IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 1434/07

In the matter between:-

RUSTENBURG UNITED LOCAL AND LONG DISTANCE TAXI ASSOCIATION Applicant

and

BAFOKENG TAXI OWNERS ASSOCIATION Respondent

CIVIL MATTER

DATE OF HEARING : 23 JUNE 2011
DATE OF JUDGMENT : 30 JUNE 2011

COUNSEL FOR THE APPLICANT : ADV SKOSANA
COUNSEL FOR THE FIRST RESPONDENT : ADV ESTERHUIZEN

JUDGMENT

HENDRICKS J

[A] Introduction:-

[1] The Applicant brought an application against the Respondent in 2007. The matter was argued and Landman J dismissed the application with costs on 10 August 2007. The Respondent's Bill of Cost was taxed on 16 November 2009 in the amount of R68 450.34.

[2] A writ of execution was issued and executed in respect of the aforesaid costs order but could not be satisfied as apparently no sufficient assets could be obtained from the Applicant. On 22 November 2010, the Respondent issued a notice in terms of Rule 14 against the following persons: **PM Sibanda; ET Molotsane; AS Thobokwe; JR Segodi; GEL Mualefe** *("the individuals")*.

[3] The notice alleges that the aforesaid individuals were members of the Applicant lIduring 2007, 2008 and 2009. The notice further requires the aforesaid individuals to file a notice of intention to defend the matter if they dispute that they were members of the Applicant during the period mentioned above or at any other stage and thereafter to file an affidavit in substantiation thereof.

[4] Finally, the notice states that, if the aforesaid notice of opposition is not filed, the individuals will be precluded from contesting any of the issues raised regarding their membership and will be held liable to have execution issued against them personally in the event of the Applicant's assets being excused in execution or

being insufficient. The notice therefore in essence holds the individuals personally liable to have the costs order executed against them. This is further confirmed by paragraph 2 of the notice of set down which intimates that the Respondent will apply for an order authorizing it to have execution issued against the aforementioned persons personally in respect of the taxed costs.

[5] It is common cause that the aforementioned individuals were members (and even executive members) of the Applicant during the said period. The notice is opposed in so far as it seeks to hold the aforementioned individuals in their personal capacity liable should the Applicant's assets be excused in execution or be insufficient to satisfy the costs order.

[6] On behalf of the aforementioned individuals it is contended that Rule 14, on which the Respondent relies, is intended to assist a plaintiff, applicant, defendant or respondent who seeks to hold liable members of a firm or partnership which is a party to pending court proceedings. In other words, so it is contended, Rule 14 cannot be used to hold members of a firm or an association personally liable for a judgment resulting from proceedings to which they were not parties and after such proceedings had been concluded. Such proposition is untenable and offends against the basic principle of ***audi alteram partem***.

[7] On behalf of the individuals it was contended that in view of the decision in **Jacobs v T J Daly & Sons (Pty) Ltd** 1977 (4) SA 140 (T), a number of observations need to be made in regard to Rule 14 and they are:-

[i] that the word *"suing"* in paragraph (d) of Rule 14 (5) connotes an action which is in existence or pending as opposed to concluded proceedings;

[ii] that the word *"proceedings"* in paragraph (c) of Rule 14 (5) could not embrace a judgment already granted;

[iii] that the phrase *"in limine"* in paragraph (g) of Rule 14 (5) clearly indicates that there must be a pending action; and

[iv] that the phrase *"judgment had been entered against him"* as appears in paragraph (h) of Rule 14 (5) implies judgment against a party as if such a party is a party to the action at the time when the judgment is granted.

[8] The conclusion reached in the **Jacobs** case ***supra***, was that, upon a proper interpretation of Rule 14, the Rule can only be used prior to the granting of judgment and not thereafter. Hence it was held that Mr Fanie Jacobs, who was the sole proprietor of the defendant's firm in that case, was not liable against the plaintiff as there was no valid judgment against him and a writ of execution could not be issued against him personally.

[9] In the book entitled Erasmus, Superior Court Practice on page B1 – 114 [Service 35, 2010] the learner authors states:-

"Subrule (5)(a): 'At any time before or after judgment.'
Prior to the amendment of the subrule in 1987 the notice formed

part of the summons; now the notice may be delivered to the defendant at any time before or after judgment. The decision in Jacobs v T J Daly & Sons (Pty) Ltd: In re T J Daly & Sons (Pty) Ltd v Engineering and Financial Services, in which it was held that the notice in terms of the subrule could not be issued after judgment, is therefore no longer applicable."

[10] Rule 14 is a procedural aid assisting a Plaintiff to cite certain legal entities that do not have any existence separate from their members or owners. This rule simplifies the method of citation by enabling such a body of persons to be sued in the name which it normally bears and which is descriptive of it. Rule 14 is obscurely worded and gives rise to a number of difficulties.

See:- **Ex-TRTC United Workers Front and Others v Premier, Eastern Cape Province** 2010 (2) SA 114 (ECB).

[11] I find the following comment by the authors of Erasmus, Superior Court Practice, ***supra*** quite apposite where they state:-

"The failure to make consequential amendments to the rest of the subrule, which belongs to the 'contextual scene' of a pending action, might create difficulties. For example, paragraph (g) of the subrule provides that where a person disputes the allegation that he was proprietor or partner, the court may at the hearing decide that issue in limine. When the notice is delivered to the defendant after judgment, a defendant who wants to dispute the status attributed to him in the notice would have no alternative but to bring a substantive application to have the notice set aside."

[12] Adv Skosana submitted that Form 8 of the First Schedule as referred to in Rule 14 (5)(d) clearly indicates that this Rule is to be used in pending proceedings. Furthermore, Rule 14 (10)(b), on which Respondent seems to rely, is couched in the future tense thereby emphasizing that such allegations must be made before the judgment is given.

[13] The author of Erasmus, ***supra*** states:-

> *"Consequential amendment of Forms also seems to be called for:*
>
> *"**Subrule (5)(c): A notice …. in accordance with Form 8.** The notice in accordance with Form 8 must be served concurrently with the defendant's reaction to the plaintiff's notice under paragraph (a) of the subrule. The plaintiff's notice may be delivered to the defendant at any time before or after judgment; hence the defendant's notice in accordance with Form 8 may be served after judgment. The wording of Form 8 is, however, not suited to a notice delivered after judgment: it calls upon the alleged partner to give notice of his intention to defend and to file a plea within prescribed periods. The form further says that if the alleged partner gives notice of intention to defend a copy of the summons will be served upon him, but it is nowhere made clear by whom. It is submitted that the wording of Form 8 is appropriate only to a notice given by a plaintiff under subrule (5) (d) and that adaptation of the wording will be necessary in order to fit the notice given by a defendant under this subrule.*
>
> *No provision is made for what is to happen if the defendant should fail to give notice in terms of Form 8 to a person whom he has, under the subrule, alleged to be a partner."*

[14] The contention on behalf of the individuals that they were neither parties to the proceedings which resulted in the costs order against the Applicant nor was any notice in terms of Rule 14 issued by the Respondent prior to the conclusion of those proceedings does not hold water. In my view, the Respondent is perfectly entitled to seek the necessary authorization to have execution issued against the individuals in respect of the cost order granted.

[B] Order:-

[15] Consequently, the following order is made:-

[i] The application is dismissed with costs.

[ii] The individuals named in the *"Notice to Alleged Member of Association"* dated 22 November 2010 are found to be members of the Applicant association and are held liable in their personal capacity, jointly and severally, the one paying the other to be absolved, for the satisfaction of the Cost order dated 2 August 2007.

[iii] The individuals named in the *"Notice to Alleged Member of Association"* dated 22 November 2010 are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

R D HENDRICKS

JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT: GUMBO & CO ATTORNEYS c/o S M MOOKELETSI ATTORNEYS

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