



**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 number: 1975/2010

In the matter between:

THESI JOHN SEMELA

Applicant

and

NTOMBAMAHLUBI CONSTANCE SEMELA

First Respondent

ABSA PENSION FUND

Second Respondent

HEARD ON: 8 FEBRUARY 2018

JUDGMENT BY: BOKWA, AJ

DELIVERED ON: 01 MARCH 2018

A. INTRODUCTION:

[1] In the main application, the Applicant seeks a declaratory order that it is entitled to a 50 % share of the First Respondents pension since the date of the divorce, under case number: 4051/1998. In that application the Applicant request that a degree of divorce be amended by inserting certain words to give proper effect to the order accordingly.

[2] The First Respondent, by way of an Interlocutory application in terms of Rule 30(1), applied to court to have certain paragraphs of the Applicant's Replying Affidavit as well as the Supplementary Affidavit struck out. NS Daniso AJ heard that application on 13 October 2017 and granted the following order:

"IT IS ORDERED THAT:

1. The application to strike out is upheld and that paragraph 3.4 of the Replying Affidavit as well as the entire Supplementary Affidavit is struck out.
2. The application is postponed *sine die*.
3. The applicant to pay the wasted costs occasioned by the postponement."

[3] The matter came before P Molitsoane AJ, on 16 November 2017 where he granted the following order:

"IT IS ORDERD THAT:

1. Leave is granted to applicant to file a Supplementary Affidavit."

[4] When the matter came before me on 8 February 2018, after hearing arguments, I handed the following order:

- "1. That leave to be granted to the Applicant to file a Supplementary Affidavit;
and
2. That the First Respondent pay the costs of the application."

[5] What follows are my reasons for making the orders.

B. THE ISSUES

[6] The issues for determination was whether the Applicant had made out a sufficient case to justify a discretion by court in its favour to allow Applicant to file a Supplementary Affidavit.

C. BACKGROUND FACTS:

[7] The undisputed facts are that on 1st November 2017 the Applicant filed an Application for leave to file a Supplementary Affidavit. The First Respondent filed its Notice to Oppose that Application on 22 October 2017. The First Respondent filed an Answering Affidavit on 9th November 2017. The Deponent to that Affidavit was First Respondent's Attorney, Mr Jan Marais. Applicant filed its reply on 12 December 2017 and the matter was set for hearing on 8 February 2018.

D APPLICABLE LEGAL PRINCIPLES:

- [8] Rule 6(5)(e), deals with the filing of further Affidavits and states as follows:

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

- [9] The court will usually not allow the introduction of a new cause of action in a Replying Affidavit that supplants the cause of action set out in the Founding Affidavit. The Applicant stand or fall by his Founding Affidavit.¹

- [10] While the general rule is that only the three sets of affidavits referred to above are permitted, the court may in its discretion permit further sets.²

- [11] The courts are inclined towards the view that the parties should be permitted to have the case adjudicated on the full facts. The court will not exercise its discretion in the absence of an explanation of why it is necessary to file the affidavit concerned and will always act subject to considerations of fairness and justice and the absence of prejudice of other parties.

¹ Director of Hospital Services v Mistry 1979 (1) SA 626 (A); GNH Office Automation CC v Provincial Tender Board [1996] 3 All SA 87 (Tk) 100; Winbledon Lodge (Pty) Ltd v Gore NO [2002] 1 All SA 218(C)

² Meyer v Kritzinger 1968 (2) SA 749 (O); SY Sandocan 2001 (3) SA 824 (D); York Timbers Ltd v Minister of Water Affairs and forestry [2003] 2 All SA 710 (T), 2003 (4) SA 477 (T); Afric Oil (Pty) Ltd v Ramadaan Investments CC 2004 (1) SA 35(N) 38l – 39B

D. CONTENTIONS ON BEHALF OF THE APPLICANT

[12] The crisp issue is whether the Applicant has been able to set out material facts in his Supplementary Affidavit why it did not provide the evidence it now provides in its Founding Affidavit of the main application. This is how the Applicant explain on page 41 of the paginated bundle:

"I depose of this affidavit in support of an application to supplement the papers. The reason why I apply for such an order is the following:

- 2.1 I was under the impression, and verily believed that the First Respondent and I reached an agreement to amend the Deed of Settlement to include my claim to half of her pension interest at the time of the divorce;*
- 2.2 The reason why I was under this impression is because the First Respondent and I were in good standing after the divorce order was granted, and she indicated that she would have no problem with me claiming half of her pension interest;*
- 2.3 Another reason why I was under this impression is due to the fact that the First Respondent, on one occasion, called the Second Respondent to discuss my claim with them and she was informed that I need to bring an application for the amendment of the divorce order to enable them to transfer half of the pension interest to me;*
- 2.4 I was informed that there is no way for me to claim half her pension interest without the said order;*
- 2.5 The First Respondent and I agreed that I should approach my attorneys of record for the said amendment;*
- 2.6 Due to the agreement that was reached, I informed my previous Attorney of Record, Mrs. Oosthuizen, that the application would not be opposed;*
- 2.7 As a result thereof, I suspect that Mrs. Oosthuizen did not regard it necessary to include all the relevant facts in the application;*

2.8 *The fact of the matter is that there are facts which would have been included in the Founding Affidavit had I suspected that the Application would be opposed;*

2.9 *The First Respondent never gave any indication that she changed her mind regarding the said amendment and I was surprised to learn that she opposed the main application;*

2.10 *After she opposed the main application, I deposed of a Replying Affidavit, paragraph 3.4 of which has been struck out on 12 October 2017;*

2.11 *The affidavit contained statements which would have been included in the Founding Affidavit had it been known that the First Respondent would oppose this application;*

2.13 *It also states how surprised I was when I learned that the Application is opposed;"*

[13] In response to these submissions the deponent on behalf of the First Respondent, being his attorney states as follows:

"AD PARAGRAPH 2.1 TO 2.14 OF THE FOUNDING AFFIDAVIT

The Applicant seeks to explain why a proper case was not made out in the founding affidavit in the main application and is noted."

[14] It must therefore be accepted that these averments are accepted by the Respondent. What follows in my view is evidence which is not only material but exceptional which the Respondent offered no answer to. The Applicant stated further as follows in his Supplementary Affidavit:

"2.15 *The facts that I need to supplement to the papers are as follows:*

- 2.15.1 *On 24 August 2010 just past 09h00 I received a call from a certain Ingrid Plaatjie from Schoeman Maree Attorneys;*
- 2.15.2 *Ingrid Plaatjie told me to go to their offices immediately and that if I do not attend "something would happen" to me that day;*
- 2.15.3 *Notwithstanding being represented, Ingrid Plaatjie called me directly;*
- 2.15.4 *I immediately went to the offices of Mr. Majola, my attorney of record at that state, and requested his staff to see him. I arrived at Mr Majola's office just past 10h00 on the same day;*
- 2.15.5 *I was informed that Mr. Majola was not there and that his staff was unable to reach him on his cell phone.*
- 2.15.6 *Notwithstanding the fact that I needed Mr. Majola urgently, I was informed that he was not available. I did not have Mr. Majola's cell phone number and was informed that the staff could not give me his number.*
- 2.15.8 *I attended their offices, this being the first and only time I ever went to their offices;*
- 2.15.9 *Upon my arrival between 11h00 and 12h00 the same day, I was called into the office where I met with Ingrid Plaatjie and the First Respondent;*
- 2.15.10 *Ingrid Plaatjie informed me that all the documents were ready for my signature;*
- 2.15.11 *I told her that I was not going to sign anything and she started threatening me;*
- 2.15.12 *She threatened me with arrest, litigation, execution of my property and that I would not arrive home that day;*
- 2.15.13 *I told her that I could not sign the Deed of Settlement due to the fact that I am partially blind and cannot read the Deed;*

- 2.15.14 *I lost all the sight in my left eye and more than 50 % sight in my right eye following an accident in 2007;*
- 2.15.15 *Ingrid Plaatjie informed me that I must just sign the Deed of Settlement;*
- 2.15.16 *I attempted to read the Deed of Settlement but was unable to do so due to my visual impairment."*

[15] In answer to these extraordinary averments made by the Applicant, the Deponent on behalf of the First Respondent answers as follows on page 54 of the paginated bundle:

"AD PARAGRAPH 2.15.1 TO 2.15.30

It is recorded that all of these events allegedly took place on the 24th of August 2010.

AD PARAGRAPH 2.15.31 TO 2.15.55

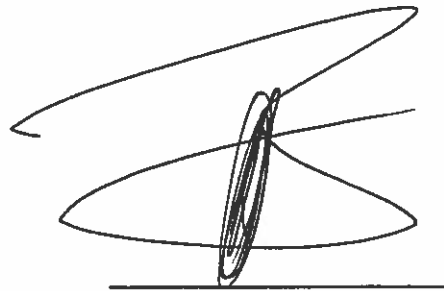
The recordal of certain events are a recordal of events without any indication of the actual dates thereof. In view of submission hereunder this evidence will not take the matter any further

AD PARAGRAPH 2.16 TO 2.17

It is submitted that these evidence also do not take the matter any further.

[16] In an answering affidavit, the Respondent is required to set out which of the Applicant's allegations he admits and which he denies and to set out his version of the relevant facts.

- [17] In dealing with the Applicants allegations of fact, the Respondent should bear in mind that the Affidavit is not a pleading and that a statement or lack of knowledge, coupled with a challenge to the applicant to prove part of his case, does not amount to a denial of the averments of the Applicant.
- [18] The Deponent's Affidavit in the First Respondent's Answering Affidavit, fall woefully short to the nature and form of an Answering Affidavit in Application proceedings. Firstly, it is not clear why the First Respondent did not depose to the Affidavit but rather his attorney. In answering, the attorney does not demonstrate his knowledge of the material facts and to counter the averments made by Applicant. A distinct impression was created in the mind of this court that the Respondent tried every trick in the book not to allow the material facts to be properly ventilated by the court. This is so in the light of the fact that the First Respondent did not put a version before this court but rather choosing her attorney to do so on her behalf, which assignment was a dismal failure in my view. These facts are exceptional and warrant this court to use its discretion in favour of the Applicant to file a further Affidavit. I was of the view that there was no prejudice to the Respondent in the event that such a discretion was granted.
- [19] It is for these reasons that I gave the order of 8 February 2018 as set out in paragraph 4 above.

A handwritten signature in black ink, consisting of several overlapping loops and a central vertical stroke, positioned above a horizontal line.

I R O BOKWA, AJ

On behalf of applicant : Mrs I L DE WET

Instructed by: **BLOEMFONTEIN JUSTICE CENTRE**

On behalf of respondents: Adv K NAIDOO

Instructed by: **O/B MAREE & PARTNERS**