REPORTABLE/SPECIAL INTEREST

IN THE HIGH COURT OF NAMIBIA **CASE NO: I 3329/2010**

In the matter between:

ANDRIES PETRUS VELDMAN **FIRST PLAINTIFF**
LEONORA VELDMAN **SECOND PLAINTIFF**

and

MURRAY HENDRIK BESTER **DEFENDANT**

CORAM: GEIER, AJ

Heard: 14 April 2011
Delivered: 14 July 2011

JUDGMENT:

GEIER, AJ.: [1] As far as summary judgment proceedings are concerned, Rule 32 (4) of the Rules of High Court provides in peremptory terms, that:

> *"No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in sub-rule (2), nor may either party cross-examine any person who gives evidence viva voce or on affidavit: provided that the court may put to any person who gives oral evidence such questions as it considers*

may elucidate in the matter".

[2] Notwithstanding these provisions first and second applicants, the plaintiffs in this action, in their continued quest to obtain summary judgment, brought an interlocutory application in which they seek an order:

a) condoning the applicant's non- compliance with the rules of the above Honourable Court; and

b) granting the applicants leave to file a supplementary affidavit (annexed to the supporting affidavit marked "**A**") in the summary judgment application.

[3] The circumstances leading up to this application were set out in an unreported judgment[1] delivered on the 17 February 2011 from which it appears that plaintiff had instituted an action for payment of the sum of N$ 127 265.00 together with ancillary relief against the defendant during September 2010. The matter was defended in response to which an application for summary judgement was promptly launched.

[4] Instead of resisting summary judgement in one of the modes prescribed by Rule 32(3) the defendant brought an application in terms of Rule 30 of the Rules of High Court – seeking the setting aside of the plaintiff's summons as an irregular step. First and second applicant's, in turn, applied for the setting aside of the respondent's application in terms of Rule 30.

[5] After hearing argument I dismissed both applications in terms of Rule 30 and granted leave to the respondent to file an affidavit in terms of rule 32 (3) (b) setting out the merits of his defence.[2]

[6] It appears also from the aforesaid judgement handed down on 17 February 2011 that, in view of the dismissal of both the aforesaid applications in terms of rule

1 *Andries Petrus Veldman & Another v Murray Hendrik Bester* delivered under Case No: I 3329/2010
2 *Andries Petrus Veldman & Another v Murray Hendrik Bester* at [76]

30, the issue of whether or not summary judgment should, at that stage of the proceedings, have been granted, was considered by the court, but declined. [3]

[7] For ease of reference I cite the relevant parts of that judgment, which explain the background against which this further application needs to be decided:

> *"THE ASPECT OF POSTPONEMENT*
>
> *[69] In view of the dismissal of both applications in terms of Rule 30 the issue of whether or not summary judgment should now be granted comes to the fore.*
>
> *[70] The plaintiffs seek summary judgment.*
>
> *[71] The defendant on the other hand in his affidavit filed an opposition to the application for jummary judgment prays that the summary judgment application should stand over for determination subsequent to the hearing of the Rule 30 application.*
>
> *[72] It needs to be clarified in this regard that, although such affidavit was annexed to a 'Notice of Opposition', in which the defendant indicated that the affidavit of the defendant would be used in support of the opposition of the summary judgment application, and although such affidavit, in part, was styled in the same fashion that an affidavit filed in opposition to summary judgment proceedings would be customarily styled, (in that it stated that appearance to defend was not entered into solely for purposes of delay,*

3 *Andries Petrus Veldman & Another v Murray Hendrik Bester* at [77]

alleging at the same time that he had certain bona fide defences against the Plaintiffs claim etc.), defendant also indicated expressly also that he wished to raise such defences at the opportune moment. The remainder of the body of this affidavit basically echoed the allegations made by Mr. Roets, the defendant's legal practitioner of record, in support of the Defendants application made in terms of Rule 30.

[73] As these affidavits contained no ' pleading over' on the merits, the defendant was clearly at risk for failing to disclose any defence on the merits therein. Thus it became imperative that a postponement be sought and obtained.

[74] The defendant is rescued in my view by the proviso contained on Rule 30 (1), which states :

> *" ... : Provided that no party who has taken a further step in the cause with knowledge of the irregularity shall be entitled to make such application.*

[75] The filing of an affidavit in terms of Rule 32(3)(b) would have constituted such a further step in the cause.

[76] As it was also not contended on behalf of plaintiffs' that the defendant's affidavit styled ' affidavit filed in support of the Notice of Opposition', constituted such a further step, it must be accepted that the

defendant was precluded by the proviso to the rule, from filing an affidavit and in terms of Rule 32(3)(b), the moment he elected to activate the mechanisms of Rule 30. The dictates of justice surely demand that he now be given such opportunity.

[8] The respondent indeed availed himself of that opportunity when he filed a lengthy affidavit in terms of Rule 32(3)(b) on 1 March 2011. In this affidavit various defences were set out.

[9] In response thereto the applicants have now brought this application in terms of which they seek leave to file a further affidavit. In support of that application first applicant states :

> *"The purpose of this interlocutory application is to seek condonation in terms of Rule 27 (3) and to be granted leave by this Honourable Court to put this affidavit before Court in the summary judgment application proceedings before Court under the above-mentioned case number.*
>
> *By way of background on 28 September 2010 the applicants issued summons against the respondent claiming the sum of N$ 127,256.00 based upon loan agreements entered into on 23 June 2010, together with interest, which action was defended by the respondent.*
>
> *On 22 October 2010 the plaintiffs filed a notice of application for summary judgment. The respondent responded with an application in terms of Rule 30 to which the applicants filed a further Rule 30 application. Respondent also filed an affidavit in opposition to the summary judgment application.*
>
> *On 17 February 2011 this Honourable Court dismissed the Rule 30 applications, but postponed the summary judgment application to*

afford the respondent an opportunity to file a further affidavit in opposition to the application for summary judgment.

At the time the respondent had simply filed an affidavit in opposition to summary judgment which did not deal with the merits of the respondent's defence, the respondent merely stating that he would deal with the merits at the "opportune moment".

I submit, with respect, that the effect of the Court's order is that the respondent was given an opportunity to file a further opposing affidavit, something that is not provided for in Rule 32 of the Rules of this Honourable Court. Ordinarily, and even where a respondent to an application for summary judgment takes a point in limine, the respondent should plead over on the merits.

In the further affidavit filed, the respondent refers to a "purported loan agreement" between himself and the second applicant and myself. He complains that a copy has not been made available to the Court. In essence, he denies the existence of such agreement.

In order to set the record straight, I annex as "APVI" a copy of the relevant page of a previous affidavit (page 69) dated 22 October 2010 deposed to by the respondent in opposition to his sequestration by the Bank of Namibia (under case number A2 5 5/2010) wherein he confirms the existence of such agreements, by stating:

'188.3 It is also evident that the loan agreements which were concluded on 23 June 2010, constituted a novation of the previous agreements between myself and the Veldmans'.

The respondent's denial of the existence of the loan agreements is accordingly false. Due to the prolixity of such answering affidavit my legal practitioners will ask that the Registrar of this Court make such file in respect of such application available at the hearing of this

matter.

In the same way that the Court in this matter found that the "dictates of justice" demanded that the respondent be given a further opportunity to set out his defence, it is submitted that similarly the "dictates of justice" demand that the applicants be given the opportunity to put the aforesaid portion of the respondent's affidavit before Court to confirm that what the respondent states in his affidavit is completely untrue.

It is respectfully submitted that special circumstances dictate that the applicants be granted condonation and leave to file this affidavit and to have the relevant file placed before Court.

I accordingly pray that the Court may grant the order as set out in the notice of motion to which this affidavit is annexed."

[10] The application for summary judgment was in such circumstances again set down again for hearing.

[11] Mr Corbett appeared on behalf of the applicant. There was no appearance on behalf of the respondent.

[12] In such circumstances it was apposite that the court 'attend to the applicants submissions' but would also have to 'take cognisance of the contents of the affidavit' filed on behalf of respondent in terms of rule 32 (3) (b) as, clearly, the non-appearance of the defendant, in person, was irrelevant to the consideration of the application as a whole on the papers, which served before the court and to which regard should be had. It is also clear that rule 32 does not require an appearance on behalf of any respondent who has filed an opposing affidavit.[4]

4 See *Die Afrikaanse Pers Beperk v Neser* 1948 (2) SA 295 (C), *Gilinsky v Superb Launderers and Dry Cleaners (Pty) Ltd* 1978 (3) SA 807 C 808 H, *First National Bank of SA Ltd v Myburg and Another* 2002 (4) SA 176 C at 179 G, *Mopicon Construction CC v Partnership: Van Jaarsveld and Heyns* [2003] 3 ALL SA 397 T at 400 See also generally : *'Summary Judgement – A Practical Guide'* by Van Niekerk, Geyer & Mundell at p 11-44 (Issue 5)

THE APPLICATION FOR LEAVE TO FILE A FURTHER AFFIDAVIT

[13] At the hearing Mr Corbett then firstly submitted that the court should, in the exercise of that same discretion that the court had utilised in its judgment, and in terms of which the court had allowed the respondent to file a further affidavit in terms of rule 32 (3) (b), allow the applicant to respond to the respondent's further affidavit by way of the affidavit through which the applicants were now seeking to introduce onto the record – alternatively that court should exercise its inherent jurisdiction to do so. There were essentially two 'legs' to Mr Corbett's argument.

[14] He submitted further with reference to the court's judgment that it was clear that the court had exercised its discretion when it allowed the respondent to file a further affidavit. Thus the applicants should similarly be entitled through the court's beneficial exercise of such discretion to respond thereto. The additional affidavit, which the applicant's were seeking to introduce, did not introduce new issues – on the contrary - it simply amounted to a rebuttal to which the applicant's should be entitled to 'in all fairness'.

[15] Leave to introduce such further affidavit was then sought on the basis of Rule 27(3). The applied for condonation should be granted as the rebutting evidence which the applicants wished to introduce onto the record demonstrated clearly that the respondent had perjured himself in regard to the denial of the existence of the loan agreement - on which applicants had based their action - and which alleged perjury was further apparent from the contents of the court file, which was made available through the registrar to the court - which contents would show that- what the respondent had stated in his affidavit – 'was completely untrue'.

[16] He relied further on the 'exceptional circumstances of the case' created by this situation, through which the applicant's should obtain an opportunity to rebut the respondent's perjury and in respect of which 'the dictates of justice ' would demand that the court accede to the application to ensure that the 'respondent not

get away with it'.

[17] On closer analysis of these submissions it appeared that the applicants were essentially seeking to utilise the mechanisms created by rule 27(3) as the springboard for introducing the further affidavit - despite the peremptory provisions of rule 32 (4) to the contrary - to enable the court to take 'proper' cognisance of further evidential material which was not 'properly before the court', such material to become admissible, through condonation, for purposes of the adjudication of the pending summary judgment application.

[18] If one thus - for the moment leaves aside - the dictates of Rule 32(4) - it appears firstly that the application brought in terms of Rule 27(3) can only succeed – if the applicants can show the requisite *'good cause'*.[5]

[19] As "the sub-rule expressly empowers the court to condone any non-compliance with the rules and should not only be confined to non-compliances with the rules, other than those laying down time limits,"[6] rule 27(3) could, in principle, constitute the vehicle to overcome the hurdle posed by Rule 32(4).

[20] "The wide powers of the court, to condone non-compliances with its own rules, are however subject to the requirement, and safeguard, that '*good cause'* must be shown"[7].

[21] "It is clear that in principle and in the long-standing practice of our Courts the term *'sufficient cause'* or *'good cause'* is that the party seeking relief must (i) present a reasonable and acceptable explanation for its default; and (ii) that on the merits such party has a prima facie defence or claim, that carries some prospects of success."[8] At the very least the party seeking the indulgence must show something which entitles him to relief.

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5 The court may, on good cause shown, condone any non-compliance with these rules.
6 *'Erasmus Superior Court Practice'* at p B1-174 (Service Issue 35, 2010)
7 *'Erasmus Superior Court Practice'* at p B1-174 (Service Issue 35, 2010)
8 See for instance : *Solomon v De Klerk* 2009(1) NR 77 (HC); *Van Zyl and Another v Smit and Another* 2007(1) NR 314 (HC), *China State Construction Engineering Corporation (Southern Africa) (PTY)Ltd v Pro Joinery CC* 2007 (2) NR 67 (HC) *TransNamib v Essjay Ventures Ltd* 1996 NR 188 (HC); *Rothe v Asmus and Another* 1996 NR 406 (HC); *Xoagub v Shipena* 1993 NR 215 (HC) etc

[22] Have the applicants shown such entitlement?

[23] It appears, in the main, that the applicants now wish 'to turn the tables' on the court when they argue - on the strength of the court's reasoning – and on the basis of the court's finding that 'the dictates of justice' then demanded - in the circumstances - that the respondent be given an opportunity to file a further affidavit on the merits - in terms of Rule 32(3)(b) – that the applicants now – similarly - 'on the strength of the dictates of justice' – claim to have become, or should become entitled to respond to the further affidavit filed as a result of the court's order.

[24] This argument significantly fails to take into account that it is quite explicit from the court's reasoning that the further affidavit was allowed on the following very limited basis only :

> *"[74] The defendant is rescued in my view by the proviso contained on Rule 30 (1), which states :*
>
> > *" ... : Provided that no party who has taken a further step in the cause with knowledge of the irregularity shall be entitled to make such application.*
>
> *[75] The filing of an affidavit in terms of Rule 32(3)(b) would have constituted such a further step in the cause.*
>
> *[76] As it was also not contended on behalf of plaintiffs' that the defendant's affidavit styled ' affidavit filed in support of the Notice of Opposition', constituted such a further step, it must be accepted that the*

defendant was precluded by the proviso to the rule, from filing an affidavit and in terms of Rule 32(3)(b), the moment he elected to activate the mechanisms of Rule 30. The dictates of justice surely demand that he now be given such opportunity."[9]

[25] It appears quite clearly from the above that the court had to - and did - reconcile the requirements of Rule 30(1) with the requirements set by Rule 32(3)(b). It also appears from the judgment that the court was alive to the requirements of Rule 32(3)(b).[10]

[26] It cannot thus be said that there was ever any intention to deviate 'in the interests of justice' from the strict requirements set by Rule 32 for the summary judgement procedure – or to convert same to motion proceedings governed by Rule 6 of the Rules of High Court - and to thus open up such procedure to the exchange of further affidavits – contrary to the requirements set by Rule 32(4) on any exceptional basis.

[27] The first point to be made is therefore that the ground, which is based on the court's decision, to afford the respondent the opportunity to file a further affidavit – is misconceived due to an incorrect interpretation/analysis of the court's ruling. Such ground in my view thus cannot constitute good and sufficient cause to afford the applicant's the indulgence sought.

[28] The second aspect which comes to the fore is that the admission of a further affidavit onto the record – for the self-admitted purpose – to rebut the respondent's case only – would be to afford the applicants a right – which – in terms of Rule 32(4) – they don't have.[11]

[29] It appears further that applicants have elected to activate and utilise the

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9 See the unreported Judgment : *Andries Petrus Veldman & Another v Murray Hendrik Bester* delivered on 17/2/2011 Case No: I 3329/2010

10 Unreported Judgment : *Andries Petrus Veldman & Another v Murray Hendrik Bester* delivered on 17/2/2011 Case No: I 3329/2010 at para [73]

11 See also *Rossouw and Another v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) at 453F -454C

summary judgement mechanisms. They have thus elected to bring themselves within the ambit of Rule 32. They now 'want to contract out' of this dispensation – surely this is not what the framers of the Rule had in mind when they framed rule 32(4) – in clear, unambiguous words - which expressly states that a plaintiff may not adduce any evidence other than that allowed by rule 32(2).

[30] Is it not relevant – and fair – in such circumstances – that a respondent – who has brought himself within the ambit of the rules – should be entitled to the protection afforded by such rules. To 'shift the goalposts', so-to speak- on that basis – surely - would also not constitute good- or sufficient grounds for the granting of the indulgence sought.

[31] Mr Corbett however had a further argument and he thus urged the court to exercise its inherent jurisdiction. No authority was advanced for this proposition.

[32] A useful summary and history of the High Court's inherent jurisdiction is however set out by Heathcote AJ in the recently reported decision of *Namibia Development Corporation v Aussenkehr Farms* 2010 (2) NR 703 (HC) at pages 713 to 718 para's [16] – [30].

[33] Relevant to this matter it appears from the aforesaid exposition of applicable law that :

a) the court's inherent jurisdiction will only be exercised in exceptional circumstances;[12]

b) the exercise of the court's inherent jurisdiction would be justified if there is a lacuna in the law;[13] (in this regard it needs to be taken into account that 'the court is in all probability not entitled to make substantive law, and cannot act contrary to statutory prohibition'[14])

12 *Chairperson of the Immigration Selection Board v Frank & Another* 2001 NR 107 (SC) at 176 D; *Namibia Development Corporation v Aussenkehr Farms at [30] [i]*
13 *Namibia Development Corporation v Aussenkehr Farms at [29]*
14 *Namibia Development Corporation v Aussenkehr Farms at [30] [l]; Minister of Defence v Mwandinghi* 1993 NR 63 SC - (1992 (2) SA 355 (NmH) at 368-369

c) the inherent power is not merely one derived from the need to make Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation;[15]

[34] The decision of *Commercial Bank of Namibia Ltd v Grobler*[16]*,* in which Levy AJ, (as he then was), *' rejected an invitation from counsel to exercise the court's inherent jurisdiction, holding that the court's inherent jurisdiction will not be exercised ' were the Rule of Court deals with the situation adequately',*[17] seems to be in line with the above exposition.[18]

[35] Finally regard should be had to what Grosskopf JA stated in *Krygkor Pensioenfonds v Smith*[19]*,* when the South African Appellate Division held that *'only in exceptional cases will the court exercise its inherent jurisdiction to follow procedures not regulated by the ordinary law of procedure. It will do so only when the requirements of justice demand a deviation from the ordinary rules of procedure. And even when a deviation may be necessary, the court will always attempt to deviate as little as possible from established procedure'*.[20]

[36] Having regard to these principles it would appear that it has to be determined whether or not, the situation at hand, calls for the exercise of he the court's inherent jurisdiction? Is the situation exceptional?

[37] In this regard it must firstly be kept in mind that the Applicant's resorted to – and have activated the summary judgement mechanisms provided for in Rule 32 of the Rules of High Court. This election was made in the acute knowledge that rule 32 (4) would restrict their right to respond. Once applicants were faced with the

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15 *Namibia Development Corporation v Aussenkehr Farms [27] ; Ex parteMillsite Investment Co Pty Ltd 1965 (") SA 582 (T)*
16 2002 NR 24 (HC)
17 *Namibia Development Corporation v Aussenkehr Farms at [29], Commercial Bank of Namibia Ltd v Grobler at p30 D-E*
18 See also generally : *Herbstein & Van Winsen* : *'The Civil Practice of the Supreme Court of South Africa'* at p 38 were it is stated : 'Thus, where a particular matter is not provided for in the rules of court, the superior courts will, in the exercise of their inherent powers, deal with it.'
19 1993 (3) SA 459 (A)
20 *Krygkor Pensioenfonds v Smith* at 469 F-I

respondent's affidavit filed in terms of Rule 32(3)(b), they wished to rebut the contents of that affidavit. They now claim that this scenario calls for the exercise of the court's inherent jurisdiction.

[38] I fail to appreciate why such scenario should be considered exceptional. Is the situation, which arose in this instance, not precisely that, which arises, in most summary judgment proceedings, were a plaintiff, having verified his claim under oath, usually, is faced with the defendant's, conflicting, version, also under oath?

[39] Surely it would also not be uncommon, in such situation, for a Plaintiff to claim that he has available, certain rebutting evidence which would show that- what the respondent has stated in his affidavit – 'was completely untrue', that the respondent therefore has perjured himself, and that the respondent 'should not get away with it'. I would think that is a scenario that was always within the contemplation of the parties and the rules?

[40] Secondly it is clear that there is no lacuna in the applicable procedural law, given the requirements of Rule 32(4).

[41] The related question which also arises is whether Rule 32(4) adequately deals with the situation, which has arisen in this case?

[42] In this regard it must be of relevance that the summary judgment procedure is an extra-ordinary procedure[21], which should not to be equated with opposed motion procedure in terms of rule 6, and in terms of which the rule-maker, in terms of rule 32(7), has created a speedy mechanism of assessing whether a matter is to proceed to trial or not.[22]

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21 Described by the learned authors Van Niekerk, Geyer & Mundell in their book *'Summary Judgment – A Practical Guide'* as being 'a unique, hybrid and final remedy' – affording 'prompt relief for a plaintiff at the expense of a defendant denied the normal trial procedures' – at p1-5 (Issue2), which has also been described as a remedy which is 'very stringent' in that it closes the door to the defendant …' : see for instance *Herbstein & Van Winsen* : *'The Civil Practice of the Supreme Court of South Africa'* at p 435

22 (7) If the defendant finds security or satisfies the court as provided for in sub-rule (3), the court shall give leave to defend, and the action shall proceed as if no application for summary judgement had been made.

[43] Surely the scheme created by the rules of court appears to be one that, once a respondent has crossed that hurdle, the summary judgement procedure should not to be 'contaminated' with that which ought to be decided upon at a trial itself. The wording of sub-rule (4) is clear in this regard.

[44] Whether or not the respondent has committed perjury in denying the existence of the loan agreement relied upon in this instance is clearly such an issue which should be decided at the trial itself. It appears that there is no immediate need to regulate an existing procedure in order *'to hold the scales of justice'* at this moment as the applicable law and procedure provide adequately for the given situation in due course.

[45] Ultimately the applicants' argument loses sight of the fact that the summary judgement procedure merely provides for a minimum level of evidence, against which a case needs to be decided. The summary judgment procedure is not geared to the resolution of material disputes and where the admission of a further affidavit onto the record would not only set a precedent which would open the proverbial 'floodgates' so- to- speak to similar applications, but which would also allow the summary judgment process to degenerate into a trial on paper, which is not only undesirable, but, for obvious reasons, would go against the grain of the nature and purpose of summary judgment proceedings.

[46] In such circumstances and for such reasons I cannot accede to the application to allow the further affidavit of first applicant onto the record.

THE APPLICATION FOR SUMMARY JUDGMENT

[47] The applicants have again applied for summary judgment.

[48] The respondent has now filed an affidavit in terms of rule 32(3)(b).

[49] In these circumstances the respondent had to allege and prove that he has a

bona fide defence or defences to the action instituted against him, in respect of which he also had to fully disclose the nature and grounds of such defences as well as the material facts relied upon therefore. These requirements are satisfied if a defendant alleges facts, which, if proved at the trial, will be an answer to the plaintiffs claim and which are not inherently and seriously unconvincing.[23] Furthermore, as it was put in *Standard Bank of Namibia Ltd v Veldsman* : *'summary judgment is a very stringent and final remedy which closes the doors of the court for the defendant and should be granted only if it is clear that the plaintiff has an unanswerable case'*.[24] It has often been stated by the court that, '*even if the defence of the defendant does not sufficiently comply with the requirements of rule 32 (3) of the rules of court the courts still has a discretion to refuse summary judgment.*' [25]

[50] It appears from the further affidavit of the respondent that he has meticulously raised various defences which are summarised, in the conclusion, as follows:

> *"57. I respectfully say that the above evidence gives rise to the following conclusions, each of which establishes a defence in my favour against the claims of the plaintiffs:*
>
> *57.1 The plaintiffs, on their own version, have participated in what they allege was an unlawful and illegal agreement, contravening the provisions of the Banking Institutions Act. They are accordingly precluded by the provisions of the pari delictum rule to enforce such agreement;*
>
> *57.2 The plaintiffs have approached the court with unclean hands, in the process deliberately and disingenuously concealing the background of their transactions with me which was labelled, in the proceedings of the Bank of Namibia, as unlawful and illegal. In addition thereto the plaintiffs have made themselves*

23 See for instance : *Breytenbach v Fiat SA Edms Bpk* 1976 (2) SA 226 (T) at 227 G 228 B
24 1993 NR 391 at 392 D
25 *Standard Bank of Namibia Ltd v Veldsman* at 392 D

guilty of presenting false evidence to this court, under oath, as and when they deemed it "strategically wise" to do so;

57.3 Further in addition to the aforegoing, the plaintiffs and I have orally agreed that I would be given an opportunity until April 2014 to recoup the losses that I suffered in the trading on the behalf of first plaintiff, by reason of which the amounts currently claimed in the simple summons – even if it is postulated or assumed that these amounts are due to the first and second plaintiff in their personal capacities – are not due and payable."

[51] All these defences, if established at a subsequent trial, would satisfy the requirements of rule 32 (3) (b). It also cannot be said that the applicants have an unanswerable case.

[52] If one then in the final analysis compares particularly the allegations of the respondent to the effect that " … *the plaintiffs have made themselves guilty of presenting false evidence to this court, under oath, as and when they deemed it "strategically wise" to do so …"*, with those which the applicants wanted to adduce by way of a further affidavit and a further court file, proving in effect that the respondent had perjured himself, it becomes clear that this would never have been a fit and proper instance to have made an order allowing for a ventilation of these issues by way of a deviation from rules of court, in the interests of justice, at the summary judgment stage.

[53] In the circumstances the application for summary judgment falls to be dismissed. Costs are ordered to be costs in the cause.

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GEIER, AJ

Counsel for First and Second Plaintiffs: **Adv. A.Corbett**

Instructed by: **LorentzAngula Inc**

No appearance by Defendant