

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 12099/2007

DATE: 31 JANUARY 2008

5 In the matter between:

THE NATIONAL DIRECTOR OF Applicant
PUBLIC PROSECUTIONS

and

DOUMBIA MAMDOU Respondent

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J U D G M E N T

BOZALEK, J:

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[1] At the commencement of argument in this application the respondents brought an application to strike out five passages in the applicant's replying affidavits as is set out on page 416 of the record. The grounds are, in one instance, that the contents are hearsay and in the other instances that the contents are irrelevant. More particularly it is said that the offending passages are attempts to make out a new or an additional case against the respondents in reply, one which was not relied upon by the applicant in its founding papers.

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[2] In the main application the National Director of Public Prosecutions seeks a final order for the preservation of property in terms of section 38(1) of Chapter V1 of the Prevention of Organised Crime Act No. 121 of 1998. The case arises out of a raid conducted by the police on certain premises at the Cape Town railway station in December 2006 when a large sum of money, including considerable foreign currency, was seized. It is alleged that the currency is the instrumentality or proceeds of an offence, namely the conducting of unlawful foreign exchange transactions by first respondent. A number of intervening respondents have now joined in opposing the finalisation of the provisional preservation order.

[3] During the raid the police confiscated the currency, stamp pads, calculators and a variety of documents. The applicant relies on some of these documents as evidencing currency transactions, conduct denied by the first respondent. The striking out application involves essentially the use by applicant in reply of certain of these documents, namely papers from one or more diaries allegedly seized from the first respondent's desk, as well as loose pages or notes allegedly contained in those diaries, also allegedly evidencing currency transactions.

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[4] In its founding papers the applicant referred to the documents in the affidavit of Dzwinga as follows at page 39 of the record:

5 "11. On the table Mohokare found files...the files contained documents evidencing various currency exchange transactions".

At page 41 of the record, paragraph 17, it is stated:

10 "Inspector Beukes also seized calculators, stamp pads and files evidencing a money-exchange business from first respondent's office".

It will be noted that no reference was made to diaries or loose notes within those diaries.

15 [5] In reply, however, in the passages which first respondent seeks to strike out, the applicant's deponent Mohlala refers, in para 55 of the replying affidavit:

 "... diaries, loose pieces of papers with inscriptions..."

20 and in para 73.1 to

 "...the diaries depicting various transactions evidencing the sale of foreign currency, loose documentation recording many money-exchange transactions..."

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In addition, there are two further references to these documents, while sample copies are also annexed in reply. There is, moreover, what purports to be an analysis of some of the information allegedly contained in these documents. I should mention that Dzwinga also filed an affidavit in reply stating that her use of the word “files” in the founding papers was a misnomer since no files were in fact found or seized.

10 [6] The relevant rule, Uniform Rule 6(15) of Court provides:

“A court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it not be granted”.

15 In Erasmus: Superior Court Practice page B1-57 the learned author states that the sub-rule is not exhaustive of the grounds upon which an application to strike out matter from an affidavit may be brought. Thus it has always been the practice to strike out matter in replying affidavits which should have appeared in the founding affidavits.

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[7] Quoted as authority for this proposition is the case of Titties Bar & Bottle Store (Pty) Ltd v ABC Garage & Others 1974(4) SA (TPD) at 362. In that matter the Court stated at page 369A-B:

5 "It lies of course in the discretion of the Court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere
10 skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit".

[8] In Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa (4th ed.) at page 365-366
15 the learned authors state the general rule as follows:

 "The necessary allegations must appear in the supporting affidavits for the court will not, save in exceptional circumstances, allow the applicant to
20 make or supplement his case in his replying affidavit and will order any matter appearing in it that should have been in the supporting affidavits to be struck out.

 If, however, the new matter in the replying
25 affidavits is in answer to a defence raised by the

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respondent and is not such that it should have been included in the supporting affidavits in order to set out a cause of action, the court will refuse an application to strike out.

5 It is well established that there exists a general rule that new matter may not be introduced by an applicant in its replying affidavit but this is not an absolute rule and the court may, in an appropriate case, allow an applicant to do so. In this context
10 new matter is not synonymous with a new cause of action”.

[9] In the present matter, first respondent did not merely deal in his opposing affidavit with the undetailed
15 allegations made by applicant in its founding papers relating to the documentation. In terms of the rules he called for an inspection of everything seized by the police. His attorney, Mr Corin, inspected and photographed all the exhibits, including the diaries and
20 loose pieces of paper inside. He had sample pages made of the diary and the loose pages inside and in due course took instructions from his client thereon.

[10] First respondent then dealt with all these documents in
25 his opposing affidavit. This included a certain Galileo

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file, which in fact refers to documents contained in a study guide entitled "Galileo". However, in paragraphs 33.7 and 33.8 of the first respondent's answering affidavit he deals extensively with the diaries and the loose pages contained therein but testifies that he does not recognise them and saw them for the first time when his attorney showed them to him. He denies that they were found on his premises and he says that the occupant of an adjoining office, also raided by the police at the same time, told him that they belonged to him. There is thus a clear dispute over whether these documents – for want of a better description – were found in the first respondent's possession or not.

[11] Not content with this however, the first respondent goes on in his answering affidavit to say that none of the entries are in his handwriting and make no sense to him. The question may then legitimately be asked, what is the status of all the material in paragraphs 33.7 and 33.8 if the striking out of the passages in the applicant's replying affidavit responding thereto, is allowed. The anomalous position is reached that the first respondent's material in question stands as support for his general denial but at the same time the applicant cannot rely on that material to which the first respondent is responding.

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[12] Mr Tredoux for the first respondent asked rhetorically in argument the good question why first respondent should speculatively answer to what was contained in the documents in question when they were not properly brought up in the applicant's founding papers. However, this is exactly what the first respondent did. Mr Tredoux also argued that had the first respondent known that these documents would then come to the fore in the replying affidavits he may well have dealt with them more thoroughly.

[13] There are at least two answers to this argument. Firstly, the first respondent did deal with the documentation in question at some length, apart from denying furthermore that they were seized from him. Secondly, Mr Tredoux confirmed that he seeks no opportunity to deal with the documentation by way of a supplementary affidavit.

[14] Furthermore, the material sought to be struck out does not amount, in my view, to the applicant making out a new case in reply. It always alleged that the documentation seized revealed evidence of foreign currency exchange transactions. Given the applicant's failure to deal with the documents in any detail in its

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founding papers, it would ordinarily be precluded from doing so in reply. However, there are, in my view, exceptional circumstances present here, namely the first respondent's detailed dealing with the documents in question as I have described above which makes it appropriate, in my view, to allow the applicant to deal with the documents more extensively in reply than it did in its finding papers.

[15] By answering in the manner that he did, the first respondent in effect sought to gain an advantage. Now that he is met with a response to his allegations from the applicant in reply, I do not consider that he can be heard to complain when the applicant replies to this material, nor can I see any meaningful prejudice to the first respondent, bearing in mind that prejudice obviously does not mean merely a set-back or what may be perceived as a set-back to one's case. It remains always for this Court to evaluate what weight, if any, is to be given to the material objected to in the light of the first respondent's denial that it was seized from him or that it evidences currency transactions.

[16] In the result the striking out application in terms of paragraphs 1-4 of the notice is dismissed. The

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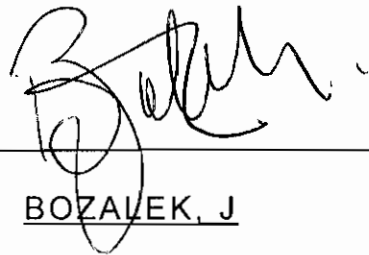
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application succeeds in respect of paragraph 5 thereof which deals with certain words in the replying affidavit of one Christians since it is common cause that such material amounts to hearsay.

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[17] I will make no order as to costs at present but deal with this aspect at the conclusion of the matter overall.

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BOZALEK, J

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