

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

CASE NUMBER: 42570/2012

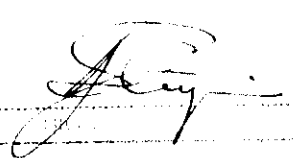
14/6/2013

In the matter between:

JOHAN HENDRIK BAKKES

APPLICANT

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVERSED	
14.06.2013	
DATE	SIGNATURE

PIETER HENDRIK STRYDOM N.O.

FIRST RESPONDENT

JOHN RODERICK GREAME POLSON N.O.

SECOND RESPONDENT

LOUIS STRYDOM N.O.

THIRD RESPONDENT

STRIJDOM AJ

DATE OF JUDGMENT: 14 JUNE 2013

JUDGMENT

NATURE OF APPLICATION:

1. The Applicant applies for leave to be granted to him to initiate and proceed with arbitration proceedings against Corporate Money Managers (Pty) Ltd

(under curatorship) for payment of the Applicant's salary/bonuses/retrenchment package and for a costs order against the Respondents.

2. Applicant also applies to the above Honourable Court to strike out certain allegations of the Respondents in terms of the provisions of Rule 6 (15).

COMMON CAUSE FACTS:

3. It is common cause:

- 3.1. That in terms of the provisions of Section 5 of the Financial Institutions (Protection of Funds) Act, No 28 of 2001 the company Corporate Money Managers (Pty) Ltd (hereinafter referred to as "CMM") was placed under provisional curatorship on 28 April 2009 and finally on 18 June 2009.

- 3.2. That the Respondents were appointed as curators and the curatorship still exists.

- 3.3. That in terms of the Court Order, all claims, actions, proceedings, the execution of all writs, summonses and other process against CMM are, whilst the curatorship exists, stayed

and may not be instituted or proceeded with, without the leave of the Court.

- 3.4. That on 25 June 2005 the Applicant and CMM concluded a written contract of employment in terms whereof the Applicant was appointed as chief executive officer and that he has been in the employment of CMM since the acceptance of a written offer.

THE FACTUAL DISPUTES BETWEEN THE APPLICANT AND RESPONDENTS:

4. The factual disputes between the Applicant and Respondents are:

- 4.1. Whether or not the Applicant's employment has been terminated and/or whether or not the said contract of employment was cancelled. The Applicant states that his employment has never been terminated and/or the said contract of employment has never been cancelled. The Respondents states that the Applicant was dismissed at the end of April 2009 and even if he was not dismissed, they terminated his employment on 13 July 2009. The amount payable to the Applicant as salary, bonuses and the retrenchment package are also in dispute.

- 4.2. Whether there was an agreement between the Applicant and the Respondents insofar as a retrenchment package is concerned.
5. In terms of the provisions of clause 14 of the Applicant's contract of employment a dispute of any nature whatsoever will be dealt with in accordance with a private dispute resolution procedure as envisaged in Section 158 (3) (d) of the Labour Relations Act, 66 of 1995, and will be resolved in accordance with the rules of the Arbitration Foundation of South Africa.
6. It was submitted by Counsel for the Applicant that this Court is not requested to make any decision on the merits of the factual disputes as it is the duty of the arbiter to make such a decision. It was further submitted that the allegations by the Respondents on the answering affidavits regarding the fraudulent and/or reckless and/or negligent conduct of the Applicant are totally irrelevant for the purpose of this Application.
7. Counsel for the Respondents submitted that before exercising its discretion, the Court must consider the merits and circumstances of each case.
8. Counsel for Respondents further submitted that there is no real dispute of fact where the Applicant, in his replying affidavit, merely denies the allegations made by the Respondents in their answering affidavit.

9. A bare denial of the Respondents' allegations in their affidavits will not in general be sufficient to generate a genuine or real dispute of fact. It has been said that the Court must take 'a robust, common-sense approach' to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so.

See: Gemeenskapsontwikkelingsraad v Williams (2) 1977 (3) SA 955 (W)

Soffiantini v Mould 1956 (4) SA 150 (E)

10. In Wightman t/a JW Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at 375F-376B the following is stated:

"A real, genuine and bone fide dispute of fact can exist only where the Court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing) evidence if they be not true or accurate but, instead of doing so, rest his case on a bare or ambiguous denial the Court will generally have difficulty in finding that the test is satisfied."

11. In the Answering Affidavit of the First Respondent he, *inter alia*, alleged that there were numerous examples of reckless and grossly negligent

management on the part of the Applicant and it was submitted that the Applicant, being in charge of CMM and the fund, is a major cause for the investors losses of approximately R1,2 billion.

12. Serious allegations of fraud against the Applicant is made in the Answering Affidavit and it is alleged that the fraud continued even after CMM was placed under curatorship.
13. The Applicant in his Replying Affidavit did not provide an answer to the allegations made in the Answering Affidavit of the Respondents. Instead of doing so he rest his case on a bare denial.
14. In my view the bare denial of facts stated in the Respondents' Answering Affidavit is not sufficient to generate a genuine or real dispute of fact.

THE DISCRETION OF THE HIGH COURT:

15. The discretion of this Court is a judicial discretion. Before this Court exercise its discretion, it will consider the merits and circumstances of the case.
16. I am of the view that the Court has to consider the following criteria in this matter:

- 16.1. The Applicant's prospects of success in respect of the intended arbitration proceedings;
 - 16.2. Remuneration and the question whether the Applicant has been dismissed;
 - 16.3. The Applicant's alleged entitlement to a retrenchment package;
 - 16.4. The Applicant's alleged entitlement to bonuses;
 - 16.5. The Applicant's alleged entitlement to benefits;
 - 16.6. The consequences of the Order that the persons who had managerial powers in respect of the management of business of the CMM had been divested thereof;
 - 16.7. The prejudice of the investors.
17. There is no merit in the submission made by Counsel for the Applicant that the Court must not consider the facts stated by the Respondents in their Answering Affidavit for purposes of this Application.
 18. An analysis of the Founding Affidavit shows that the Applicant has not addressed the issue of the prospect of success. I agree with the submission made by Counsel for the Respondents that one would have

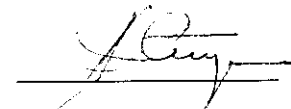
expected that the Applicant would show that there is a strong prospect of success in respect of his intended claim against the CMM for remuneration, bonuses, benefits and a retrenchment package allegedly owed to him.

**THE APPLICANT'S APPLICATION TO STRUCK OUT CERTAIN PORTIONS
OF THE ANSWERING AFFIDAVIT:**

19. It was submitted by the Counsel for the Applicant that certain allegations in the Respondents' Affidavit are "scandalous, vexatious and irrelevant".
20. In my view the Applicant's conduct as alleged by the Respondents in their answering affidavit is relevant and must be considered by this Court to exercise my discretion in deciding whether the Applicant has any prospect of being successful with his intended arbitration proceedings against the CMM.
21. Having perused and considered the facts stated in the papers before me I am of the view that the Applicant has no prospect of success to succeed with a claim of remuneration, bonuses, benefits and a retrenchment package against the CMM in the intended arbitration.
22. It follows that the Application is dismissed and the following Order is made:

- 22.1. Condonation is granted for the late delivery and filing of the Respondents' Answering Affidavit.
- 22.2. The Application to strike out the paragraphs in the Answering Affidavit and the annexures identified in the Applicant's Heads of Argument is dismissed.
- 22.3. The Applicant's Application for leave to be granted to him to initiate and proceed with arbitration proceedings is dismissed.
- 22.4. Applicant must pay the costs of this Application.

SIGNED AT PRETORIA ON THIS THE 14th DAY OF JUNE 2013



JJ STRIJDOM

ACTING JUDGE:

NORTH GAUTENG HIGH COURT

COUNSEL FOR APPLICANT:

ADV MM SNYMAN

ATTORNEYS FOR APPLICANT:

EY STUART

COUNSEL FOR RESPONDENTS:

ADV W LUDERITZ

ATTORNEYS FOR RESPONDENTS:

ROESTOFF & KRUSE