

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application Number : 4858/2009

In matter between:-

PNA STATIONERS (PTY) LTD

Applicant

and

RIVER STATIONERS CC T/A PNA PARYS

First Respondent

WILLEM BAREND ABRAHAM BOSHOF

Second Respondent

KAREN ERICA VAN DER WALT

Third Respondent

JUDGMENT BY:

VAN ZYL, J

DELIVERED ON:

18 MARCH 2010

1] The applicant approached Court by means of application proceedings in which the following relief as set out in the Notice of Motion is being sought:

“1. That the first, second and third respondents be interdicted and restrained from carrying on or being interested directly or indirectly, in the business as news agent, bookseller or stationer for a period of 18 months after termination of the agreement, namely the 31st of August 2009 and within 20 kilometres of the premises

of or the premises of any business franchised by the Applicant. (*sic*).

2. That the first, second and third respondents be interdicted and restrained from soliciting business as a news agent, bookseller or stationer. The words “soliciting business” are deemed to include responding to invitations to tender for business as news agent, bookseller or stationer for eighteen months from namely the 31st of August 2009. (*sic*)
3. Directing the first, second and third respondents to furnish the applicant with a list of the first respondent’s clients and customers as at date of termination. (*sic*)
4. Directing the first, second and third respondents at their own expense forthwith remove all signs, whether from the premises, vehicles or elsewhere, which display the name or trading name of the applicant. (*sic*).
5. That the respondent be directed to pay the costs of this application on attorney and client scale.”

- [2] The application is being opposed only by the first and second respondents.

THE FOUNDING PAPERS:

3] One Herman Botha, the Group General Manager of the applicant, deposed to the founding affidavit on behalf of the applicant. The salient facts which appear from the affidavit, can be summarised as follows:

3.1 On 26 June 1997 the first respondent entered into a franchise agreement (hereinafter referred to as "*the agreement*") with PNA Stationary Franchising Company (Pty) Ltd (hereinafter referred to as "*the company*"), a copy of which agreement is attached to the founding affidavit as annexure "HB1". The first respondent at the time of entering into the agreement was a corporation to be formed and duly represented by second and third respondents. Subsequent to entering the agreement the first respondent was duly incorporated in terms of the Close Corporation Laws of the Republic of South Africa and was registered

under the name “*River Stationers CC*”, which traded as PNA Parys. Also subsequent to entering the agreement, the company was liquidated. On 26 January 2000 the applicant and the liquidator of the company entered into a sale of business agreement, whereby the applicant bought the franchise business from the liquidated estate. At the time of purchasing the franchise business the applicant was duly incorporated in terms of the Company Laws of the Republic of South Africa under the name New Adventure Investments 237 (Pty) Ltd. The applicant subsequently changed its name to PNA Stationers (Pty) Ltd, with its details as cited in the current application. By virtue of the aforementioned sale agreement, the applicant effectively became the franchisor in terms of the agreement. Any reference in the agreement to “*the company*” or “*the franchisor*” should therefore be considered to now refer to the applicant. (When applicable, I will consequently hereinafter also refer to the applicant when I refer to the agreement, except in instances of quotations.)

3.2 In terms of the preamble of the agreement, the applicant is the proprietor of a business plan and system, which business system is defined in the agreement as follows:

“a method of conducting the business of a news agency, bookseller, stationer and related activities under the style of PNA and/or PNA Stationary Franchising Company utilising certain trade marks, trade names, trade secrets, designs, copyright, business know-how and logos and other identifiable material, methods, specific style and character of layout and display of stock in franchised outlets and operating manual”.

3.3 In terms of the agreement the applicant appointed the first respondent as exclusive franchise holder of the business system in the area. The premises from which the first respondent became entitled to conduct the franchised business, is the Pick 'n Pay Centre, Parys, Free State Province.

3.4 The agreement deals extensively with the rights and

obligations of the respective parties thereto and the applicable clauses were referred to and recorded in the founding affidavit.

3.5 In terms of clause 9.1 of the agreement the first respondent is compelled to pay to the applicant a royalty of 5,5% plus VAT on the first respondent's turnover, which royalty is to be paid monthly. In terms of clause 13.1.2 of the agreement the first respondent is furthermore compelled to pay a monthly advertising levy to the applicant calculated at 2% plus VAT on the first respondent's turnover.

3.6 On 19 June 1997 the second and third respondents signed a deed of suretyship in terms whereof they jointly and severally bound themselves as surety and co-principal debtor in *solidum* with the first respondent to and in favour of the applicant for the due performance of all obligations of the first respondent due and owing by the first respondent to the applicant by virtue of the agreement. A copy of this deed of suretyship is attached to the founding affidavit as annexure "HB2".

3.7 The second and third respondents further signed an undertaking as contemplated in clause 18.4 of the agreement (to which I will again refer later herein) on 19 June 1997. A copy of the undertaking is attached to the answering affidavit as annexure “HB3”. In terms thereof, the second and third respondents, respectively, agreed as follows:

“... hereby bind myself and undertake as against PNA Stationary Franchising Company (Pty) Ltd (“the franchisor”) that on termination of its franchise agreement with a close corporation to be incorporated (“the franchisee”) of which I am the member/ shareholder I shall procure and I shall myself ensure that

1. the franchisee shall furnish the franchisor with a full list of the franchisee’s clients and customers;
2. neither the franchisee nor I shall solicit or conduct business dealing with such clients and customers for a period of 18 (eighteen) months after termination of this agreement.” (*sic*)

3.8 The first respondent has paid royalties and advertising levies to the applicant up until February 2008. However, it is averred on behalf of the applicant that the first respondent has failed to pay the applicant royalties and advertising levies “*from the end of February 2008, and then from April 2008 to current date*” with no valid reason. A letter was addressed to the first and second respondents advising them of the breach, but first respondent failed to remedy the breach. It is alleged on behalf of the applicant that the applicant therefore became entitled in terms of clause 18.2.1 of the agreement to cancel the agreement.

3.9 The applicant subsequently issued summons in the Magistrates Court of Parys for the payment of the outstanding royalty fees and advertising levies, and for a debate of the account from July 2008 to date of judgment or to the date that the first respondent ceases trading. The first, second and third respondents are defending the said action.

3.10 On 20 August 2009 the applicant's attorneys addressed a letter to the first, second and third respondents' attorneys and the first, second and third respondents themselves, a copy of which letter is attached to the founding affidavit as annexure "HB9". It is averred on behalf of the applicant that the applicant effectively terminated the agreement in this letter.

3.11 In a subsequent letter addressed to the first, second and third respondents' attorneys and the first, second and third respondents themselves, dated 26 August 2009, the applicant's attorneys advised the first, second and third respondents that they are required to cease trading as a PNA franchisee on 31 August 2009. This letter also recorded certain other obligations of the first, second and third respondents in terms of the agreement. A copy of this letter is attached to the founding affidavit as annexure "HB10".

3.12 The founding affidavit is then concluded in the last three paragraphs thereof as follows:

“34.

The first, second and third respondents have refused and/or neglected to cease trading as PNA franchisee and are in breach of the restraint of trade clause as mentioned in paragraph 6.17 herein.

35.

The applicant has suffered prejudice due to the conduct of the first, second and third respondents, and their persistence to trade under the franchise of the applicant without compensating the applicant and without the applicant's consent.

36.

I submit that the applicant is entitled to the relief sought in the Notice of Motion.”

APPLICABLE LEGAL PRINCIPLES:

Applications:

4] Rule 6(1) determines the following pertaining to a founding affidavit in application proceedings:

“6(1) Save where proceedings by way of petition are prescribed by law, every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.”

5] It is trite that in application proceedings the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial. In **TRIOMF KUNSMIS (EDMS) BPK v AE & CI BPK EN ANDERE** 1984(2) SA 261 (WPA) this principle was stated at 269 G to H in the following words:

“Die oorsaak van aksie moet behoorlik uiteengesit word in stukke soos hierdie wat beide pleitstukke en getuienis kombineer.”

This principle was again confirmed in **TRANSNET LTD v RUBENSTEIN** 2006(1) SA 591 (SCA) at 600 G to H:

“The fundamental problems facing Transnet are twofold. In motion proceedings the affidavits constitute not only the evidence, but also the pleadings. Transnet’s answering affidavit is deficient in both respects.”

6] In addition to the aforesaid, the rule is also that the necessary allegations upon which the applicant relies must appear in his or her founding affidavit, as he or she will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. This principle was referred to in **JOHN RODERICK'S MOTORS LTD v VILJOEN** 1958 (3) SA 575 (OPD) at 579 C, with reference to the judgment in *Pounta's Trustee v Lahanas* 1924 WLD 67 at 68 where Krause J said:

"I think it has been laid down in this Court repeatedly that an applicant must stand or fall by its petition and the facts alleged therein...."

This rule was also stated in **SHAKOT INVESTMENTS (PTY) LTD v TOWN COUNCIL OF THE BOROUGH OF STANGER** 1976(2) SA 701 (D&CLD) at 704 G:

"In proceedings by way of motion the parties seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was

required to meet.'

In **POSEIDON SHIPS AGENCIES (PTY) LTD v AFRICAN COALING AND EXPORTING CO (DURBAN) (PTY) LTD AND ANOTHER** 1980(1) SA 313 (D&CLD) the aforesaid principle was dealt with in an extensive manner and in this regard the following principles were laid down or reconfirmed at 315 E to 316 A:

"Mr. Feitelberg (who appeared for the applicant) endeavoured to rely on the material contained in replying affidavits ... The correct approach to the problem was enunciated clearly by Caney J in *Bayat and Others v Hansa and Another* 1955(3) SA 547 (N) at 553 D:

"... the principle which I think can be summarised as follows ... that an applicant for relief must (save in exceptional circumstances) make his case and produce all the evidence he desires to use in support of it, in his affidavits filed with the notice of motion, whether he is moving ex parte or on notice to the respondent, and is not permitted to supplement it in his replying affidavits (the purpose of which is to reply to averments made by respondent in his answering affidavits), still less make a

new case in his replying affidavits.”

It is true that in certain circumstances it would be unjust to confine an applicant to the contents of his launching affidavit. ... But none of these cases go the length of permitting an applicant to make a case in reply when no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view it is essential for applicant to make out a prima facie case in its founding affidavit.”

[7] With regard to documentation attached to an affidavit, the following requirements are applicable as formulated in

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1999 (2) SA 279 (T) at 324

F – G:

“Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were

not so the essence of our established practice would be destroyed. A party will not know what case must be met.” (Own emphasis) _

The aforesaid principle has also been confirmed by the Supreme Court of Appeal in **MINISTER OF LAND AFFAIRS AND AGRICULTURE AND OTHERS v D & F WEVELL TRUST AND OTHERS** 2008 (2) SA 184 (SCA) at 200 C:

“It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits.” _

Restraints of trade:

- 8] Although the onus of proving that a restraint of trade clause is unreasonable and therefore unenforceable rests on the party seeking to avert the enforcement of the restraint (see **REEVES v MARFIELD INSURANCE BROKERS CC** 1996(3) SA 766 (A) at 776 A to C and **REDDY v SIEMENS TELECOMMUNICATIONS (PTY) LTD** 2007(2) SA 486

(SCA) at 493 G to 494 A), that onus only comes into play once it has been established that the applicant in fact has an interest recognised by the law and requiring protection by means of the restraint. In **THE CONCEPT FACTORY v HEYL** 1994 (2) SA 105 (TPD) at 112 F the following was stated:

“In order to be enforceable, a contract in restraint of trade must protect some proprietary interest of the person who seeks to enforce it...whether or not such a proprietary interest exists is a question of fact...”

In **AUTOMATIVE TOOLING SYSTEMS (PTY) LTD v WILKENS AND OTHERS** 2007(2) SA 271 (SCA) at 277 G – 278 A the Supreme Court of Appeal explained this principle as follows:

“At issue in this case, therefore, is whether the appellant does have a proprietary interest worthy of protection. An agreement in restraint of trade is enforceable unless it is unreasonable. It is generally accepted that a restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable

interest of the employer, but merely seeks to exclude or eliminate competition.”

Also see **KWIK KOPY S.A. (PTY) LTD v VAN HAARLEM AND ANOTHER** 1999(1) SA 472 (WLD).

APPLICATION OF THE AFORESAID LEGAL PRINCIPLES TO THE CURRENT APPLICATION:

9] The second respondent deposed to an answering affidavit on behalf of both himself and the first respondent. In this answering affidavit the relief sought was attacked on various grounds. A replying affidavit was thereupon filed on behalf of the applicant.

10] Before I even begin to consider the issues raised in the answering affidavit, I consider it, in this instance, apposite to first ascertain whether the applicant has made out a *prima facie* case in its founding affidavit for the relief sought, as required by the relevant case law to which I referred to earlier herein.

11]In my view the applicant has *prima facie* proved the conclusion, as well as the terms, of the agreement, the deed of suretyship and the written undertaking.

12]The basis upon which the applicant seeks the enforcement of the restraint clause, is squarely confined to the allegations made in paragraphs 34 and 35 of the founding affidavit, which I again record herein:

“34.

The first, second and third respondents have refused and/or neglected to cease trading as PNA franchisee and are in breach of the restraint of trade clause as mentioned in paragraph 6.17 herein.

35.

The applicant has suffered prejudice due to the conduct of the first, second and third respondents, and their persistence to trade under the franchise of the applicant without compensating the applicant and without the applicant's consent.”

13]Although no paragraph 6.17 exists in either the founding affidavit or the agreement, I accept that the deponent to the

affidavit intended to refer to the restraint of trade as contained in clauses 17.1 and 17.2 of the agreement, which reads as follows:

“RESTRAINT:

17.1 The franchisee warrants that for the duration of this agreement and for a period of 18 (eighteen) months after termination of this agreement it or any of its present or past members shall not anywhere in the area or within a radius of 20 (twenty) kilometres of the premises or the premises of any business franchised by the franchisor and whether as shareholder, member, beneficiary, consultant, advisor or employee, and whether alone, jointly or together with or as agent for any other person, partnership, company, body corporate, trust or association of any nature or in any other manner whatsoever be engaged, interested or concerned in or with or benefit from or employ or assist or be instrumental in the employment of the business plan or any part thereof to any business or undertaking relating to the business of news agency, bookseller or stationer.

17.2 The franchisee hereby acknowledges that the restraint set out in this clause is fair and reasonable and is also

required by the franchisee itself and goes no further than is reasonably necessary to protect the proprietary interests of the franchisor, the franchisee and the other franchisees in the business plan and to preserve and protect it for their mutual and exclusive benefit.” (Own emphasis)

14]In my view and on a plain and proper interpretation of the aforesaid restraint clause, it is clear that what is prohibited by it is the “*employment of the business plan or any part thereof*” to any business or undertaking relating to the business of news agency, bookseller or stationer. It does not bar the respondents from conducting business as news agent, bookseller or stationer in any other manner than by the employment of the business plan.

Although “*business plan*” is not specifically defined in the agreement, I accept in favour of the applicant that the reference to “*business plan*” is intended to refer to the “*business system*” as defined in the agreement and which definition I have already quoted in paragraph 3.2 *supra*.

15]Contrary to the aforesaid wording and meaning of the

restraint clause, the order which is sought in prayer 1 of the Notice of Motion is to interdict and restrain the respondents from carrying on or being interested in any business as news agent, bookseller or stationer for a period of eighteen months within a radius of twenty kilometres from the premises, irrespective of whether the respondents employ the business system of the applicant in such business, or not. Clearly this is not what was prohibited by the restraint clause in the agreement.

16]Therefore and even if the averments in paragraphs 34 and 35 of the founding affidavit to the effect that the respondents refuse and/or neglect to cease trading as PNA franchisee are to be accepted as the truth, it still does not entitle the applicant to the relief sought in prayer 1 of the Notice of Motion. The relief sought is not at all justifiable by the terms of the agreement.

17]Turning to the relief sought in prayer 2 of the Notice of Motion, it appears that the applicant attempts to base this relief on clause 18.4 of the agreement, read with the written undertaking, annexure "HB3". Clause 18.4 of the

agreement reads as follows:

“18.4 At the termination of this agreement, the franchisee shall furnish the franchisor with a list of the franchisee’s clients and customers and the franchisee undertakes not to solicit or conduct any business dealings as news agent, bookseller, stationer with such clients and customers for a period of 18 (eighteen) months after the termination of this agreement. The words “soliciting business” are deemed to include responding to invitations to tender for business as news agent, bookseller or stationer. The franchisee shall procure that upon signature of this agreement its members or shareholders sign a similar undertaking in a form approved by the franchisor.”

The wording of the written undertaking has already been recorded in paragraph 3.6 above, from which it is clear that the undertaking entails that second and third respondents on termination of the franchise agreement, shall ensure that first respondent furnish the applicant “*with a full list of the franchisee’s clients and customers*” and that neither of the respondents shall solicit or conduct business dealings with “*such clients and customers*” (of the applicant) for a period

of eighteen months after termination of the agreement.

18]From a proper reading and interpretation of the aforesaid clause, read with the undertaking, it is evident that what is prohibited is the soliciting or conducting of business dealings as news agent, bookseller or stationer with clients and customers of the applicant. It does not prevent or bar respondents from otherwise soliciting or conducting business dealings as news agent, bookseller or stationer as sought in prayer 2 of the Notice of Motion.

19]Therefore, once again, even if the averments in the founding affidavit that the respondents “*refuse and/or neglect to cease trading as PNA franchisee*” are to be accepted, the terms of the agreement, read with those of the undertaking, do not entitle the applicant to the relief sought in prayer 2 of the Notice of Motion.

20]When I, during the hearing of this application, pointed out the aforesaid contradictions between the terms of the agreement and the relief sought in prayers 1 and 2 of the Notice of Motion, Mr. Reinders, on behalf of the applicant,

conceded, and in my view rightfully so, that the said relief sought is irreconcilable with and not justified by the terms of the agreement.

21]Moreover and even if the application was to be considered on the basis that the relief sought in prayers 1 and 2 of the Notice of Motion is or was intended to be in accordance with the wording of the agreement and the undertaking, it is still to be concluded that the applicant has failed to make out a *prima facie* case in this regard in its founding affidavit. Considering the applicable legal principles referred to earlier herein, the applicant failed to make a single averment with regard to the existence or nature of its alleged protectable interest which necessitates the enforcement of the restraint of trade. When confronted with this failure of the applicant, Mr. Reinders submitted that such protectable interest of the applicant is evident from the terms of the agreement as such. In support of his contention he, for instance, referred to the terms of clause 12.2 of the agreement which specifically refers to the “goodwill” and “trademarks” which form part of the business system of the applicant.

In my consideration of the said contention of Mr. Reinders, I found that in addition to the aforesaid paragraph 12.2, further references to trademarks, trade secrets and alike appear in the agreement, as for example in the definition of “business system”.

However, although some of the said clauses have been identified on behalf of the applicant in the founding affidavit, no averment has been made as to the reliance which is placed and the case which is sought to be made out on the strength thereof, as necessitated by the relevant case law. Therefore I cannot consider those references in the agreement to have been properly put before me in evidence. Moreover, no facts or evidence whatsoever were advanced in support of the alleged protectable interest of the applicant as reflected in the agreement. Because of this patent deficiency in the founding papers of the applicant, it is not necessary to consider the merits of the arguments advanced by Mr. Fourie, on behalf of the first and second respondents, to the effect that the applicant, as a franchise holder and with no business in the applicable area, does in fact not possess any protectable interest.

22]The applicant consequently dismally failed in making out a *prima facie* case in its founding affidavit for the relief sought in prayers 1 and 2 of the Notice of Motion. In the absence of a *prima facie* case in the founding affidavit, there is no need to consider the averments made in opposition of the application and/or the averments made in the replying affidavit. The averments in the replying affidavit cannot be used to make a case in reply where no case at all was made out in the founding affidavit. In this instance, I may add that not even a consideration of the averments in the replying affidavit can ever entitle the applicant to the relief sought in prayers 1 and 2 of the Notice of Motion.

23]The relief sought in prayer 3 of the Notice of Motion pertaining to respondents' obligation to furnish the applicant with a list of the first respondent's clients and customers as at date of termination of the agreement, is apparently on the terms of clause 18.4 of the agreement, read with the terms of the written undertaking, both of which I have already referred to above. However, although the said clause and written undertaking were referred to in the founding affidavit,

once again no facts were averred as to the case which the applicant seeks to make out on the strength thereof and/or the conclusions to be drawn from the said stipulations. It certainly is not the duty of the Court to do so.

24]Consequently, in the absence of a *prima facie* case, the response of the first and second respondents in their answering affidavits is not be considered, even though the first and second respondents indicated that they have no objection to comply with the said relief, especially because the first and second respondents at the same time specifically indicated that they do not concede that the applicant is entitled to the list in question.

25]In terms of prayer 4 of the Notice of Motion the applicant seeks an order that the respondents be ordered to remove all signs, whether from the premises, vehicles or elsewhere, which display the name or trading name of the applicant and to do so at respondents' expense. In the founding affidavit reference was made to paragraph 19.4 of the agreement, the relevant part of which for purposes of the relief sought, read that upon termination of the agreement

“the franchisee shall, if required to do so by the franchisor, at its own expense forthwith remove all signs, whether from its premises, vehicles or elsewhere, which display the name PNA or PNA Stationary Franchising Company or which refer in any way to the trade names of the franchisor ...”.

Annexure “HB9” attached to the founding affidavit, which recorded a number of clauses of the agreement, also recorded the contents of clause 19.4 of the agreement, but without any request or demand to in fact remove such signs.

In the so-called letter of demand, attached to the founding affidavit as annexure “HB10”, the following was stated:

- “3. Your clients must then remove all the PNA signage on the 31st of August 2009, before close of business at your clients’ own costs.
4. Failure to remove such signage will result in our client arranging for the removal of the signage at your clients’ expense and our client reserves the right to charge your client R500.00 for every day after the 31st of

August 2009, that the signage is still on the premises or on your clients' vehicle."

26] Save for the aforesaid, not a single averment was made in the founding affidavit to the effect that the relief sought is on the strength of clause 19.4. Nor was any allegation made with regard to the actual factual position of such signs at the date of the signing of the affidavit. Considering that the applicant in the letter of demand requested the respondents to remove the signage, but at the same time indicated that should the respondents fail to do so, the applicant will arrange for the removal of the signs, there is no indication whatsoever that the said signs have not in the meantime been removed, whether by the applicant or by the respondents. From the wording of the letter of demand, in the absence of any allegation to the contrary, one has to conclude that the applicant would in the meantime have arranged for the removal of the signs.

The fact that an allegation was made in the replying affidavit averring that PNA signs are in fact still on display at the business, substantiated by two photographs, does not

assist the applicant. This averment should have been made in the founding affidavit and no reason whatsoever has been advanced by or on behalf of the applicant why this was not done.

[27] The applicant has therefore once again failed to put proper evidence before Court in its founding affidavit in support of the relief sought. Consequently the applicant is not entitled to the relief sought in prayer 4 of the Notice of Motion.

COSTS:

28] Although Mr. Reinders made certain submissions pertaining to costs should some of the relief sought be granted, those submissions have become irrelevant in view of my findings alluded to above.

29] I am of the view that there is no reason why the costs should not follow the outcome of the application.

30] The only remaining issue to be considered is whether such costs should be ordered on a scale as between attorney and client as requested by first and second respondents in

their answering affidavit. Mr. Fourie contended that the applicant was reckless in its approach by making unsubstantiated allegations under oath, in the absence of any evidence in support thereof.

31] That the Notice of Motion, read with the founding affidavit, was very poorly drafted is evident from the findings I have already made herein. The founding affidavit properly and convincingly set out the background to the conclusion of the agreement and the terms of the agreement. With regard to the essence of the application and the relief sought, however, the founding affidavit dismally failed to conform to the requirements of a founding affidavit. Suffice it to say that the mere recording of the terms of the agreement, followed by the two sentences in paragraphs 34 and 35 of the founding affidavit, cannot be considered to be in accordance with the requirements of an application to the effect that the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial; hence, the necessity to set out the evidence in support of the application and to do so in the founding affidavit as such. Although the replying affidavit

was a seemingly brave attempt to make out a case in reply when no at all was made out in the founding affidavit, it could not rectify the totally defective application. However, having said that, I am not convinced that I can conclude that the poorly drafted application was necessarily as a result of any reckless conduct by or on behalf of the applicant. In the exercise of my discretion I am not convinced that the circumstances justify a special costs order.

[32] Consequently the application is dismissed with costs.

C. VAN ZYL, J

On behalf of applicant:

Adv. S.J. Reinders
On instructions of:
Honey Attorneys
Bloemfontein

On behalf of first and second respondents:

Adv. J.A. Fourie
On instructions of:
Stander Venter & Kleynhans
Bloemfontein