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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 40729/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

10/08/2022

In the matter between:

BP SOUTHERN AFRICA (PTY) LTD

Applicant

and

KTA SERVICES STATION (PTY) LTD

Respondent

In re:

KTA SERVICES STATION (PTY) LTD

Applicant

and

BP SOUTHERN AFRICA (PTY) LTD

Respondent

JUDGMENT

MAKUME, J:

[1] In the present application the Applicant BP Southern Africa (Pty) Ltd (BP) who are the Respondents in the main application seek an order granting them leave to file the affidavit by one Rita Sikhondze dated 1st February 2022 in the main application.

[2] This application is opposed. The Affidavit opposing the application is deposed to by Mr Nathan Lindsay Hitler who describes himself as the legal representative of KTA Services Station (Pty) Ltd (KTA).

[3] It is common cause that the Applicant (BP) is being sued by the Respondent KTA for payment of the amount of R2 526 228.00 being outstanding rentals in respect of certain business premises known as BP Kagiso. To this extend on the 29th March 2021 Memela Jones Incorporated acting on behalf of KTA issued a letter of demand addressed to BP.

[4] Having failed to comply with the letter of demand KTA through its attorneys instituted motion proceedings on the 25th August 2021 whereupon BP filed its notice to oppose the claim on the 10th September 2021.

[5] The Founding Affidavit of KTA is deposed to by Nathan Lindsay Hittler who describes himself as the Chief Executive Officer of Corwill Investment Holdings (Pty) Ltd. Mr Hittler says that he is the representative of the Sole Shareholder of KTA being Corwill Investment.

[6] Hittler says that he has been duly authorised to depose to the Founding Affidavit by virtue of a Directors Resolution dated the 30th July 2021. He attaches such resolution as Annexure NH1.

[7] The resolution is in actual fact dated the 16th July 2021 and it appoints Messrs Memela Jones Incorporated to prosecute its claim against BP for payment of the amount of R2 397 014.00 (Two Million Three Hundred and Ninety-Seven Thousand and Fourteen Rands)

[8] On the 28th September 2021 BP's attorneys filed and served a notice in terms of Rule 7(1) disputing the authority of Memela Jones Incorporated to act on behalf of KTA.

[9] Similarly on the 27th October 2021 KTA also filed a Rule 7(1) notice disputing the authority of Edward Nathan Sonnenberg Inc. and Rita Sikhondze to represent BP.

[10] On the 3rd November 2021 Ms Rita Sikhondze filed and deposed to the main Answering Affidavit and applied for condonation for the late filing thereof. In the Answering Affidavit it was made clear that firstly no agreement exists between KTA and BP because the people who purported to act for KTA had not been authorised thereto.

[11] On the 11th November 2021 Memela Jones Incorporated filed a second Rule 7(1) notice still objecting or querying the authority of Rita Sikhondze to have filed an Answering Affidavit on behalf of BP. Four days after this notice Memela Jones Incorporated withdrew as attorneys of record for KTA.

[12] On the 19th November 2021 Mr Hittler filed a notice in terms of Rule 16A in which he indicated that hence forth all pleadings in this matter had to be served on him at [...] M [...] Street F [...] Extension 2, R [...].

THE APPLICATION TO GRANT LEAVE TO FILE FURTHER AFFIDAVIT BY BP

[13] On the 13th February 2022 BP filed a notice of application in which they seek leave that a further affidavit by Rita Sikhondze dated 1st February 2022 be admitted as evidence in the main application. The notice of motion was served on KTA c/o Nathan Lindsay Hittler at [...] M [...] Street, F [...] Ext 2, R [...].

[14] The affidavit is described as a Supplementary Answering Affidavit to the Founding Affidavit. It was as a result of the information provided by Mr Hittler in the rule 35(13) application that necessitated the filing of this Supplementary Answering Affidavit. BP maintain that the requested documents in the 35(13) notice were

necessary to enable BP to deal fully with Hittler's allegations that Corwill is the Shareholder of KTA.

[15] Rita Sikhondze on behalf of BP contends that the further Answering Affidavit is relevant and provides further ventilation of the issues in question and it is in the best interest of justice to permit BP to supplement the initial Answering Affidavit.

[16] The Applicant BP has also raised a point in *limine* that since the withdrawal of Memela Jones Incorporated as attorneys of record for the Respondent that the company is accordingly not represented in accordance with the rules.

[17] It is common cause that BP launched an application in terms of Rule 35(13) in which it sought the court to authorise the delivery of certain documents set out in terms of Rule 35 (14). When BP filed its main Answering Affidavit it had not as yet been furnished with the Rule 35 documents as a result in the Answering Affidavit BP made it clear in advance that depending on the outcome of its application in terms of Rule 35(13) it may be necessary to supplement the Answering Affidavit. That time is now because BP is now satisfied that the required documents have been furnished.

[18] At the core of the dispute in this matter is the *locus standi* of people who purport to act on behalf of KTA both as directors or shareholders. Hittler has been unable to provide a share transfer form transferring KTA shares to Corwill. He has also failed to furnish an agreement in terms of which Corwill purportedly acquired shareholding in KTA. It is this new evidence that BP seeks leave that it be placed before this Court for the proper ventilation of the issues. There is in my view a huge dispute of facts in this matter.

[19] The general and ordinary rule in our law is that of three sets of affidavits namely the Founding, Answering and lastly Replying affidavit. This rule is however, not static and does not preclude a Court on good cause shown to allow further affidavits. In this regard the Appellate Division per Ogilvie JA in **James Brown and Hammer (Pty) Ltd v Simmons 1963 (4) SA 656 (A) at 660 D –F** made the following authoritative pronouncement:

“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 sequences 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.”

[20] In order for KTA to succeed in its opposition to the filing of a further affidavit it must prove that the Applicant BP is acting *malafide* and that KTA will be prejudiced in the further conduct of its claim.

[21] I take the view that it is in the interest of justice to grant this application as the Respondent KTA has failed to demonstrate any material prejudice in the conduct of its case. The real issue is about the *locus standi* of the persons who say they act on behalf of KTA.

[22] In **Milne NO v Fabric House (Pty) Ltd 1957 (3) SA 63 (N) at 65A** it was held that it is essentially a question of fairness to both sides whether further sets of affidavits should be permitted.

[23] The Applicant BP has demonstrated and shown substantial grounds why this further affidavit by Sikhondze should be allowed as evidence. Holmes J in Milne (*supra*) summarised it as follows:

“In my view it is neither necessary nor desirable to say more than that the Court has a discretion to be exercised judiciously upon consideration of the facts of each case and that it is basically a question of fairness to both sides.”

[24] On the facts of this matter there can be no suggestion of any *malafides* or culpable remissness on the part of BP. BP indicated well in advance that depending on the receipt of documents requested in its Rule 35(14) notice it reserves the right to file further Answering Affidavit. This is in my view no surprise to the Respondent.

In any case KTA can never be prejudiced by the filing of that affidavit. The affidavit is there to put full facts before the court for a proper ventilation of the issues.

[25] The Respondent's interest is that it be paid a certain large amount of money based on a notarial deed. The Applicant BP says that money that is due is not due to the party that now purports to be the Applicant. BP does not want to make payment to a wrong and non-existent entity. It is therefore only fair that the Respondents prove their *locus Standi*. In the result I find that the further affidavit by Rita Sikhondze should be admitted.

DOES MR NATHAN HITTLER HAVE THE NECESSARY AUTHORITY TO REPRESENT KTA?

[26] On the 10th May 2022 BP delivered supplementary heads of argument in which they referred to an as yet unreported judgment handed down on the 5th April 2022 in this division in which judgment the eligibility of Mr Hittler to represent KTA in certain proceedings was dealt with. It is the case of **Corwil Investments Holdings (Pty) Ltd & Another v Investec Securities (Pty) Ltd Case No. 11126/2021**.

[27] It is common cause that Mr Hittler is presently an unrehabilitated insolvent and is thus barred from occupying a position of a director in any company. In the Corwill matter Manoim J ruled that the legal position is quite clear in that Mr Hittler who is not a legal practitioner nor a director cannot represent Corwill in resisting the joinder application in that matter.

[28] In the matter of **Manong and Associates (Pty) Ltd v Minister of Public Works and Another 2010 (2) SA 167 (SCA)** the SCA made an exception to the general rule that a company may not conduct litigation except by the appearance of Counsel or in certain circumstances attorneys. The Court found that cases would arise where the administration of justice might require some relaxation of the general rule. That their occurrence was likely to be rare and circumstance exceptional or at least unusual. In the final analysis the Court found that in each instance leave to represent a company whilst not being Counsel or attorney had to be sought by way of a properly motivated timeously lodged formal application showing good cause why

in the particular case the rule prohibiting non-professional representation should be relaxed.

[29] In the present matter Mr Hittler has not placed before this Court a well-motivated application why he should be the legal mouthpiece of KTA. He is an un-rehabilitated insolvent and lacks the necessary *locus standi* to litigate. He can only do so with the consent of the trustee in his estate.

CONCLUSION

[30] In the final analysis I have come to the conclusion that KTA will not be prejudiced by the admission into evidence of the affidavit deposed to by Rita Sikhondze, secondly Mr Nathan Hittler has no right to represent KTA as if he is Counsel or attorney in this matter.

[31] In the result I make the following order:

ORDER

1. BP Southern Africa (Pty) Ltd (BPSA) is hereby granted leave to file the affidavit of Rita Sikhondze dated the 1st February 2022 in the main application instituted by KTA under case number 40729/2021.
2. KTA is ordered to pay costs of this application on a party and party scale including the costs of Counsel employed.

Dated at Johannesburg on this 10th day of August 2022

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 21 JUNE 2022

DATE OF JUDGMENT : 10 AUGUST 2022

FOR APPLICANT : ADV G HERHOLDT

INSTRUCTED BY : MESSRS EDWARD NATHAN &
SONNENBERGS ATTORNEYS

FOR RESPONDENT : MR N HITTLER