



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **3497/2021**

In the matter between:

MANGAUNG METROPOLITAN MUNICIPALITY

1st Applicant

THE EXECUTIVE MAYOR OF MANGAUNG
MUNICIPALITY

2nd Applicant

And

UNIVERSITY OF THE FREE STATE

1st Respondent

Adv. PHILLIP MOKOENA SC

2nd Respondent

Adv. GCBANI NGANGISA

3rd Respondent

Adv. L TLELAI

4th Respondent

MOROKA ATTORNEYS INC.

5th Respondent

Adv. TANKISO MEA

6th Respondent

JUDGMENT BY:

MOLITSOANE, J

HEARD ON:

7 SEPTEMBER 2023

DELIVERED ON:

27 DECEMBER 2023

- [1] The First Respondent brought an application on motion in terms of Uniform Rule 30(1) seeking that the 'Explanatory Affidavit filed by the Sixth Respondent delivered on 22 November 2022 be struck off. The main application is for the rescission of the order of review granted by consent between the Applicants and the First Respondent. In this interlocutory application the parties will be referred to as in the main application.
- [2] The facts of this application are largely common cause: On 29 November 2017, the First Respondent instituted a review application in this court under case number 6266/2017 against the Applicants. On 27 May 2019 the court granted a review order by agreement in favour of the First Respondent. During the granting of the review application the Applicants were represented by a senior counsel, a junior counsel an attorney The attorney, (the Third Respondent) was from the office of the Fourth Respondent, which was also the attorneys of record of the Applicants.
- [3] On 30 July 2021 the Applicants launched an application for rescission of the judgment granted on 27 May 2019. The basis for the rescission of judgment is that the Applicants contend that the erstwhile legal representatives of the Applicants were not authorised to agree to an order of 27 May 2019 and as such, the said order was erroneously granted. The First Respondent opposed the rescission of judgment, in limine, on the basis that the Applicant's erstwhile legal representatives should have been joined. On the merits the rescission application was opposed on the basis that the order of 27 May 2019 was granted by agreement between the respective counsels of the parties.
- [4] On 19 May 2019 this court upheld the attack of non-joinder and ordered that the rescission application be stayed until such time as the joinder of the Second to the Sixth Respondent had been effected. On 22 June 2022 the Applicants issued an application for the joinder of the Second to the Sixth Respondent in the rescission application. On 20 July 2022 the Fifth Respondent delivered what is termed an 'Explanatory Affidavit' with annexures thereto in the joinder application. The Explanatory Affidavit deal

essentially with circumstances leading to the conclusion of the agreement which led to the order of 27 May 2019. The joinder application was enrolled for hearing on 11 August 2022. The court granted the joinder application on an unopposed basis on the said day. The order reads:

“In accordance with Rule 10, Uniform Rules of Court, First, Second, Third, Fourth and Fifth Respondents be joined as Respondents in case 3497/2021(main matter) and to file, if necessary and where relevant affidavits in support and /or opposition and /or reply to the respective affidavits and Sixth Respondent and Applicants to supplement, answer and/ reply if any.”

[5] Following the granting of the joinder order the First Respondent launched an application to supplement its papers by means of the Explanatory Affidavit referred to in paragraph [4]m above. The Applicants did not oppose this application and same was granted on 27 October 2022. The court in granting this order also granted the following relief:

1. “...
2. ...
3. ...
4. The applicants are granted leave to supplement their replying affidavit in the rescission application within ten days from delivery of this order to the applicants’ attorneys in accordance with the uniform rules of court.”

[6] The Sixth Respondent also delivered an ‘Explanatory Affidavit’ on the First Respondent on 22 November 2022. The Explanatory Affidavit deals with facts pertaining to his instructions and his reliance on his adviser during his tenure as a Municipal Manager. The affidavit also purports to set out how the Sixth Respondent could not have given the instructions for the agreed order of 27 May 2019. The First Respondent objected to the filing of this Explanatory affidavit as an irregular step. A notice was duly issued in terms of Rule 30 calling upon the Sixth Respondent to remove the cause of the irregularity by withdrawing the affidavit. The Sixth Respondent elected not to withdraw the

affidavit. The First Respondent contends that it not taken any further step in this cause.

[7] The First Respondent contends that *'the contents of the Explanatory Affidavit; deposed to by the Sixth Respondent relates to facts that was(sic) known to the Sixth Respondent all along and at the time when he deposed to a confirmatory affidavit in the rescission application and these facts and contentions should have been set out in the affidavits filed in support of the applicants'* rescission application. The First Respondent further contends that the Rules make no provision for filing of the Explanatory Affidavit.

[8] On the other hand the Applicants dispute that the Rules make no provision for the filing of an Explanatory Affidavit. It is contended by the deponent on behalf of the Applicants and which contention is purported to be confirmed by the Sixth Respondent that the rights / obligations obtained in the orders of 11 August 2022 and 27 October 2022 are still available to the Sixth Respondent.

[9] In my view the issue which calls for determination is whether the filing of the Explanatory Affidavit is irregular and has to be struck out. Allied to this, is the interpretation of the orders of 11 August 2022 and 27 October 2022.

[10] Rule 6(1)(e) of the Rules provides as follows:

“(1) Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

(2) ...

(3) ...

(4)

(5) (a) to (c)

(d) Any person opposing the grant of an order sought in the notice of motion must-

(i)

(ii) within fifteen days of notifying the applicant of his intention to oppose the application, deliver his answering affidavit, if any, together with any relevant documents; and

(iii)

(e) Within 10 days of the service upon him of the affidavit and documents referred to in subparagraph (ii) of paragraph (d) of sub rule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits”

[11] A court has the sole discretion in terms of Rule 6(5) (e) to allow the filing of further affidavit(s) after the usual three sets allowed by the Rules. In *Hano Trading v JR 209 Investments*¹ the court held that:

“[11] Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion in this regard where there is a good reason for doing so.

[12] This court stated in *James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963(4) SA 656 (A)* at 660D-H that:

‘It is in the interest of the administration of justice that the well- known and well established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted.....”

[13] It was then later stated by Dlodlo J in *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) in paras 12-13:

“The applicant is simply not allowed in law to take it upon himself and [to] file an additional affidavit and put same on record without even serving the other party with the said affidavit.....

¹¹ [2012] ZASCA 127(21 September 2012).

Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as pro non scripto”

- [12] The Fourth and Sixth Respondents filed what they termed Explanatory Affidavits. The First Respondent, in order to supplement its papers approached the court on notice by way of an interlocutory application. The reason for the application was, inter alia, to seek leave to supplement its paper by formally requesting the court to sanction admission of the said affidavit into evidence. The Applicants did not find it necessary to follow the route of the First Respondent. According to the Applicants and the Sixth Respondent, the court in the orders of 11 August 2022 and 27 October 2022 had already sanctioned the filing of this Explanatory affidavit.
- [13] In interpreting a judgment or order, the approach of a court is the same as when interpreting a document. The effect of a judgment or order is ascertained from reading the court order or judgment as a whole and giving words their natural or ordinary meaning.²
- [14] As a starting point it is important to note that the Sixth Respondent purported to file a confirmatory affidavit, confirming the facts contained in the answering affidavit of the Applicants’ attorney of record. The answering/opposing affidavit of the attorney was signed and sworn before the commissioner of oaths on 16 February 2023. The confirmatory affidavit was signed and sworn on 13 February 2023, three days before the answering affidavit was attested to. It follows that the Sixth Respondent could not have confirmed the affidavit when same did not exist. Such confirmatory affidavit must be seen as pro-non scripto.
- [15] Be that as it may, it is undisputed that the Sixth Respondent did not seek leave from the court to file the so-called Explanatory Affidavit. In as much as the Applicants contend that the Rules make provision for the filing of the

² See *Firestone South Africa (Pty)Ltd v Genticuro AG* 1977(4) SA 298(A) at 304 D-E.

Explanatory affidavit, this court was not referred to any authority on the said aspect. This court is also unaware of any such authority which allows for the filing of an Explanatory Affidavit. It is submitted in the Heads of Argument that the court has a discretion whether or not to grant the application even if the irregularity is established. In my view, the discretion can only be exercised where there is an application before court for the exercise of its discretion. Absent any formal application, there is no discretion to exercise.

[16] The Applicants do not seem to have filed any Notice to Oppose. That was done by the Sixth Respondent. I am willing to accept that this notwithstanding, it is clear that the Applicants are desirous to oppose the relief sought. It is important to observe that the Sixth Respondent had filed a supporting affidavit in the rescission application. It is true what is contended by the First Respondent that all the facts which are contained in the Explanatory Affidavit were known to the Sixth Respondent when he deposed the supporting affidavit in opposing the rescission application. The Sixth Respondent gives no plausible explanation as to why the information which was within his knowledge was not set out in his supporting affidavit.

[17] His explanation that after going through all the affidavits again, especially in light of the Notice of Application by the First Respondent and the affidavit of Mr Christiaan Rudolph Liebenberg, he sought legal advice on the matter. that he was advised to submit an explanation³ is not good enough. It is important to note that the lis in this matter is essentially between the First Applicant and the First Respondent. Much as the Sixth Respondent has been joined, it is as a result of the interest he may have in the outcome of these proceedings. It is for this reason that the rescission application is vociferously pursued by the First Applicant. The orders of 27 May 2019 and 27 October 2022 were not meant to give any party the so-called proverbial second bite on the cherry. The two orders did not give the parties the blanket licence to file any affidavit they wish to file. The orders were specific that the Sixth Respondent could supplement, answer or reply by way of a further affidavit.

³ FA Annexure CL2 page 18 para 5.

[18] It is clear that the Sixth Respondent sought to bolster or supplement the affidavit he filed in opposition of the rescission application. In *Bangtoo Bros and Others v National Transport Commission and Others*⁴, court held that where supplementary affidavits do not deal with new matters arising from the reply by an applicant, or new evidence which came to the attention of the parties subsequent to their filing of the affidavits, the party seeking an indulgence must provide an explanation which is sufficient to assuage any concern that the application is mala fide or that failure to have introduced the evidence in question is not due to a culpable remissness of such party. I have already alluded to the fact that the explanation of the Sixth Respondent for failing to deal with facts which were known to him holds no water. The Explanatory affidavit did not supplement, answer or offer a reply. Such an affidavit could not be filed without the permission of the court. Its filing thus constitutes an irregular step. I accordingly find that the First Respondent's application must succeed.

[19] With regard to the issue of costs, it is trite that their award lies in the discretion of the court. When the Sixth Respondent decided to oppose this application, he should have known that a cost order might be made against him should he be unsuccessful in opposing the application. The Sixth Respondent and the First Applicant must surely bear the costs as unsuccessful parties. I am, however, of the view that this application did not warrant the employment of two counsels. I accordingly make the following orders:

ORDER

1. The Explanatory Affidavit of the Sixth Respondent, Advocate Tankiso Mea delivered on 22 November 2022 is struck out;
2. The First Applicant and the Sixth Respondent are ordered, jointly and severally, the one to pay the other to be absolved, to pay the costs of this application which costs shall include the costs of one Counsel.

⁴ 1973(4) SA 667(N) at 680 B.

P. E. MOLITSOANE, J

On behalf of the First Respondent:

Adv. DJ van der Walt SC

Appearing with

Adv. JS Rautenbach

Instructed by

Symington De Kok

BLOEMFONTEIN

Ref

On behalf of the Applicants:

Adv. AH Burger SC

Instructed by

State Attorney

BLOEMFONTEIN

Ref

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