

SOUTH AFRICA / JUDGMENT

Labuschagne v Labuschagne and Others (A9.2015) [2016] ZAFSHC 163 (22 September 2016)

[2016] ZAFSHC 163

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl, Rampai, Chesiwe

CASE / FILE NUMBER

A9/15

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE STATE

DIVISION, BLOEMFONTEIN

Appeal

Number: A9/15

In

the appeal between:-

FERDINAND

JACOBUS LABUSCHAGNE

.....Appellant

and

BETTY

LABUSCHAGNE

.....1st

Respondent

METROPOLITAN

RETIREMENT

ADMINISTRATORS.....1st

Respondent

CORAM:

VAN ZYL, ADJP et RAMPAI, J et CHESIWE,
AJ

JUDGMENT

BY: VAN ZYL, J

DELIVERED ON: 22 SEPTEMBER 2016

[1] This is an appeal against the whole of the judgment and order of Tsatsi, AJ, delivered on 30 October 2014. Leave to appeal was granted by the Court a quo on 12 December 2014.

[2] The first respondent (applicant in the Court a quo) instituted an application against the appellant (first respondent in the Court a quo) and the second respondent (second respondent in the Court a quo), which application was opposed by the appellant, but not by the second respondent. The Court a quo granted the following order:

"1. The first and second respondents are to furnish to the applicant, within 10 (TEN) days of the granting of this order, a true and proper statement, together with substantiating documents, reflecting the value of the benefits paid to the first respondent, which he held in the Transnet Retirement Fund.

2. The first and second respondents are to furnish to the applicant, within 10 (TEN) days of the granting of this order, a true and proper statement, together with substantiating documents, reflecting the value of the first respondent's pension interest in the Transnet Retirement Fund as at 14 October 2008.

3. The applicant is granted leave to approach this Court on the same papers duly amplified - if so advised - for an order that the first respondent to pay to the applicant whatever amounts appear to be due to the applicant in terms of the aforesaid statements rendered.

4. The first respondent is to pay the costs of this application."

[3] The notice of appeal reflects, inter alia, the following grounds of appeal:

2.

Her Ladyship respectfully erred in her application of the principles set-forth in *Krygkor Pensioenfonds v Smith* [1993] ZASCA 47; 1993 (3) SA 459 to the facts of this matter in that Her Ladyship did not find that:

2.1 the first respondent was entitled to enforce her right by way of action or application;

2.2 whichever procedure, as elaborated upon immediately herein above, chosen by the first respondent, she would have been able to establish by discovery or Rule 35(13), as the case may be, how much monies the appellant had received from the second respondent, if any at all;

2.3 the first respondent could also have obtained any unprivileged information from the second respondent by obtaining a subpoena (even, in appropriate circumstances in motion proceedings);

2.4 the first respondent need not require extraordinary relief in the application especially in view of the fact that the first respondent could have obtained the information in question from the appellant without deviating from the established rules of procedure;

2.5 given the facts of this matter Her Ladyship erred in the exercise of her discretion.

3.

Her Ladyship respectfully erred in finding that the authority and principles set out in the matter of *Sempapalele v Sempapalele* 2001

(2) SA 306 (0) were applicable to the facts of this matter.

4.

Her Ladyship respectfully erred in finding that there was an amendment of the Honourable Justice Gillie's order, dated 14 October 2010.

5.

Her Ladyship respectfully erred in finding that the first respondent is entitled to the relief sought in order to enable her to determine the true value of her 50% of the pension fund benefit held by the appellant and should have dismissed the application (launched by the first respondent) with costs."

I will refer to the parties as in the appeal. The second respondent is not an active party to the appeal.

[4] The appellant and the first respondent were married in community of property on 2 September 2000 and the marriage relationship was terminated by a October 2008 ("the Court order"). order reads as follows: decree of divorce on 14 Paragraph 4 of the said

"4. Oat die verweerder toe te sien dat 50% van sy belang in die Transwerk Pensioenfonds aangedui word as synde 'n bedrag waarop eiseres geregtig sal wees by datum van uitbetaling daarvan. Die Regeringwerknemerspensioenfonds 'n aantekening ten dien effekte in sy rekords aan te teken." (sic)

[5] According to the first respondent the appellant was previously employed by Transwerk, which was a predecessor of the legal entity

Transnet. As such the name of the applicable retirement fund was amended on 1 December 2000 to the Transnet Retirement Fund. At all relevant times to the application the Transnet Retirement Fund was administered and managed by second respondent. In a letter from the second respondent addressed to the first respondent's attorneys of record, dated 23 November 2009, and attached to the founding application papers as annexure "LB4", the second respondent indicated as follows:

"Mr Labuschagne divorced his first wife on 5 January 1995.

Mr Labuschagne total market value on date of divorce 14 October 2008 amounted to R1 298 724-41 minus first divorce endorsement of R18 911-67 equals R1 279 812-74, 50% of R1 279 812-74 amounts to R639 906-37." (sic)

[6] The appellant's pension benefits accrued to him during September

2012. The first respondent then initiated the necessary steps in order to obtain her 50% share of the accrued pension benefits. The appellant transferred an amount of R156 634-79 to the trust account of the first respondent's attorneys of record. According to the appellant the aforesaid amount constituted the first respondent's 50% share of the pension benefits.

[7] The first respondent believed that the value of the appellant's pension benefits, as at 23 November 2009, was at least the amount

reflected in the letter of same date from the second respondent.

[8] A number of letters were addressed to the second respondent in order to obtain confirmation of the value of the benefits paid to the appellant and a calculation of the value of the pension interest at the date of divorce. No answer was forthcoming from the second respondent. The first respondent subsequently launched the application.

[9] The first respondent also averred as follows in the founding affidavit:

"22.

I am advised that and submit that the trustees of a pension fund bear a common law fiduciary duty to disclose information which is reasonably required to protect or advance the rights of a complainant and that such duty may, in certain circumstances, extend to a non-member of the fund.

23.

Insofar as the first respondent is concerned, he was enjoined by an order of this Honourable Court to pay 50% of his pension benefits to me which he clearly has not done. I respectfully say therefore that the first respondent ought to be compelled to provide the requested information so as to give effect to the relevant court order.

24.

The disclosure of information that I seek is pivotal to establish inter alia:

24.1 if there is indeed any amount of pension benefits due to me by the first respondent;

24.2 the exact amount of such pension benefits due;

24.3 whether it would be competent for me to approach this Honourable Court by way of action or motion proceedings for the payment of any pension benefits that prove to be due to me.'

[10] The appellant raised the following defences in his answering affidavit:

10.1 He has never been a member of the Transwerk Pensioenfonds, nor has he been a member of the Regeringswerknemerspensioenfonds referred to in paragraph 4 of the Court order. At all relevant times the appellant was only a member of the Transnet Retirement Fund. The appellant consequently contended that the Court order was not issued against his retirement fund and therefore there is no obligation on Transnet Retirement Fund to comply with the Court order. The amount of R151 544-61 which was indeed paid into the trust account of the first respondent's attorneys of record, was therefore paid by himself and not by the second respondent.

10.2 With regards to his stance pertaining to his own obligations, I deem it apposite to repeat the appellant's averments in support of his defence:

"11.1 Dit is korrek dat ek weier om 50% van my pensioenfonds op datum van egskeding aan die applikante oor te betaal.

11.2 Daar bestaan geen hofbevel wat my gelas om 50% van die pensioenfondsbelang van die Transnet Pensioenfonds soos op datum van egskeding aan die applikante oor te betaal nie.

11.3 Indien die applikante van voornemens is om die bestaande hofbevel soos uiteengesit in Aanhangsel 'LB1' te wysig, sal ek sodanige aansoek opponeer.

11.4 Ek was te alle tye onder die indruk gewees dat ek slegs geregtig is om 50% van die pensioenfondsbelang wat ontstaan het vanaf datum van my huwelik met die applikante tot datum van ontbinding van die huwelik aan haar oor te betaal. Ek het bygevolg Transnet versoek om sodanige berekening te doen wat 'n bedrag daargestel het van R151 544-61, welke bedrag inderdaad aan die applikante oorbetal was.

11.5 Indien die applikante nou wens aansoek te doen vir wysiging van die hofbevel sal ek sodanige aansoek opponeer en terselfdetyd aansoek doen dat die hofbevel ook gewysig moet word dat die applikante slegs geregtig sal wees op 50% van my pensioenfondsbelang vir die datum wat ek met die applikante getroud was.

11.6 Die applikante is klaarblyklik van oordeel dat sy geregtig is op 50% van my totale pensioenfondsbelang vanaf my aansluiting by die pensioenfonds, tot en met die ontbinding van die huwelik. Die applikante neem ook nie in ag dat ek reeds voorheen getroud was en dat my eerste eggenote geregtig was op 50% van my pensioenfondsbelang soos op datum van my eerste egskeding nie. Ek heg hierby aan as Aanhangsel 'FJL3', my eerste egskedingsbevel tesame met die akte van dading daartoe."

Regarding the aforesaid calculation which the appellant requested from Transnet, he referred to a letter from the second respondent

addressed to appellant's attorneys of record, dated 5 March 2014, attached to the answering affidavit as annexure "FJL4", in which the following was stated:

"Refer to your letter RJ Britz.... dated 26 February 2014.

The calculation from date of marriage till date of divorce was done on enquiry from your client. The first calculation that was done was from date of service till date of divorce minus the first divorce endorsement."

10.3 Lastly, the appellant averred that he is not in possession of any documentation which the first respondent seeks in terms of prayers 2 of the notice of motion and that she can make the necessary calculations with the information at her disposal. In this regard he made the following averments:

"16.2 Ek het geen dokumente wat ek aan die applikante kan beskikbaar stel nie.

16.3 Daar is ook geen hofbevel wat die Transnet Pensioenfonds en ook die administrateurs van die Transnet Pensioenfonds verplig om enige dokumentasie aan die applikante beskikbaar te stel nie. Daar bestaan immers nie 'n hofbevel teen die Transnet Pensioenfonds nie.

18.1....Die inhoud van Aanhangsel 'LB4' is insiggewend. In hierdie dokumente word volledige besonderhede verskaf van my bedankingswaardes soos op datum van egskeiding en is dit nie vir my duidelik na welke ander dokumentasie die applikante opsoek is nie. Daar kan nie ander dokumentasie wees nie. Dit is bygevolg 'n verkwisting van tyd en kostes gewees om hierdie aansoek te verrig het.

19.

Ek het reeds gehandel met die inhoud van Aanhangsel 'LB4' en is dit nie vir my duidelik na welke ander informasie die applikante en haar prokureur opsoek is nie. Uit Aanhangsel 'LB4' blyk dit duidelik wat my pensioenfondsbelang te Transnet beloop het op datum van egskeiding en kan die applikante, indien sy 'n berekening wil doen, daarvolgens handel."

[11] Mr Tsangarakis, appearing on behalf of the appellant, submitted that the application was premature as a consequence of the fact that no order has been granted against the appellant in terms of which he is obliged to pay any pension benefits from his Transnet Retirement Fund to the first respondent. There can consequently mutatis mutandis be no obligation on the second respondent to provide any documentation or information to the first respondent.

[12] It was also submitted by Mr Tsangarakis that the relief granted by the Court a quo in effect compels the appellant to make discovery of documents even prior to the institution of an application/ action which is not the object of discovery and which should not be allowed. In this regard he relied on the following passage from Erasmus Superior Court Practice,

D.E. Van Loggerenberg, Volume 2, Part D, at 01-459:

"The employment of discovery should be confined to cases where parties are properly before the court and are litigating 'at full stretch'. The essential feature of discovery is that the person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle

lines and establish the legal issues. Rather, it is a tool used to identify factual issues once legal issues are established. Discovery is not intended to be used as a sniping weapon in preliminary skirmishes."

Mr Tsangarakis also contended that the Court a quo should even have been more loathe to have ordered discovery in the circumstances where the appellant specifically indicated in paragraph 16.2 of the answering affidavit that he himself does not have any documents available and that second respondent cannot be compelled to provide documents to the appellant in the absence of any reference to the Transnet Retirement Fund in the Court order of 14 October 2008.

[13] It was furthermore the submission of Mr Tsangarakis that the first respondent in any event did not make out a proper case regarding the alleged necessity to obtain the documents and information prior to the commencement of litigation. He submitted that the first

respondent has enough information at her disposal to formulate a sustainable cause of action. She would then be able to obtain the available documentation and/or information in the normal course of litigation by means of discovery and/or the other various mechanisms available to her in terms of the Uniform Rules of Court.

[14] Mr Tsangarakis submitted that although it was decided in *Krygkor Pensioenfonds v Smith* [1993] ZASCA 47; 1993 (3) SA 459 (A) that a Court has the inherent power to adapt its procedures when it is in the interest of justice, it would exercise its inherent jurisdiction to deviate from established procedures in exceptional circumstances only and where the requirements of justice demand it. Even then a Court will always attempt to deviate as little as possible from such established procedures and practices. Mr Tsangarakis submitted that the first respondent proffered no explanation or grounds regarding the existence of the required exceptional circumstances in support of the exceptional relief which she seeks.

Contents of the Court Order and Misnomer of the Retirement Fund:

[15] The Court a quo dealt with these aspects in paragraphs [19] and [20] of her judgment. In my view her findings cannot be faulted.

[16] The fact of the matter is that the appellant was a beneficiary of the Transnet Retirement Fund, which, at all relevant times hereto, was administered by the second respondent. Any entitlement which the first respondent may have to the appellant's pension benefits can only be with regard to his membership of the Transnet Retirement Fund. The said retirement fund was previously known and described as the Transwerk Pension Fund, as referred to in paragraph 4 of the Court order. From the replying affidavit it is evident that Transwerk was the predecessor of the legal entity known and described as Transnet and as such the name of the retirement fund was amended accordingly on 1 December 2000. Even the particulars of claim contained an averment that the appellant was in the employment of Transwerk. It is therefore in my view evident that the reference in paragraph 4 of the Court order to "Transwerk Pensioenfonds" is a mere misnomer. The reference to "Die Regeringswerknemerspensioenfonds", on the other hand, is an apparent patent error.

Whether it will be necessary for the first respondent to have the aforesaid amended and/or corrected,

and the manner in which that ought to be done, are not necessary to be decided upon in this judgment. As correctly submitted by Mr Coetzer, appearing on behalf of the first respondent, the application was not aimed at obtaining a ruling regarding the appellant's

obligation to effect a payment to the first respondent. Therefore, where it is common cause that the appellant was a member of the Transnet Retirement Fund, the misnomer/error in the Court order could not, for purposes of the current proceedings, have caused the application to be dismissed.

[17] Similarly, the issue regarding the difference between the initial prayers in the particulars of claim and the subsequent contents of the Court order, is irrelevant for purposes of the current proceedings. On the facts currently before Court, the Court order is the one which had been issued at the time and is in the absence of any amendment thereto up to date, currently still of force and effect.

[18] I am consequently of the view that the judgment in *Sempapalele v Sempapalele and Another* 2001(2) SA 306

(0) is not directly relevant to the appeal. The facts are distinguishable in the sense that in that matter there was a deed of settlement which provided for a blanket division of the joint estate. In this appeal there is a binding Court order which specifically identifies the pension fund (albeit by means of a misnomer) and which specifically provides for a 50% entitlement to the pension benefits in favour of the first respondent. However, the Court a quo's reference to the said judgment has, in my view, no impact on the outcome of this appeal.

Exceptional circumstances:

[19] The first issue to be decided is whether the exceptional relief which was granted by the Court a quo was at all necessary considering the contention by Mr Tsangarakis that the first respondent has enough information at her disposal to formulate a sustainable cause of action for the payment of the pension benefits allegedly due to her. As correctly pointed out by Mr Coetzer, Rule 18 requires that the first respondent will have to formulate her hypothetical particulars of claim with sufficient particularity to enable the appellant to reply thereto, failing which the appellant may either file an exception and/or a Rule 30 notice. This may lead to the striking out of the particulars of claim even before the discovery phase of litigation arrives and the first respondent will not be able to recover her share of the appellant's pension benefits as she is legally entitled to. The same principles apply to a hypothetical application. Annexure "LB4" to the founding affidavit is, to say the least, extremely badly worded and merely provides certain figures without giving any indication as to how those figures have allegedly been compiled and calculated. All attempts to obtain more information from the second respondent were unsuccessful. The said letter refers to the "total market value" "on date of divorce". It is not clear whether "total market value" is the

same as the actual value of the first respondent's pension interest at the said date. As further correctly averred by the appellant in her replying affidavit, Annexure "LB4" is dated 23 November 2009, almost three years prior to the date on

which the first respondent's pension benefits accrued to him and the appellant consequently became entitled to the payment of her share. The appellant has no knowledge of the bearing that interest has had on the respective figures, nor does she know what the value was of the pension benefits which had in fact accrued to the first respondent and exactly what amount had been paid out to him. Without the information she requested in the application, the first respondent is called upon to speculate whether she in fact has a valid claim, how much money is owed to her and to formulate her claim based upon such speculation. She reasonably requires the said information to protect her rights.

[20] Mr Tsangarakis correctly submitted that the order made by the Court a quo was tantamount to compelling the discovery of documents even prior to the commencement of litigation. He also correctly pointed out that in general this should not be allowed as it is contrary to the purpose of discovery as stated in Erasmus Superior Court Practice, supra.

[21] In the Kryqkor Pensioenfonds-matter, supra, the background facts and circumstances were similar (although not identical as I will later show) to the facts of this appeal. There

Mrs Smith approached Court on an urgent basis for, inter alia, an order compelling the pension fund of which her ex-husband was a member, to provide her with certain information regarding his pension benefits and payments that were made to him. The relief was granted by the Court a quo and the pension fund then took the matter on appeal. The following principles were stated at 469 B - I of the

judgment:

"Hoewel die debat rondom Hart v Stone en Stuart v Ismail dus nog nie finaal afgehandel is nie, het hierdie Hof gesaghebbend bevestig dat die Hof wel sy prosedure kan aanpas in die belang van behoorlike regspleging. Vir huidige doeleindes is ek bereid om ten gunste van mev Smith te veronderstel, sander om die punt te beslis, dat 'n Hof in 'n gepaste geval selfs 'n derde party, teen wie die applikant geen eisorsaak het nie en wat nie 'n party of beoogde party tot litigasie met die applikant is nie, kan gelas om die aangevraagde inligting te verstrek. Dit sou verder veronderstel dat afgewyk word van die dicta in die House of Jewels & Gems-saak supra op 828H-829A en die Cerebos Food-saak supra op 173E ten effekte dat die verlening van so 'n bevel 'n saak van substantiewe reg is, en nie een van prosesreg nie. In hierdie

veronderstelling sou die Hof a quo die bevoegdheid gehad om die verskaffing van die aangevraagde inligting deur die Pensioenfonds te gelas. Die verdere vraag is dan hoe hierdie bevoegdheid uitgeoefen moes word.

Normaalweg word die verstrekking van inligting as 'n deel van die regsproses gereel deur die Hofreels. Voorsiening word gemaak vir blootlegging inter partes en vir getuiedagvaardings of dagvaardings duces tecum ten opsigte van derde partye. Ons Howe is tradisioneel ongenee om buite hierdie bepalings te gaan. Sien, bv, behalwe die gewysdes reeds hierbo behandel, *Biden v French and D'Esterre Diamond Mining Company* (1882) 1 Buch AC 95; *Colonial*

Government v W H Tatham (1902) 23 NLR 153 op 157-8; *Spies v Vorster* 1910 NLR 205 op 216; *Messina Brothers, Coles and Searle v Hansen and Schrader Ltd* 1911 CPD 781; *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) op 462H-463B; *Roamer Watch Co SA and Another v African Textile Distributors also tla M K Patel Wholesale Merchants and Direct Importers* 1980 (2) SA 254 (W) op 282C en 284C en *Seetal v Pravitha and Another* NO 1983 (3) SA 827 (D) op 832G- 833E. Vergelyk ook die bespreking in *Jaffa* se saak supra op 293J- 294D. Wat duidelik uit hierdie gewysdes blyk, is dat die Hof slegs in uitsonderlike gevalle sy inherente bevoegdheid sal uitoefen om prosedures te volg waarvoor nie in die gewone prosesreg voorsiening gemaak word nie. Die uitsonderlike gevalle word op verskillende maniere omskryf in die beslissings wat hierbo aangehaal is. Virhuidige doeleindes is dit egter genoeg om te se dat die Hof hierdie bevoegdheid sal uitoefen net waar geregtigheid vereis dat afgewyk word van die gewone prosedure-reels. En selfs waar 'n afwyking nodig mag wees, sal die Hof natuurlik altyd poog om so naby as moontlik aan die erkende praktyke te bly." (Own emphasis)

[22] It is evident from the aforesaid passage that it was found that a Court has the inherent discretion to adapt its procedures when it is in the interest of justice. A Court will only exercise such inherent jurisdiction to deviate from its established procedures in exceptional circumstances where the requirements of justice demand it.

[23] In my view it is important to also specifically take note of the factual findings the Court made in applying the aforesaid principles to the facts of that matter, as it appears at 469 I - 470 G of the said judgment:

"As hierdie benadering in die onderhawige geval toegepas word, is die resultaat myns insiens soos volg. Mev Smith het 'n reg tot 'n helfte van die pensioengeld gehad. Hierdie reg kon sy by wyse van aksie of aansoek teen mnr Smith afdwing. Watter prosedure sy ook al gevolg het, sou sy deur blootlegging kon vasstel watter bedrae mnr Smith ontvang het (sien Reel 35 en veral Reel 35(13) van die Eenvormige Hofreels). Verder sou sy enige ongeprivilegieerde inligting van die Pensioenfonds kon bekom deur middel van 'n getuiedagvaarding selfs, in 'n gepaste geval, in mosie-verrigtinge. Sien *Harms Civil Procedure in the Supreme Court* para G27. Vir 'n gewone Hofproses het sy dus geen buitengewone regshulp nodig gehad nie.

Sy het egter om verstaanbare redes besluit om 'n dringende aansoek aan te vra. Haar eerste bede was om 'n bevel wat mnr Smith gelas

om die helfte van die bedrag wat hy van die Pensioenfonds ontvang het, aan haar te lewer. As sy bang was dat hy haar sou bedrieg en minagting van die Hof sou pleeg deur 'n bedrag oor te betaal wat minder as die helfte is, sou sy ook in hierdie aansoek die Hof kon gevra het om terselfdertyd

blootlegging te gelas ingevolge Hofreel 35(13). Dit sou haar in staat gestel het om insae te kry in alle relevante dokumente wat in sy besit was, soos byvoorbeeld korrespondensie met die Pensioenfonds, bankstate, en dies meer. Geen rede blyk uit die stukke om te vermoed dat mnr Smith 'n meinedige blootleggingsverklaring sou geliasseer het nie. Ook in die dringende aansoek het sy dus myns insiens nie buitengewone regshulp nodig gehad nie. Veral was dit nie nodig om die Pensioenfonds, 'n buitestaander, in hierdie stadium in te trek in die geskil tussen haar en haar voormalige man nie. Die Pensioenfonds was nie die enigste wat die inligting gehad het nie. Mnr Smith het dit ook gehad, en van horn kon sy dit kry sander om af te wyk van die erkende praktykreels, behalwe miskien insoverre dit nodig mag gewees het om hulle aan te pas weens die dringendheid van die saak. En as dit uiteindelik onmoontlik geblyk het om reg te laat geskied sander die inligting van die Pensioenfonds, sou die Hof kon gelas het dat 'n gepaste amptenaar van die fonds viva voce getuienis afle. Sien Harms (op cit).

Om op te som: as ek veronderstel dat die Hof wel die inherente bevoegdheid het om bekendmaking van hierdie soort inligting deur 'n buitestaander tot 'n geskil te gelas, meen ek nogtans nie dat die Hof dit in hierdie geval behoort te gedoen het nie. Daar was dus myns insiens geen regverdiging vir mev Smith om die Pensioenfonds by hierdie aansoek te betrek nie..."

[24] The finding regarding the existence of exceptional circumstances, or not, will obviously depend on the particular facts of the matter. In my view there are very important facts which distinguish the Krygkor Pensioenfonds-matter from this appeal. In that matter the Court found that Mrs Smith could have enforced her entitlement to half of her ex- husband's pension benefits by means of action or application, in which instance she would have been able to establish the required information by means of the normal rules of discovery. I have already made the finding that in this matter the first respondent does not have enough information at her disposal to formulate a sustainable cause of action, whether by means of action or application. The Court also stated that in the case of an application, she could have included a request for discovery in terms of Rule 35(13) ".....as sy bang was dat hy haar sou bedrieg en minagting van die Hof sou pleeg deur 'n bedrag oor te betaal wat minder as die helfte is.....". In the instant appeal, on the first respondent's version, this is exactly what the appellant had already done.

The Court then continued and found that Rule 35(13) would have provided her with an appropriate remedy in that she would have been able to obtain all the necessary documentation which Mr Smith had in his possession because "...geen rede blyk uit die stukke om te vermoed dat Mnr Smith 'n meinedige blootleggingsverklaring sou geliasseer het nie....". It was also found that the pension fund was not the only party who had the information at its disposal as "....Mnr Smith het dit ook gehad, en van horn ken sy dit kry sender om af te wyk van die erkende praktyksreels". The circumstances in the current appeal are however completely different. In the current instance the appellant specifically stated in paragraph 16.2 of the answering affidavit that he has no

documentation at his disposal which he can provide to the first respondent. Moreover, he indicated in paragraph 18 of his answering

affidavit that ".....dit (is) nie vir my duidelik na welke ander dokumentasie die applikante opsoek is nie.... daar kan nie ander dokumentasie wees nie...". He again confirmed this attitude in paragraph 27 of the answering affidavit where he stated " ...ek

beskik bowendien nie oor sodanige informasie nie...".

[25] The obstructive conduct and attitude of the appellant as reflected by the contents of the application papers, speak of a complete lack of co-operation. Moreover, it is quite obvious that he will leave no stone unturned to frustrate the first respondent in any of her attempts to obtain the necessary information in order to claim any further payments from him. This was clearly also the experience of the first respondent as she specifically stated the following in paragraph 21 of her founding affidavit.

"I did not seek the relevant information from the first respondent simply because of the fact that, as a result of the first

respondent's conduct that precipitated this application in the first place, the inference was inescapable that he would in all likelihood not have played open cards with me, so to speak."

[26] In view of all the peculiar circumstances of the matter, the first respondent's decision to have recourse against the second respondent was justified. In my view the aforesaid facts constitute exceptional circumstances which indeed necessitated a deviation from the established procedures. The order the Court a quo made was justified as justice would have been defeated in the absence thereof.

[27] I pause to mention that although the Court a quo did not specifically deal with the question of exceptional circumstances, her factual findings cannot be faulted and they are indicative of the existence of the required exceptional circumstances.

Order:

[28] The appeal is accordingly dismissed with costs.

C. VAN ZYL, J

I concur.

M.H.RAMPAI, J

C. CHESIWE, AJ

On behalf of Appellant:Adv S. Tsangarakis

.....Instructed by: Honey Attorneys

.....BLOEMFONTEIN

On behalf of First Respondent: Adv. JC Coetzer

.....Instructed by:

.....McIntyre & van der Post

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/labuschagne-v-labuschagne-and-others-unknown-topic-afshc-2016--6a3ea5193b1caa912980fa40>

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