the logical constraints of financial legal costs that contributed to the late delivery of the answering affidavit. This statement speaks for itself and needs no further interpretation. Then in paragraph (17) of the answering affidavit he explains how such financial constraints became a problem and what the attorneys did. He stated that:

“The legal fee problem became such a problem due to the high amount the Defendants were in arrears in that our attorney of record notified me on or about 25 September 2017 that whilst his firm is out of pocket for legal fees and counsel cost no further work can be done on the file.”

- [38] He states furthermore that because of the history and complexity of the matter, he found it practically impossible to replace his withdrawn legal team with a new one. He only managed on 14 September 2017 to settle his legal team’s fees. While he concedes the late delivery of the Affidavit he contends that such late delivery will not delay the proceedings. I disagree. Progress in the matter has already been delayed. Furthermore, he submits that the granting of the Condonation Application will not prejudice the Applicant in any manner that cannot be compensated by an order of costs. He tenders to pay the costs of this application for condonation and other costs caused by his delay.

- [39] The Applicant raised the following four complaints against the answering affidavit, that:

[39.1] although in terms of the Court order and the directives issued by consent between the parties on 21 September 2017 the First and Second Respondents had been

ordered to deliver their answering affidavit on or before 27 October 2017, the said Respondents failed to do so and only did so on 22 December 2017 and, even then, only after the Applicant's contempt application had been re-enrolled for hearing.

[39.2] the Respondents' answering affidavit was irregular as it was delivered seven months from the date of the order of Judge Mali (not Adams) dated 19 May 2017 and some 38 court days from the Court's directive of 21 September 2017;

[39.3] lack of funds does not constitute good cause and was devoid of any truth;

[39.4] that the application for condonation is irregular as it was not brought by way of motion proceedings, i.e. it was not accompanied by a notice of motion setting out the relief the First and Second Respondents sought.

[40] The complaints raised in paragraphs [39.1] and [39.2] have, in my view, been dealt with in the application for condonation. I will deal with them on that basis. It is the complaints raised in paragraphs [39.3] and [39.4] *supra* that warrant further consideration.

[40.1] The Respondents lacked funds

The fact that the First Respondent lacked funds did not prevent him from complying with the Court order without the assistance of his legal team. He did not state that he was unable to do so. Secondly, he did not ask the other side for indulgence. This he could have done without the assistance of his legal team. I therefore conclude that lack of funds did not constitute a good excuse for failing to comply with the Court order.

[40.2] The application for condonation was not brought by way of motion proceedings

This complaint by the Applicant that the First and Second Respondents' application for condonation was not brought by way of motion proceedings seems to lack merit. This is so because in practice condonation is usually sought on notice. Furthermore, it can also be sought from the bar in circumstances where the objection is technical

and the other party will not suffer any prejudice. In regard to the First and Second Respondents' failure to launch their application by way of motion proceedings, in other words, a notice of motion supported by an affidavit, I take the approach set out in *McGill v Vlakplaats Brickworks Pty Ltd* 1981 (1) SA 637 [WLD], 643 D, where the Court, in dealing with what was perceived to be a summons that did not comply with the Rules of Court in certain respects, stated that:

"The objection is of a highly technical nature and the Defendant has not suffered any prejudice as a result of such imperfect procedure. In these circumstances, and relying on the principles enunciated in the following cases, in exercise of my discretion, I am of the opinion that the irregularity in relation to the summons should be condoned without enquiring a substantive application for such relief. Wiehahn Konstruksie Toerusting Maatskappy Edms Bpk v Potgieter 1974 (3) SA 191 [T] at 203; *Trans Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 at 278 F."

[40.3] According to the foregoing authorities the Court must look at two aspects, firstly, the nature of the default and, secondly, whether the other party stands to suffer any prejudice. If the failure to comply with the Rules is of a highly technical nature and, secondly, the other side will not suffer any prejudice the failure to comply with the Rules should be condoned.

[40.4] *In casu*, the Applicant has raised a complaint, and I must emphasize that it is valid, a complaint that the First and Second Respondents have failed to bring an application for condonation by way of motion proceedings. The Applicant has unfortunately not produced any evidence to prove that such failure by the said First and Second Respondents, which cannot be made good by an order of costs, has prejudiced him. Accordingly, I hereby condone the First and Second Respondents' failure to bring the application for condonation by way of motion proceedings.

[41] Does the affidavit in support of condonation meet the requirements?

For this Court to exercise its discretion in favour of the First and Second Respondents, they must, in their application for condonation, satisfy the following two requirements:

[41.1] firstly, they should file an affidavit, as they have done, in which they satisfactorily explain their delay in complying with the Court orders and directives. It is in this affidavit that the First and Second Respondents must at least furnish the Court with an explanation of why they failed to comply with the Court orders sufficiently to enable the Court to understand how it really came about. Such an explanation will enable the Court to assess the conduct and motives of the First and Second Respondents.

[41.2] secondly, they must satisfy the Court that they have a *bona fide* defence. Both in respect of this requirement and the requirement referred to in paragraph [40.1] *supra* I rely on the following excerpt from *Ford v Groenewald* 1977 (4) SA 224 [TPA], 225 G-H:

“Tog blyk dit uit die gewysdes (en ek maak weereens staat op die laasgenoemde uitspraak) dat daar twee hoofvereistes bestaan waaraan voldoen moet word in hierdie soort van aansoek. Eerstens moet ‘n applikant wat die Hof vir sodanige toeskietlikheid nader, ‘n redelike verduideliking onder eed voorlê vir sy verontagsaming van die Hofreëls. Tweedens, moet sy beëdigde verklaring aantoon dat hy ‘n bona fide verweer teen die aksie het. Wat die eerste vereiste betref moet ‘n verduideliking verstrek word wat genoegsaam volledig is om die Hof te laat vestaan hoe die verstek eintlik ontstaan het en om die applikant se optrede en motiewe te oorweeg; (Silber v Ozen Wholesalers Pty Ltd 1954 (2) SA 345 [AA]). Wat die tweede vereiste betref wil ek dit volgende meld. In Swarts v Minister of Justice 1942 [TPA] 210, is dit beslis dat dit voldoende is as die applikant onder eed verklaar dat hy ‘n

bona fide verweer het en dat dit onnodig is om die aard van sulke verweer te openbaar.”

[41.3] I am satisfied that the First and Second Respondents have satisfied the second requirement set out in paragraph [41.2]. I need therefore not be detained by this requirement any longer that is necessary.

[41.4] It is the first requirement that needs consideration.

41.4.1 On 30 September 2016 the Court ordered the Respondents to comply with the Applicant’s Notice in terms of Rule 35(12) dated 28 July 2016 and the Applicant’s subsequent Notice in terms of Rule 30A dated 10 August 2016 within seven days from the date of the order. It is not in dispute that the First and Second Respondents failed to comply with the said Court order within a period of seven days from 30 September 2016 nor is it in dispute that, even for a very long period thereafter up to the day on which they received a letter from their attorneys in which such attorneys informed them that they would not act for them any longer due to non-payment of fees, the First and Second Respondents still failed to comply with the said Court order. In the circumstances it behoved the First and the Second Respondents to give this Court a satisfactory explanation for their default to enable it to understand how it really came about that they should fail for so long to comply with the Court order. They have failed to do so. The Court is therefore unable to determine whether such failure resulted from their recklessness or their intentional disregard of the Court Rules. Therefore the Court is unable to come to their assistance.

[42] Mr. Da Silva referred the Court to the following authority in support of his submission that the First and Second Respondents were in contempt of the Court order. *Fakie N.O. v CC11 Systems Pty Ltd 2006 (4) SA 326 [SCA]* where at paragraph 42 the Court had the following to say:

“To sum up:

- (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with Court orders, and survives constitutional scrutiny in the form of motion court application adapted to Constitutional requirements;*
- (b) The Respondent in such proceedings is not an ‘accused person’, but is entitled to analogous protections as are appropriate to motion proceedings;*
- (c) In particular, the Applicant must prove the requisites for contempt (the order); service or notice; non-compliance; and wilfulness and mala fides beyond reasonable doubt;*
- (d) But once the Applicant has proved the order, service or notice, and non-compliance, the Respondent bears an evidential burden in relation to wilfulness and mala fides: should the Respondent fail to advance evidence that establishes a reasonable doubt as to whether the non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt;*
- (e) A declaratory and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”*

[43] I have come to the conclusion that the Respondents are in contempt of the Court order dated 30 September 2016. The said Court order was served on the First and Second Respondents by the Sheriff on 7 February 2017. The First and Second Respondents were therefore fully aware of the said Court order. Still they failed to comply with it. Furthermore still they failed to take this court into their confidence and explain why they defied the court order. Therefore the Applicant has established, beyond reasonable doubt, contempt by the First and Second Respondents. This

finding can be made even if the default was corrected before the hearing of the application for contempt.

[43.1] The Applicant seeks the relief as set out in paragraphs 3 and 4 of the amended Notice of Motion, if the Court should grant him the relief set out in paragraph 1 of such notice of motion. I am disinclined, for five reasons, to grant such a relief, even if this Court were entitled to do so;

[43.2] the first reason is that both cases instituted in this matter are of paramount importance to all the parties involved in them. A court should not close the door to either of the parties on technical points and furthermore on failure by either party to comply with the Rules of Court in circumstances where such failure can be sufficiently compensated by an appropriate order of costs;

[43.3] the second reason is, albeit late, the First and Second Respondents have complied with the Court order dated 30 September 2016. If the Applicant is unhappy with the extent of the First and Second Respondents' compliance with the said Court order the Rules provides remedy therefor;

[43.4] thirdly each party is confident of the strength of its case. They should therefore be allowed an opportunity to properly ventilate all the issues without leaving one or two out;

[43.5] fourthly this court has a *prima facie* view that the First and Second Respondents do have, on the merits, *prima facie* a good defence against the Applicant. In such circumstances a good defence can make up for a bad explanation.

[43.5] fifthly the First and Second Respondents wish to challenge the Applicant's *locus standi*.

In the result the following order is made:

1. The Applicant's application for an order declaring the combined summons instituted by the First and Second Respondents against the Applicant and Alexiprox (Pty) Ltd (the Third Respondent) dated 12 July 2017 under case number 36842/16 under an already existing action with case number 36842/16 between the Applicant and the First and Second Respondents is hereby dismissed, with costs including the costs consequent upon the employment of two counsel, where applicable.
2. The application for condonation is hereby granted and the First and Second Respondents are both hereby ordered to pay the costs thereof, the one paying and the other to be absolved.
3. The First Respondent is held to be in contempt of the Court order granted on 30 September 2016.
4. The First Respondent is hereby committed to prison for a period of twelve months suspended for as long as the main action proceeds, on condition that the First and Second Respondents, jointly or severally, comply accordingly with the all the orders of the courts granted against them in the process of the main action.
5. The First and Second Respondents are hereby ordered, jointly and severally the one paying and the other to be absolved, to pay all the Applicant's costs of the applications to compel and for contempt of court.



PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:*Counsel for the Applicant:**Instructed by:**Counsel for the First and Second Respondents:**Instructed by:**Date heard:**Date of Judgment:**Adv. Da Silva (SC)**Hennie Kotzé Attorneys**Adv. R du Plessis (SC)**Adv. FJ Labuschagne**Johann De Wet Attorneys**10 January 2018**26 January 2017*