

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 18976/19

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 21 August 2023

E van der Schyff

In the matter between:

JOHANNA MAGRIETA SUSANNA BOTHA APPLICANT

and

4D HEALTH (PTY) LTD RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] This matter has a protracted history. In this interlocutory application, the applicant seeks leave to file a supplementary affidavit to introduce amended particulars of

claim under case number 80758/18 as new evidence. The applicant contends that the new evidence is material to the subject matter in the main application and only 'came about' after filing the replying affidavit on 15 October 2020. What the applicant essentially purports to do, is to add the amended particulars of claim as an annexure to the application. The application is opposed.

Context and submissions

- [2] The applicant launched an application for the respondent's winding-up in her capacity as a contingent, alternatively, prospective creditor of the respondent. She simultaneously instituted action proceedings against the respondent and its directors under case number 80758/2018. The particulars of claim were amended several times, with the final amendment effected on 24 February 2022. The applicant wants to introduce the final amended particulars of claim as new evidence to the winding-up application.

- [3] The applicant avers that the amended particulars of claim is material to the main application as it relates to her *locus standi*. She contends that the introduction of the amended particulars of claim will not prejudice the respondent, as the respondent can be afforded the opportunity to file its amended plea in this regard. The applicant submits that the basis upon which she relies for purposes of *locus standi* in the main application has not changed. It is merely clarified through the amended particulars of claim.

- [4] The respondent contends that the applicant's latest attempt 'to bolster' her *locus standi* is untenable, as the amended particulars of claim did not exist when the liquidation application was issued. The respondent submits that should leave be granted to the applicant to file a supplementary affidavit, it would result in her filing a fourth set of affidavits where she has advanced no exceptional or special circumstances. The respondent denies that the amended particulars of claim is material to the main application or relate to the applicant's *locus standi*.

- [5] The respondent claims that the substantial prejudice it faces should a fourth set of affidavits be allowed cannot be cured by a costs order, as the 'new evidence' is irrelevant. I pause to note that the respondent failed to indicate the 'substantial prejudice' it would suffer or why such prejudice would follow from allowing new evidence, even if it is not relevant.
- [6] The applicant reiterated in reply that the court has a discretion to allow the filing of additional affidavits, including a further supplementary answering affidavit. She emphasises that it is in the interest of justice to ensure that all facts and evidence material to the subject matter of the main application be placed before the court.

Applicable legal principles

- [7] It is trite that rule 6(5)(e) of the Uniform Rules of Court provides that a court may in its discretion, permit the filing of supplementary affidavits in motion proceedings.
- [8] It is trite that there is no hard and fast rule as to when more than three sets of affidavits will be allowed in motion proceedings. Every case should be determined not only according to its own circumstances but having regard to the contents of the further affidavit and especially whether some reasonable explanation has been given or is apparent for its late filing.¹

Discussion

- [9] *In casu*, the explanation provided by the applicant does not point to any *mala fides*. The court's attention has not been drawn to any prejudice which cannot be remedied by an award of costs and allowing a supplementary answering affidavit to be filed.
- [10] The respondent's primary complaints are that the litigation has been dragging on for years, that the particulars of claim did not exist when the application was instituted, and that the new evidence is irrelevant to the proceedings.

¹ *Parow Municipality v Joyce & McGregor (Pty) Ltd* 1973 (1) SA 937 (C).

- [11] As for the duration of the litigation, I am of the view that the current case management of the matter will promote the finalisation of the application. The respondent did not indicate with specificity in what regards it is prejudiced by the passage of time. Considering the constitutionally entrenched right of access to justice, a court will be slow to close the doors to a litigant in the absence of a clear indication as to how the duration of litigation prejudices a party.
- [12] As for the submission that the new evidence that the applicant wants to introduce did not exist when the liquidation application was instituted, I am of the view that the question is not whether the particulars of claim existed at the time the liquidation application was instituted, but whether the cause of action, that renders the applicant a contingent or prospective creditor of the respondent existed. The particulars of claim are nothing more and nothing less than an exposition of the applicant's claim against the respondent. The first set of particulars of claim might have fallen short because it did not make out a case against the respondent, but the respondent was cited as a defendant. The intention to include the defendant as a defendant is clear, although the execution of the intention was defective. This is, seemingly, now rectified.
- [13] The applicant acted proactively by seeking the court's permission for the filing of the fourth set of affidavits in an interlocutory application and not on the date of the hearing, as it should.² It cannot be said that this application is a veiled attempt at further delaying the proceedings or ambushing its opponent.

ORDER

In the result, the following order is granted:

- 1. The applicant is granted leave to file a supplementary affidavit with annexure(s) within 10 days of the granting of this order;**

² *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N).

2. The respondent is granted leave to file a response thereto within 10 days after receipt of the applicant's supplementary affidavit, whereafter the applicant may file her replying response within 10 days;
3. Costs are reserved to be determined at the final hearing of the liquidation application.


E van/der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. J. A. Klopper
Instructed by:	Cavanagh & Richards Attorneys
For the respondent:	Adv. N. C. Maritz
Instructed by:	Van der Merwe and Bester Inc
Date of the hearing:	28 July 2023
Date of judgment:	21 August 2023