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

DELETE WHICHEVER IS NOT APPLICABLE

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

28/03/17
DATE

SIGNATURE

CASE NO: 63168/2012

3/4/2017

In the matter between:

DLEZAKHE JILI (CHAIRPERSON)	Applicant
and	
NBC HOLDINGS (PTY) LTD	1st Respondent
ISCOR EMPLOYEES RETIREMENT FUND	2nd Respondent
ISCOR PENSION FUND TRUSTEES	3rd Respondent
ISCOR EMPLOYEES RETIREMENT FUND, NEWCASTLE	4th Respondent
SOUTH AFRICAN RECEIVER OF REVENUE (SARS)	5th Respondent
ABSA BANK LIMITED (JOHANNESBURG)	6th Respondent
THE MINISTER OF DEPARTMENT OF LABOUR	7th Respondent
THE MASTER OF THE NORTH GAUTENG HIGH COURT	8th Respondent

DEPARTMENT OF HOME AFFAIRS	9th Respondent
RFS ADMINISTRATORS (PTY) LTD	10th Respondent
ISCOR RETIREMENT FUND BOARD	11th Respondent
BAMBANANI BENEFITS ADMINISTRATORS	12th Respondent

JUDGMENT

Baqwa J

[1] This is an application for an order compelling the respondents to provide the applicants with information to enable them to access R21 billion invested by the second and eleventh respondents offshore during 1989.

[2] The notice of motion does not specify what information the applicants are seeking but the founding affidavit identifies the information as follows:

2.1 Information which the applicants allege is in the possession of the respondents and which information the applicants require to exercise or protect their rights in relation to an investment by the second and eleventh respondents in 1989 to date.

2.2 They seek records, documents and statements regarding the said R21 billion which include:

2.2.1 The date of maturity of the capital amount of R21 billion;

2.2.2 Interest and/or profit earned of the R21 billion invested overseas on behalf of the applicants.

The Parties

[3] Apart from the first applicant, Dlezakhe Jili (Jili) it is alleged that there are 2185 other applicants but only 572 consommé to affidavits have been filed.

[4] Jili has brought the application as chairperson of the applicants and it also appears that some of the applicants are executors in deceased estates.

[5] The first respondent is NBC Holdings (Pty) Ltd described as the first black owned and managed employee benefits company in South Africa with its registered office at 76 Juta Street Braamfontein, Johannesburg.

[6] The first, second, third, fourth, tenth, eleventh and twelfth respondents are opposing the application and they have filed heads of argument. The applicant is not seeking any relief against the first to ninth respondents.

[7] In a nutshell, the crux of the applicant's case is the R21 billion investment overseas regarding which documentation is sought and which certain respondents are refusing to provide.

Background

[8] The applicants contend that during 1989 the general works manager K. W. V. Robertson invested R21 billion (the funds) on behalf of the ISCOR Newcastle black employees. The funds, which were invested overseas, were taken from the ISCOR Retirement Fund which is cited as the second respondent herein.

[9] Subsequent to the said investment road shows were held at all ISCOR workplaces ostensibly to inform the workers about the investment. The applicants further contend that the occurrence of the said road shows is admitted by the second, third, fourth, tenth, eleventh and twelfth respondents. The communication of the investment message was conveyed to the employees on the occasion of the visit of his majesty, King Zwelithini to Newcastle and that the former general manager Robertson's action in making the investment was even acknowledged and recognised by the king.

[10] It is also contended that the funds have been changing hands between ISCOR Pension Fund Trustees, the third respondent and Bambanani Benefits Administrators (the twelfth respondent) and that there is a possibility that movement of funds between different entities might result in the dissipation of the funds to the prejudice of the applicants who are dependent on the funds.

[11] The applicants also submit that the respondents have failed and/or refused to disclose the relevant financial statements.

[12] The applicants submit that the respondents have acted in dereliction of their duties in terms of the Pension Funds Act in that they have failed to trace dependents and to identify the beneficiaries to the funds.

[13] The applicants have been informed that no information will be provided to them as the R21 billion in question does not exist, hence this application.

[14] The second, third, fourth, tenth, eleventh and twelfth respondents oppose this application. They deny the existence of a R21 billion investment and consequently deny that there is any information or documentation in relation to such an investment and they contend as a result thereof that the applicants are not entitled to any relief as set out in the notice of motion.

[15] The respondents also draw the attention of this court **in limine** to certain defects which are apparent from the applicants' papers.

[16] Firstly they point out that:

16.1 Whilst the notice of motion and founding affidavit are dated 1 October 2013, the case number used by the applicants is a 2012 case number.

16.2 The applicants have attached unsigned affidavits to the application which puts into question the issue of who, genuinely, are the applicants before this court.

16.3 The respondents also seek to strike out certain portions of the founding affidavit.

[17] The respondents contend that whilst unlike a summons there is no requirement that an application be issued through the Office of the Registrar, there must be an application before a case number is allocated to a matter. Consequently, it is not possible to have a case number allocated in the absence of a notice of motion supported by an affidavit.

[18] The respondents contend that when the case number was allocated in the present matter, there was no application and that the application is defective and should be dismissed with costs.

[19] The respondents further contend that whilst there are purportedly 2185 applicants in this application, there are only 572 confirmatory affidavits. They also point out that there are no records of a number of individuals who purport to be applicants with the tenth, eleventh and twelfth respondents. The same contention applies regarding certain persons who purport to be executors in the estates of former members of the funds and where no records exist for the so-called former members of the fund.

[20] The respondents contend also that Mr Jili, the first applicant, cannot possess authority to act on behalf of unidentified applicants and that such individuals or persons are not properly before this court and are not entitled to any relief.

Application to Strike Out

[21] The respondents contend that the allegations made in the applicant's founding affidavit, (paragraphs 29 to 32) are made without any factual basis and that as such they are vexatious and scandalous and ought to be struck out.

[22] The said allegations accuse the respondents of acting unprofessionally and failing to comply with the requirements of the Pension Funds Act. They also insinuate that the respondents may this dissipate funds which are held in trust thereby alluding to dishonest conduct on the part of the respondents.

[23] Rule 6 (15) of the Uniform Rules of Court provides:

"*(15) The court to may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.*"

[24] Allegations are scandalous where they are so worded as to be abusive or defamatory. Allegations which are gratuitous and based on suspicion rather than fact are prejudicial. Scandalous or irrelevant matters which are defamatory are prejudicial.

See **Bredenkamp V Standard Bank of SA Ltd** 2009 (5) SA 304 GSJ at 321 C - E; **National Director of Public Prosecutions v Zuma (Mbeki and another intervening)** [2009] 2 AllSA 243 (SCA) at para [81] - [82]; **Vaatz v Law Society of Nambia** 1991 (3) SA 563 (NM) at 566 C - E.

Material Facts (As Pleaded by the Respondents)

[25] The first respondent has no interest in this matter and has no relationship with the eleventh respondent.

[26] There are no such entities cited by the applicants such as the second to fourth respondents. A notice of opposition has been filed on behalf of those respondents because of the inaccurate or improper description of the respondents.

[27] The ISCOR Retirement Fund exists as a separate legal entity and the eleventh respondent has been cited incorrectly.

[28] The application concerns employees of the former ISCOR Limited employed at the Newcastle works.

[29] Until 30 June 2004, the eleventh respondent was administered by the ISCOR Employees Provident Fund. Bambanani Benefits Administrators (Pty) Ltd, the twelfth respondent, administered ISCOR Retirement Fund from 30 June 2004 to 31 December 2012 whereafter, from 1 January 2013 RFS Administrators (Pty) Ltd, the tenth respondent took over the administration of the eleventh respondent.

[30] The more significant material facts in the context of this application are however the following:

30.1 In 1988 the total asset value of the eleventh respondent was R206 678 000.00. Three years later, in 1991, the total asset value of the eleventh respondent was R411 492 000.00.

30.2 At no stage did the eleventh respondent invest R21 billion overseas. There is no evidence that the eleventh respondent or any of the respondents at any stage had an asset value close to R1 billion, not to mention R21 billion. In 2007 the total assets of the eleventh respondent amounted to R387 467 147.00. In December 2012 it stood at R467 658 620.00.

30.3 During 2009, rumours surfaced about a R21 billion overseas investment by the eleventh respondent. Representatives of the eleventh and the twelfth respondents met the Sonqoba Community Organisation on 5 October 2010 and 13 July 2012 to explain that there had never been a R21 billion investment as alleged by the applicants. During those discussions, no proof was ever offered of the alleged investment.

[31] Mr Robertson, who was allegedly a key role player in ensuring the making of the R21 billion investment, has filed a confirmatory or supporting affidavit in which he denies that he ever informed employees at the Newcastle works, or any other employee that R21 billion was invested on their behalf by the ISCOR Retirement Fund.

[32] I have considered the facts deposed to by Jili in his founding affidavit and replying affidavit. There is nothing of substance therein to justify granting of the order prayed for in the notice of motion.

[33] Mr van der Westhuizen, counsel for the second, third, fourth, tenth, eleventh and twelfth respondents submits and I accept that the best case at the time of filing of the notice of motion by the applicants was the hearsay case of Mr Robertson. Once the answering affidavit was filed which included Robertson's confirmatory affidavit there was nothing left of the applicant's case.

[34] The objective evidence which includes financial statements covering the period 1988 to 1991 in particular demonstrates that the R21 million asset was a figment of someone's imagination. The assets reflected in the said financial statements were nowhere near that figure.

[35] Counsel for the first respondent, Ms Freese submits and I accept that the fund administrated by the first respondent was the ISCOR Employees Umbrella Provident Fund which was established in 1992 at the request of the trade unions.

[36] The first respondent was never involved in the other retirement fund namely, the ISCOR Employees Retirement Fund and the first respondent was not responsible for any payments to those employees.

[37] The first respondent only assumed the administration of the Umbrella Fund in January 2013 and as such would not be in a position to know of events which occurred in 1989 involving the applicants nor would it owe any duties to those employees.

[38] The first applicant in his replying affidavit to the answering affidavit of the second, third, tenth, eleventh and twelfth respondents made the averment that the first respondent admitted the existence of the R21 billion investment. Counsel for the applicants, Mr Molobedi could however not find such admission in the documents filed when asked by the court.

[39] Counsel for the respondents did not pursue any of the points raised **in limine** including the application to strike out certain portions of the founding affidavit. I therefore do not propose to make any finding in that regard. It is however my considered view that it would have been superfluous to pursue those points in light of the poor quality of evidence tendered by the applicants. I accordingly find that the applicants have dismally failed to make out a proper case.

Costs

[40] Both counsel for the respondents have asked for the application to be dismissed with costs and that the costs be awarded on a **de bonis propriis** basis as the attorneys for the applicants were duly warned in that regard in correspondence sent to them before the matter was heard. In support of that submission Mr van der Westhuizen has also referred to the vexatious and defamatory averments in paragraphs 29 - 32.5 of the applicants founding affidavit in respect of which he had sought in order to strike out in terms of Rule 6 (15) of the Uniform Rules of Court.

[41] Such costs orders are made when the conduct of a legal representative is reprehensible, negligent or can be considered to have been taken in bad faith. See **Blou v Lampert and Chiplain NNO and Others** 1973 (1) SA 1 (A) at 14 A - D.

[42] After instituting the application and filing of the answering affidavit by the other opposing respondents confirming the non-existence of any sort of relationship between the eleventh respondent and first respondent, the first respondent's attorneys wrote to the applicants attorneys inviting them to withdraw the application as against the first respondent failing which a costs order **de bonis propriis** would be sought.

[43] I accept that gratuitous allegations of dereliction of duty and/or dishonesty against respondents who are pension administrators and who in their day to day activities are responsible for the administration of trust funds may be injurious to their reputation. When such allegations are made without any factual or legal basis, they may well lead to a punitive costs order such as the one being sought in the present case.

[44] In **Venter NO v Scott** 1980 (3) SA 988 (O) the following was said regarding a representative of the plaintiff:

"*.... Had no reason to doubt that his action would be successful, he would not necessarily be ordered to pay the costs of the unsuccessful defendant out of his own pocket. Where he actually had or could have had no such certainty, and nevertheless made no provision for the defendant's costs, the position is different.*"

[45] The applicants' attorneys were duly informed that they had no case against the respondents. They however refused to withdraw the application against the respondents. In the circumstances, they ought to be penalised for their conduct in order to compensate the respondents for their costs.

[46] **In casu**, the cause of action invoked by the applicants is not clearly and concisely set out, and all the allegations they make about the breaches of duties and statutes on the part of the respondents are so vague as to make them meaningless. Fabricius J in **Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd** 2014 (3) SA 265 (GP) at 289 A - D said:

"*It is true that legal representatives sometimes make errors of law, omit to comply fully with the rules of court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to make its profound displeasure at the conduct of the attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, gross incompetence and a lack of care.*"

[47] The present case represents precisely what Fabricius J was referring to. The applicants' attorneys knowingly and recklessly launched an application with no cause of action and did not even give specificity to the alleged breaches of statutes on the part of the respondents which are said to afford the applicants the rights to information. They continued to litigate even though they had no credible basis for believing they could make out a case on behalf of the applicants.

[48] In the result:

48.1 The application is dismissed.

48.2 The applicants' attorney, Ntimane Attorneys are ordered to pay the respondents costs **de bonis propriis** which costs shall include costs of two counsel.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances

For the Applicant: Instructed by:	Advocate N. G. Molobedi Ntimane Attorneys
For the First Respondent: Instructed by:	Advocate S. Freese Mervyn Taback Inc.
For the 2nd - 4th & 10th - 12th Respondents: Instructed by:	Advocate G. van der Westhuizen Mahlangu Attorneys
Date of Hearing: Date of Judgment:	9 March 2017 3 April 2017