# IN THE HIGH COURT OF SOUTH AFRICA
# GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST OF OTHER JUDGES: ~~YES~~/NO
(3) REVISED
19 NOVEMBER 2021
DATE SIGNATURE

**CASE NO: 28249/2020**

**In the matter between:**

| | |
|---|---|
| **MOLATJANE, DAPHNE** | **Applicant** |
| **and** | |
| **JOFFE, MARC BEVAN** | **First Respondent** |
| **GLOBAL CREDIT RATING COMPANY** | **Second Respondent** |
| **WILSON, RICHARD** | **Third Respondent** |

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**JUDGMENT**

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**FRIEDMAN AJ:**

1 The applicant (to whom I refer as "Ms Molatjane" or "the applicant" below) launched an application, which bears a date stamp of 29 September 2020, in

which she seeks an order in the following terms (and I quote verbatim from the notice of motion):

> *"1. Declaring invalid, a nullity and setting aside the separation agreement hereinafter referred to as the agreement entered into on 20 November 2017 by and between Global Credit Rating Company (Pty) Ltd hereinafter referred to as GCR and the applicant.*
>
> *2. The extent to which the separation agreement is relied upon, be declared invalid because the respondent was induced to her detriment, by way of misrepresentation of facts on the part of the first respondent in his capacity as the Chief Executive Officer of the second respondent to enter into and sign the agreement.*
>
> *3. Setting aside the appointment of Riana Theorides, the compliance officer of the second respondent and the reinstatement of the applicant to its former position of compliance officer of the second respondent.*
>
> *4. Declaring invalid and of no consequence, the contents of Annexure C as they were induced by untruths and misrepresentations made by the first respondent to the applicant.*
>
> *5. The first respondent is ordered to reimburse the applicant amounting to R3 000 000 00 (three million rand only) and the cost of this application jointly and severally with any other respondent opposing this application.*
>
> *6. Further or alternative relief.*
>
> *7. Costs if opposed."*

2 I reiterate that the above is a verbatim quote from the notice of motion. Curiously, the notice of motion says that the affidavit of "Jurgen Boyde, the Deputy Executive Officer at the Financial Services Conduct Authority" ("the FSCA") will be used in support of the application". No explanation is given as to why the Deputy Executive Officer of the FSCA would be the deponent to Ms Molatjane's founding affidavit. And I could, in any event, find no trace of such an affidavit in the papers. Instead, unsurprisingly, the deponent to the founding affidavit was Ms Molatjane.

3 The founding affidavit makes no attempt to justify the bulk of the prayers in the notice of motion which I have quoted above. Instead of attempting to substantiate the multifaceted requests for relief, the founding affidavit focuses on a narrative which, in essence, is that Ms Molatjane was induced by fraud to conclude the separation agreement which is impugned in paragraph 1 of the notice of motion. On this issue, the versions of Ms Molatjane and the company are diametrically opposed (to borrow the phrasing of a letter written by Ms Molatjane's attorney on 24 May 2021, to which I return below).

**THE BACKGROUND**

4 The separation agreement was signed on 20 November 2017 by both parties. It forms part of the papers. As the name suggests, it was intended to bring an end to Ms Molatjane's employment with the second respondent ("the company") by virtue of Ms Molatjane's resignation as the Compliance Officer of the company. The separation agreement was concluded after disciplinary proceedings were instituted by the company against Ms Molatjane. The letter dated 13 November 2017 addressed to Ms Molatjane, which commenced these proceedings and which is headed "Notification of incapacity hearing", has been annexed to the answering affidavit (I shall describe it as "the notification letter"). Grave concerns relating to the manner of Ms Molatjane's performance were raised in the notification letter. She was advised that a hearing would be held a few days later, at which she would be given a chance to put up anything relevant in response. She was informed that she could be represented by a co-employee.

5 One of the issues raised in the notification letter was that, in a meeting held on 2 November 2017, the Financial Services Board ("the FSB"), which is now the

FSCA, raised serious concerns about the quality and performance of the company's compliance function. By virtue of her position as the company's Compliance Officer, this went to the heart of Ms Molatjane's responsibilities as an employee.

6 Before the hearing, Ms Molatjane requested further information (including the minutes of the meeting held on 2 November 2017 between the FSB and the company) and then a postponement of the hearing to 20 November 2017 (it was initially scheduled for 16 November 2017), which was granted. After further correspondence was exchanged, the first respondent ("Mr Joffe"), representing the company, and Ms Molatjane held an off-the-record meeting at which it was decided to conclude the separation agreement. Mr Joffe sent the draft agreement to Ms Molatjane on Saturday 18 November 2017, and she replied early on the morning of Monday 20 November 2017 to say that the contents of the draft "are noted as a true reflection of what we discussed on 16 instant". She then continued: "I am happy. We may proceed to sign accordingly".

7 It is not necessary for me to highlight all of the terms of the separation agreement. However, of relevance to the ultimate decision that I must make in this matter is the following:

7.1 The agreement provided that, although the last day of Ms Molatjane's employment was 31 December 2017, she would be retained on the payroll for January and February 2018 with no obligations to render any services. This was a gratuity, which was part of the terms of the settlement.

7.2 The agreement placed an obligation on both parties not to damage the good name and reputation of the other party in the marketplace or to any third party, including the FSB, and provided that neither party would make any statements, whether publicly or privately, including to the FSB, in which the working methods, capabilities, competence or abilities of the other party were disparaged, criticised, compromised, derided, or otherwise discredited.

7.3 The agreement recorded that Ms Molatjane accepted the gratuity (ie, the salary and benefits for January and February 2018) in full and final settlement of any and all disputes between the parties.

7.4 It also expressly recorded that Ms Molatjane would have no claim against the company for compensation or reinstatement or for any remedy other than what was contained in the agreement.

8 It is necessary for me to refer to certain developments after the separation agreement was concluded to demonstrate the context in which this matter is to be decided:

8.1 After signing the separation agreement and receiving her gratuity (ie, salary for January and February 2018), Ms Molatjane wrote a letter to Mr Joffe (the first respondent) on 27 February 2018 making many of the allegations appearing now in the founding affidavit and a wide-reaching series of demands. As noted by Londeka Sosibo, the Commissioner of the Commission for Conciliation, Mediation and Arbitration ("CCMA") who heard *in limine* arguments in a referral made by Ms Molatjane (discussed

below), this letter of demand was sent the day after Ms Molatjane received her last gratuity payment from the company.

8.2 On 20 March 2018, 51 days after the statutory deadline for referring matters to the CCMA, Ms Molatjane sought to challenge her dismissal in the CCMA. In a detailed ruling, the Commissioner refused to grant Ms Molatjane condonation for the late filing of the referral. The Commissioner pointed out that Ms Molatjane was legally trained and had worked as a public prosecutor. In this context, her explanation for her delay was inadequate and her explanation of the merits of her case "did not make sense". The Commissioner therefore held that Ms Molatjane's referral was not only unreasonably late; it also bore no prospects of success.

8.3 Sometime before 26 March 2018, Ms Molatjane made a complaint to the FSB about the company. In doing so, Ms Molatjane breached the separation agreement. The complaint required the company to devote energy to refuting the allegations against it by engaging with several pieces of correspondence with the FSB. The FSB appears to have been fully satisfied with the company's response to the complaint.

8.4 On 21 May 2018, yet another letter of demand was sent to the company, this time by a firm of attorneys acting on behalf of Ms Molatjane. In this letter, Ms Molatjane demanded reinstatement to her position, failing which an approach would be made to the Labour Court "for appropriate relief" and costs. How the Labour Court would have jurisdiction to entertain this matter after the CCMA dismissed a condonation application

in respect of the same complaint is not explained. Again, the claim for reinstatement is inconsistent with the terms of the separation agreement.

8.5 In July 2018, Ms Molatjane lodged a series of baseless complaints against the company to the South African Police Service ("SAPS"). This required the company to instruct its attorneys to prepare a detailed response, which is annexed to the answering affidavit. In argument, Ms Molatjane contended that the complaints made to the SAPS do not relate to the underlying cause of action on which she relies in respect of the alleged invalidity of the separation agreement. This may be so. However, I have some sympathy for the respondents when they say, in their answering affidavit, that this referral to the SAPS was a further example of the applicant's campaign of harassment against the company.

9 After all of these developments, an application seeking the relief which I have quoted in paragraph 1 above ("the main application") was launched and then eventually set down on 25 May 2021. I do not wish to go into detail about the allegations made by Ms Molatjane in her founding affidavit. In essence, Ms Molatjane makes hard-hitting allegations that Mr Joffe informed her that the board and shareholders of the company and the FSB had issued a "strict directive" to hold the disciplinary proceedings against her and that the company was under tremendous pressure to dismiss her quickly. She says that, when she requested the minutes of the meeting at which the FSB and the company's board had decided that Ms Molatjane should face the incapacity hearing, Mr Joffe warned her that she was only making her position worse because the board was resolute in its decision to dismiss her. She says that, in these circumstances, Mr

Joffe offered to provide her with a "soft exit strategy" by concluding the separation agreement.

10 According to Ms Molatjane, she accepted the soft exit strategy on the understanding that the FSB had essentially instructed the company to dismiss her. She says that, in February 2018, she received a call from an employee of the FSB, Abel, who asked her why she had left the company. Ms Molatjane says that she expressed surprise that Abel did not know the reason, since the Registrar (ie, of the FSB) had been part of the decision to dismiss her. Ms Molatjane then wrote to the registrar to ask about the facts and, on 22 March 2018, the Registrar replied, confirming that "the first respondent was not truthful" and "misrepresented and distorted the facts".

11 I have two fundamental difficulties with the version advanced by Ms Molatjane in her founding affidavit:

11.1 First, she creates the impression that she would not have agreed to conclude the separation agreement had she known the true facts. This, in turn, implies that she was labouring under the impression that the FSB had been party to some sort of collusion with the company to dismiss her which was only corrected when she received correspondence from the FSB in March 2018. This is simply implausible. It is implausible not only because there would be no sensible reason why a regulator, which is entirely independent of the interests of any private company that it regulates, would involve itself in such conduct. It is also implausible in the light of the various other allegations, having nothing to do with the jurisdiction of the FSB, tabled to be determined at Ms Molatjane's

disciplinary enquiry. These include allegations as to absenteeism and insubordination.

11.2 Secondly, Ms Molatjane's version in the founding affidavit implies that the FSB's letter of March 2018 – in which it simply, and clearly (and without any commentary) placed on record that it had made no recommendation or directive to dismiss Ms Molatjane – was some sort of bombshell which gave her a cause of action. But this is inconsistent with the position that she took in her letter of demand dated 27 February 2018. In that letter, she raised a series of concerns which all related to facts of which she was aware before signing the separation agreement. If knowledge of those facts, and concerns as to the way in which she was being treated, were obstacles to her concluding the separation agreement, then there is no explanation as to why she concluded the agreement, accepted its benefits and then, the day after the last payment was made to her, raised all of these concerns.

12 Unsurprisingly, the company filed a detailed answering affidavit, in which it put up a very different version of the facts (some of which I have discussed above). A day before the hearing, Ms Molatjane's attorney wrote to the respondents' attorney and informed him that, because it was "very apparent that the contents of the affidavits from both the applicant and the respondents are diametrically opposed" he was instructed to remove the matter from the roll "whereafter we will issue summons to commence with action proceedings so that the matter can be set down for trial".

13 Because it was too late for the applicant to remove the main application from the roll unilaterally, the matter came before Adam AJ the next day. Adam AJ made an order removing the matter from the roll and ordering Ms Molatjane to pay the wasted costs.

14 Despite saying, in the letter dated 24 May 2021, that Ms Molatjane's next step would be to issue summons, the applicant took a different approach. On 3 August 2021, the applicant uploaded onto Caselines a defective application in terms of rule 6(5)(g) of the Uniform Rules seeking an order referring the matter to trial. In doing so, the applicant sought further relief directing the founding affidavit to stand as the declaration in the action and the answering affidavit as the plea. The application is defective because it was not brought on notice of motion supported by a founding affidavit. It also seeks relief which plainly cannot be granted – most notably the request that the answering affidavit should stand as a plea, which would prevent the respondents from asserting their rights in terms of rule 23 of the Uniform Rules.

**THE PROPER APPROACH TO THIS MATTER**

15 The rule 6(5)(g) application is essentially an interlocutory application which asks this court to keep the main application alive by referring it to trial. Rule 6(5)(g) provides that, "where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision." One of the orders that a court may make to ensure a just and expeditious decision is to refer the matter to trial. So, the question presented to me by the text of rule 6(5)(g) – now that it is common cause that the application cannot properly be decided on paper – is whether to

dismiss the application or refer the matter to trial (since that is what the applicant has asked me to do).

16 In *Lombaard*,[1] an application was brought in the High Court by Mr Lombaard to transfer certain immovable property to him. His application failed and he appealed to the Supreme Court of Appeal ("the SCA"). Unlike in the present case, there was no application in the High Court for the matter to be referred for the hearing of oral evidence or to trial. The High Court simply determined the matter on the papers. But, in the SCA, a debate arose as to whether the matter ought to have been, and therefore should now be, referred to oral evidence. The majority of the SCA held that a proper factual basis for a defence had been set out in the answering affidavit and had not been addressed by the applicant (now appellant) in his replying affidavit. In holding that it would not be appropriate to refer the matter to oral evidence – and that, instead, it was appropriate for the SCA to confirm that the application was rightly dismissed by the High Court – the SCA said the following:

> "An order to refer a matter to oral evidence presupposes a genuine dispute of fact (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163; *Ripoll-Dausa v Middleton NO and others* 2005 (3) SA 141 (C) at 151F ff [also reported at [2005] 2 All SA 83 (C) – Ed]). The appellant chose not to respond to the factual allegations concerning rectification. He did so at his peril . . ."[2]

17 There are several ways in which the *Lombaard* matter is distinguishable from the present case. But, I have referred to *Lombaard* because it is helpful in the following respect: when there are genuine disputes of fact, the court will normally

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1 Lombaard v Droprop CC [2010] 4 All 229 (SCA)

2 Lombaard (supra) at para 26

dismiss an application in circumstances where the applicant ought reasonably to have anticipated them.[3] However, before a court even enters into an enquiry as to whether the applicant ought to have anticipated that there would be genuine disputes of fact on the papers, it has to be convinced that there are genuine disputes of fact on the papers in the first place. If there are not, no purpose would be served in referring the matter for the hearing of oral evidence or trial under rule 6(5)(g). Rather, the result of the application will be determined largely by the question of which party has failed to raise a genuine dispute of fact: if it is the respondent, then the application would normally be granted on the basis of the principles expressed in *Plascon-Evans*.[4] If it is the applicant – which would arise in circumstances such as in *Lombaard* when the applicant fails to address a genuine factual defence put up in the answering affidavit – then the application would simply be dismissed.

18 To determine that there is a genuine dispute of facts, it is necessary to consider the allegations in the affidavits of each side and ask: if the allegations made in the papers of each side turn out, with the leading of oral evidence, to be true, would they disclose a cause of action or defence? To give an easy example (and let us leave aside that an applicant would be most unlikely to bring a claim of this nature on application): a particular applicant sues a respondent for R500 000 in delict for negligent damage to property. In her founding affidavit, she gives a detailed narrative of how the respondent caused extensive damage to the applicant's car. In the respondent's answering affidavit, he gives a detailed

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3 See Economic Freedom Fights v Manual 2021 (3) SA 425 (SCA) at para 114

4 Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-5

narrative of how he had nothing to do with the damage and was out of the country at the time. If the applicant's version is true, she must win. If the respondent's version is true, he must win. This is a genuine dispute of fact.

19 On the other hand, a genuine dispute of fact will not even be triggered if the respondent puts up a version saying something along the lines of: the applicant is wrong when she says that I destroyed her car with a hammer, I actually did it with explosives. Yes, the parties may have different factual versions as to what actually happened. But, on either of their versions, the applicant must win.

20 Therefore, it seems to me that a court faced with a rule 6(5)(g) application should ask the following questions:

20.1 Is there a genuine dispute of facts on the papers?

20.2 If there is, then the next question is: ought the applicant to have anticipated these disputes of fact when launching the application? If the answer to that is yes, then ordinarily the court would dismiss the application.

20.3 If the applicant cannot have anticipated that disputes of fact would arise, or there is some other compelling consideration, the court would then ask whether it is in the interests of justice for the matter to be referred to trial or for a referral to oral evidence in respect of a discrete topic to be made. This will depend on the facts of each case.

21 If one looks at the affidavits in this case, one might be tempted to conclude that there are multiple, genuine disputes of fact. Ms Molatjane's version of what was

discussed at certain meetings, for example, is "diametrically opposed" to the company's version. But, to conclude that there is a genuine dispute of fact I must, as mentioned above (see paragraph 20.1 above) be satisfied that: if the version presented on affidavit turns out to be true, the party advancing that version would win. Put differently, I have to be satisfied that, were Ms Molatjane able to prove all of the facts advanced in the founding and replying affidavits, she would succeed in her claim.

22 In my view, Ms Molatjane does not even get out of the starting blocks in that regard: what is lacking in Ms Molatjane's papers is a plausible explanation of what she did not know in November 2017 (when concluding the agreement) which she came to know in February 2018 (when claiming, in her letter of demand, that her acquiescence in the agreement was induced by fraud). In other words, other than the afterthought about the FSB, all of the complaints made by Ms Molatjane in her letter of demand on 27 February 2018 related to issues of which she was already aware in November 2017 when she signed the separation agreement. A fundamental requirement in any claim based on misrepresentation inducing contract is that the claimant would not have concluded the agreement had he or she known the true facts. Ms Molatjane's papers simply do not disclose a cause of action based on misrepresentation (fraudulent or otherwise), even on her own version of the facts.

23 On this basis, the answer to the first question identified above – see paragraph 20.1 above – is no. For this reason alone, the application must be dismissed.

24 But, even if I am wrong on the first question, the second question – see paragraph 20.2 above – leads also to the conclusion that the application should

be dismissed. At best for Ms Molatjane, she ought to have anticipated that her version of the facts would be contested. Not only was Ms Molatjane prewarned about the company's defence at the CCMA, but in response to a letter of demand from Ms Molatjane's previous attorneys – sent six months before the application was ultimately launched – the company's attorneys gave a comprehensive account of the company's version of the facts (this is in a letter from Webber Wentzel to Bazuka and Co (the previous attorneys of Ms Molatjane) dated 30 May 2018), which annexed Mr Joffe's opposing affidavit filed in the CCMA. It had to have been foreseen, and, if not, it was grossly negligent for it not to have been foreseen, that the respondents would dispute the applicant's version of the facts. This would, on its own, also be a basis to dismiss the application.

25 It seems to me that the question of the appropriate order to make in this matter must be considered on the basis of the following facts:

25.1 Ms Molatjane freely entered into the separation agreement with the company.

25.2 After enjoying the benefits of the settlement reflected in the separation agreement, Ms Molatjane (literally the day after these benefits came to an end) embarked on a sustained campaign to use whatever means necessary (including the making of unwarranted allegations to the SAPS, a very serious matter) to restore herself to her former position or receive a handsome pay-out (taking into account that she now claims R3 million in unsubstantiated damages). She did this despite freely agreeing that she would not seek to be, and could not be, restored to her former

position and had no right to any compensation other than that for which provision was made in the separation agreement.

25.3 On many of these occasions, the company was forced to retain legal assistance to respond comprehensively to the complaints.

25.4 After all of these attempts came to nothing, Ms Molatjane eventually brought the present application. In addition to the fact that Ms Molatjane ought to have anticipated material disputes of fact, her version presented in the founding affidavit is implausible and inconsistent with the written, contemporaneous evidence presented in the answering affidavit. Most importantly of all, it does not sustain a cause of action for any of the relief – including the main claim that the agreement was induced by fraud – claimed in the notice of motion.

26 It follows from what I have said above that Ms Molatjane cannot escape the consequences of her ill-considered application by hoping that I shall grant the rule 6(5)(g) application. The application must be dismissed.

**COSTS**

27 The approach followed by the applicant to the entire application is deeply problematic. There are formal defects in the rule 6(5)(g) application. There are other defects in the application such as the mis-joinder of the first and third respondents and the non-joinder of Riana Theorides, who would clearly be directly affected if I were to grant the relief sought in prayer 3 of the notice of motion. There is also the intemperate approach adopted in the various affidavits

filed by Ms Molatjane; which include an accusation that the respondents were lying when they said that the CCMA had held that Ms Molatjane's referral bore no prospects of success (which, as I have mentioned above, the CCMA clearly found to be the case) and also various references to collusion based on skin colour, which are not substantiated.

28 In heads of argument filed both in the main application and in the rule 6(5)(g) application, the respondents seek a costs order on the attorney-own client scale, in the event that the court dismisses the applications. I asked *Mr Fourie* in argument if the respondents persisted in pressing for such an order. He pointed out that the issue is within the discretion of the court and, to the extent that he argued the point, his submissions were somewhat s*otto voce*. Based on the abuses catalogued above, I would ordinarily have been strongly inclined to make a punitive costs order.

29 However, my perception changed when I had the opportunity to meet (to the extent that an encounter on Microsoft Teams could be called a meeting) Ms Molatjane during oral argument. This was not something that an (acting) judge sitting in motion court would normally experience – however, owing to her legal representative's illness, Ms Molatjane chose to argue the case herself. *Mr Fourie*, who appeared for the respondents, quite properly offered to stand the matter down until Ms Molatjane's attorney became available (his affliction, a migraine, hopefully to be short-lived). But Ms Molatjane insisted on proceeding and I was satisfied that she would not be prejudiced (taking into account that she has a law degree and practised as a prosecutor for five years). But this is a digression; what I really mean to say about her address is that it reminded me that, when it

comes to relationships, even (some would say, especially) employment relationships, things tend to be complex. Although objectively (and that must be decisive, when it comes to the merits), her application was wholly defective, she genuinely appears to believe in her cause. It is somewhat arbitrary that I was able to see this for myself – I normally would have only seen this case through the prism of what is in the papers and what counsel argued. But I cannot ignore the fact that I saw Ms Molatjane's passion with my own eyes and, however misconceived it may be, she seems genuinely to believe in her case. I am confident that my discretion on costs is broad enough to take that into account.

30 In these circumstances, and in particular because I have been assisted by Mr Fourie's decision not to press the point strenuously, I do not believe it would be appropriate to make a punitive costs order.

**ORDER**

31 In the light of the above, the following order is made:

**1. The application brought under case number 28249/20 bearing the date stamp 29 September 2020 is dismissed.**

**2. The rule 6(5)(g) application, brought under the same case number as mentioned in paragraph 1 above, is dismissed.**

**3. The applicant is to pay the costs of both applications.**

**ADRIAN FRIEDMAN**
**ACTING JUDGE OF THE HIGH COURT**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 18 November 2021.

**APPEARANCES:**

Attorney for the applicant: Mokgothu Attorneys

Counsel for the applicant: The applicant appearing in person

Attorney for the first and second respondents: Webber Wentzel, Johannesburg

Counsel for the first and second respondents: G Fourie SC

Date of hearing: 16 November 2021

Date of judgment: 18 November 2021