

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO:7605/2017

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
.....	
.....	
DATE	SIGNATURE
5-8-2019	<i>[Signature]</i>

In the matter between:

CASHBUILT(SOUTH AFRICA)

(PTY) LTD

: APPLICANT/PLAINTIFF

And

PYROCA 109 CC t/a ADA

AND / ADA CIVILS

: FIRST RESPONDENT/DEFENDANT

PITER ANDR`e CRHISTIAAN

VENTER

: SECOND RESPONDENT/DEFENDANT

JUDGMENT

SEMENYA J:

[1] The issues to be decided upon in this application are the following:

- a) whether Plippie Du Plessis, the deponent to the founding affidavit has authority to launch and to prosecute this application on behalf of the applicant;
- b) whether the second respondent should be joined to the action instituted in this court by the applicant against the first respondent.
- c) whether certain parts of the replying affidavit should be struck out in terms of rule 6(5) (e) of the Uniform Rules of Court; and, if not
- d) whether the respondents should be permitted to file additional affidavit.

[2] The applicant in this matter instituted action against the first respondent in which it claims payment of an amount of R1 460 403.00.

The claim is based on an acknowledgment of debt signed by the second

respondent on behalf of an entity known as of Pyroca 109. It has become common cause that Pyroca 109 CC is trading as ADA Civils. The second respondent is also a member of PACV Civil Construction CC which is trading as ADA Construction, a company which is in liquidation.

[3] The factual background of the events that led to this application, which are mainly common cause, is as follows. The applicant sold bags of cement to an entity it refers to in the acknowledgment of debt as ADA Construction. When payment was not forthcoming after the signing of the acknowledgement of debt, the applicant issued summons citing Pyroca 109 as the defendant. The applicant applied for summary judgment after the entering of a notice of intention to defend the action by the first respondent. In the affidavit filed in resistance of the summary judgment, the first respondent stated that Pyroca 109 trades under the name of ADA Civils and not ADA Construction and that ADA Construction is the trading name of PACV Civil Construction CC. The first respondent denied liability in that Pyroca 109 has nothing to do with the acknowledgment of debt upon which the applicant relies.

[4] The grounds upon which the applicant seeks to join the second respondent to the action are listed as follows in the founding affidavit:

- i. That the second respondent knew at the time of the signing of the acknowledgment of debt, in which the debtor is referred to as ADA Construction, that it is PACV and not Pyroca, which is trading as ADA Construction;
- ii. that he, the second respondent has authorised the application for placing PACV under liquidation; and that
- iii. that the second respondent knew, alternatively ought to have known that PACV CC has been placed into final liquidation prior to the signing of the acknowledgement of debt.

[5] The respondents objected to the applicant's lack of authority to institute and to prosecute this application. In reply, the applicant stated that rule 7 permits a party, with leave of the Court, to file evidence that prove authority to launch the application and to attach the necessary resolution to the replying affidavit. The respondent contended that a distinction has to be made between a power of attorney and capacity to institute proceedings. The respondents placed reliance on **Mall (Cape) Ltd v Merino Ko-Operasie Bpk [1957] 2 All SA 242 (C) (Mall)**.

[6] It is evident from the replying affidavit that the applicant misunderstood the objection raised by the respondent. The applicant seems to be under the impression that the respondent is challenging the absence of the power of attorney, which in terms of Rule 7 and with leave of the Court, may be cured by attaching same to the replying affidavit. In the present matter, the respondent is challenging the deponent's authority to launch this application and/or the capacity to depose to the affidavit. In Mall the court made a distinction between a case where the litigant is a natural person who is instituting proceedings on his or her behalf and where he is doing so on behalf of a juristic person. The Court held that in the case of a natural person, where a notice of motion is complete and regular on the face of it and purports to be signed by an attorney, the court may presume, in the absence of anything that shows that the applicant has not in fact authorised the attorney to issue the notice of motion on his behalf, that the attorney has been authorised. The Court however stated that in the case of an artificial person evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance.

[7] The Court in Mall stressed the need to treat each case according to its own merits in deciding whether sufficient evidence has been placed

before it. The Court found that the words "*duly authorised to make this affidavit*" constituted sufficient evidence that the company authorised the institution of the proceedings. In the matter before this Court there is no minimal evidence to show that the applicant authorised the application. The deponent to the founding affidavit simply states that he is the Divisional Manager employed by the applicant. There is nothing from which this Court may find that the applicant, an artificial person, knows about this application.

[8] Counsel for the applicant submitted that where authority is challenged in the answering affidavit, the applicant is entitled to make out a case in reply. It is indeed so that in reply the deponent states that he is duly authorised to institute the proceedings, which would have been sufficient according to Mall, had it been so stated in the founding affidavit. However, despite a clear objection to the *locus standi* the deponent failed to attach the resolution of the directors that authorises him, and not the attorneys, to institute the proceedings. The founding affidavit was deposed to on the 14 September 2018. The application was filed with the Registrar on the 21 September 2018. The resolution that authorises a firm of attorneys to act on behalf of the applicant has got its own challenges. It was adopted by the Directors of the applicant

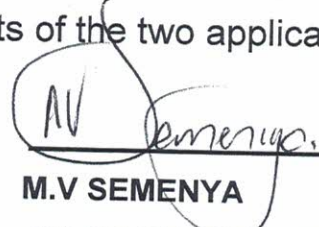
on the 5 December 2018. The respondent argued on the basis of **M & V Tractor and Implement Agencies Bpk v Vennootskap D S U Cilliers & Seuns; Hoogkwartier Landgoed; Olieevier Landgoed (Edms) Bpk (Kelrn Vervoer (Edms) BpkTussenbeitredend) 2000 (2) SA 571 (N) at 580 H-I**, that the attachment of the resolution which did not exist at the time of the launching of the application will not remedy the defect. I have no reason not to find that the application was launched without the authority in the form of a resolution of the applicant's Directors. The deponent therefore did not have the necessary *locus standi*.

[9] I do not deem it necessary to decide on the other issues raised by the respondent on the basis of my finding that the application was not properly authorised save for the issue of costs. The general rule with regard to costs is that it should follow the results. There is no reason why I should deviate from the norm. Counsel for the respondent argued that they are entitled to costs of two applications being the main application and the application to strike out new evidence. Counsel argued that in the normal cause of events the replying affidavit is not supposed to be longer than the founding affidavit as is the case in this matter. The applicant raised more factual allegations in reply than it did in the founding affidavit. The Court cannot close its eyes to the allegation

that the applicant was aware of these facts when the founding affidavit was deposed to. The respondent was entitled to apply for the striking out of certain facts and to file a supplementary answering affidavit which was not objected to by the applicant. I find that the respondent is entitled to costs of the two applications.

[10] In the results I make the following order:

1. The application for joinder of the second respondent is dismissed;
2. The respondent is granted costs of the two applications.


 M.V SEMENYA
 JUDGE OF THE HIGH COURT;
 LIMPOPO DIVISION.

APPEARANCES:

ATTORNEYS FOR THE APPLICANT	: VAN DER VYVER INC.
COUNSEL FOR THE APPLICANT	: ADV. B. MARAIS
ATTORNEY FOR THE RESPONDENT	: ASPAG MAGWAI ATT.
COUNSEL FOR THE RESPONDENT	: ADV. M BRESLER
RESERVED ON	: 19 JUNE 2019
JUDGMENT DELIVERED ON	: 5 AUGUST 2019