IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION,

CASE NO: 570/2021
Date heard: 17 February 2022
Date delivered: 1 March 2022

In the matter between

MONIQUE ABRAHAMS	**First Applicant (First Respondent in the main application)**
DENVER ABRAHAMS	**Second Applicant (Second Respondent in the main application)**
And	
MOIRA SHARON ABRAHAMS	**First Respondent (Applicant in the main application)**
THE MASTER OF THE HIGH COURT, PORT ELIZABETH	**Second Respondent (Third Respondent in the main application)**

JUDGMENT

LOWE J:

1. This is an opposed interlocutory application in terms whereof First and Second Applicants seek leave to file a further affidavit and leave to subpoena Mr. Mohamed Shuaib Ahmed to appear and be examined and cross-examined as a witness at the hearing of the main application in due course.

2. As to the costs of the application the notice of motion simply sought that these be costs in the cause.

3. The origin of the dispute between the parties is raised in a further application relating to the last Will and Testament of Applicants' late father (the main

application) First and Second Applicants in the this interlocutory application being First and Second Respondents in the main application. The contention of First Respondent in the main application (as Applicant in the main application) is simply that the signature on the relevant Will is a forgery.

4. First Respondent in the interlocutory application (Applicant in the main application) opposes the interlocutory application for reasons which are not by any means clear.

5. In summary the origin of the interlocutory application relates to Applicant's attempt, in the main application, to obtain a confirmatory affidavit in support of their case from the said Mr. M.S. Ahmed, as well as, in addition to this, Applicant's wish to file a further affidavit in opposition to the main application.

6. The further background is well summarized in Applicant's heads of argument paragraph 7 - 10 which are quoted below:

> "7. With regard to Mr. Ahmed, the Applicants allege, that the deceased approached Mr. Ahmed to assist him in drawing up his last will and testament. Their attorney of record made several attempts to obtain a confirmatory affidavit of Mr. Ahmed prior to the service and filing of their answering affidavit in the main application, however, to no avail. According to the Applicants, Mr. Ahmed will be able to confirm that he assisted the deceased in drawing up his last will and testament dated 13 December 2018, but unfortunately the Applicants' attorney of record's efforts to obtain a confirmatory affidavit, to confirm this, came to naught.
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> 8. With regard to the further affidavit, the Applicants seek to explain a discrepancy between affidavits filed on their behalf in the Magistrate's Court, Port Elizabeth, in domestic violence proceedings, and the answering affidavit filed in the main application.

9. In the Applicants' answering papers in the main application, First Applicant made the allegation that neither she nor Second Applicant was aware of the will, and that it was only at the reading of the will on 1 June 2020 that they were notified and had sight of it for the first time. However, in their affidavits filed in the Magistrate's Court they allege that they were aware of the existence of the will prior to the deceased's death.

10. It is contradiction which the Applicants seek to explain in a further affidavit to be filed."

7. In their opposition First Respondent admits that Applicants had difficulty in obtaining a confirmatory affidavit from Mr. M.S. Ahmed but deny that Ahmed had been approached by her late husband. The affidavit descends into argument with frequent reference to the replying affidavit in the main application. It must be said in fact that it is difficult to discern the basis of any material defense to the interlocutory relief which is sought in both respects.

8. It is no more nor less than a vain attempt to force Applicants to proceed in the main application absent a supporting affidavit from Mr. Ahmed on the one hand and denying the opportunity of explaining the issues already summarized above relevant to the time in which they first had knowledge of the Will in issue.

9. First Respondent's heads of argument take the matter little further and the difficulties faced in opposing the application on both issues was fully disclosed and ventilated in the arguments raised before me. It need only be said that counsel for First Respondent understandably had some difficulty in advancing cogent reasons why the relief sought should not be granted.

10. The issues can be shortly dealt with as I do below.

THE SUBPOENA OF MR. AHMED

11. Rule 6(5)(g) of the Rules of Court make it clear that the Court may on application order that a person be subpoenaed to appear and be examined and cross-examined as a witness in application proceedings.

12. The sub-rule is clearly not restricted to cases where oral evidence is called for to resolve disputes of fact appearing in the affidavits already filed[1].

13. But just as in this matter the sub-rule applies to a party in an application who requires the evidence of a person to be heard who is unwilling or unavailable to make an affidavit, that person being subpoenaed with the leave of the court for the purpose of giving *viva voce* evidence[2].

14. This is just such a matter and in my view a proper case is made out for the relief sought in this regard.

LEAVE TO FILE A FURTHER AFFIDAVIT

15. Rule 6(5)(e) authorizes a Court in appropriate circumstances to, in its discretion, permit the filing of further affidavits.

16. Again in summary and whilst there are normally three sets of affidavits in motion proceedings, a court may in the exercise of its discretion permit the filing of further affidavits where a consideration of the fundamental issues relevant requires such affidavit to enable the true facts (relevant to the issues and dispute) to be adjudicated.[3]

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[1] Khumalo v Director-General of Co-Operation and Development 1991 (1) SA 158 (A) at 167G; Moosa Bros and Sons (Pty) Ltd vs Rhaah 1975 (4) SA 87 (D) 91A – 93F.
[2] Apleni vs Minister of Law and Order 1989 (1) SA 195 (A) at 199C – E; Eramus Superior Court Practice 2nd Ed Vol 2 D1 – 71.
[3] South Pinansula Municipality vs Evans 2001 (1) SA 271 (C) at 283A – H; Dawood vs Mohamed 1979 (2) SA 361 (D) at 365H.

17. The test is no more nor less that of justice and equity, that is a question of fairness to both sides as to whether or not further sets of affidavits should be permitted. This requires a proper explanation as to why such an affidavit is required to be filed, and was not already so filed, and the Court must be satisfied that there is no prejudice in this regard which cannot be remedied by an appropriate order as to costs[4].

18. In this matter there is a reasonable explanation as to why the evidence was not produced previously. The facts disclose that it is of considerable materiality to the matter and there is in essence no prejudice to First Respondent in the interlocutory application if leave is granted to deal with this supplementary affidavit in further affidavits. In my view upon First and Second Applicants (Respondents in the main application) filing such additional affidavit, the First Respondent (Applicant in the main application) should be afforded leave to deal therewith insofar as she wishes to do so as appears from the order below.

19. In short, I am satisfied that a proper case is made out for the filing of such supplementary affidavit.

20. It is unnecessary to deal with the issue of costs for the reason that these were sought to be in the cause and no cogent argument was advanced as to why this should not be so.

ORDER

21. In the result the application is granted and the following order issues:

    1. That First and Second Applicants are granted leave to file a further set of affidavits comprising an affidavit by Second Applicant dated 6 September 2021 together with a confirmatory affidavit from First Applicant of the same date, within 5 days hereof;

[4] In Erasmus Superior Court Practice 2nd Ed vol 2 D1 – 68 sets out the factors that the Court will consider in such an application.

2. That First Respondent be granted leave to file an affidavit in answer to the above, should she wish to do so, within 10 days of the filing of the affidavits referred to above;

3. That First and Second Applicants are granted leave to subpoena Mr. Mohamed Shuaib Ahmed to appear and be examined and cross-examined as a witness at the hearing of the main application in due course.

4. That the costs of the application are to be costs in the cause.

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M.J. LOWE
JUDGE OF THE HIGH COURT

Appearing on behalf of the Applicants: Adv. T. Zietsman
Instructed by: Greyvensteins Inc, Mr. Labuschagne

Appearing on behalf of the Respondents:
Instructed by: Andrew Meldrum Attorneys, Mr. A. Meldrum