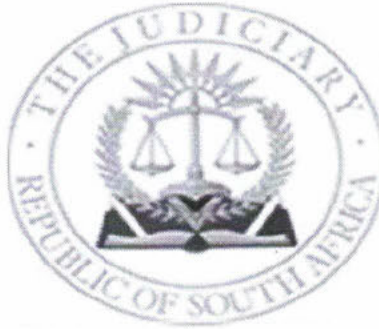




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **065220/2023**

(1) REPORTABLE: NO/~~YES~~
(2) OF INTEREST TO OTHERS JUDGES: NO/~~YES~~
(3) REVISED

SIGNATURE 05 AUGUST 2024
DATE

In the matter between:

ANNA THOKOZILE MKHWANAZI

Applicant

and

**ARENA HOLDINGS (PTY) LTD
DEPARTMENT OF CORRECTIONAL SERVICES
MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

1ST Respondent

2ND Respondent

3rd Respondent

JUDGMENT

[1] At the commencement of the hearing of this matter there were four applications that were to be heard. The main application was set for hearing today. Three other applications, interlocutory in nature, were set down to be heard simultaneously with the main application. The said interlocutory applications are: an application for the condonation of the late filing of the answering affidavit and two applications for leave to file a further affidavit. The condonation application and one of the applications for leave to file further affidavit are not opposed and should be granted.

[2] The remaining application for leave to file further affidavit, as it is opposed, should be dealt with before the hearing of the main application.

[3] The applicant in the remaining application for leave to file further affidavit, appears as the first respondent in the main application. The application is opposed by the respondent who is the applicant in the main application. The other respondents chose not to participate.

[4] The deponent to the applicant's founding affidavit, who is a candidate attorney of the applicant's attorney, alleges that the applicant seeks to place crucial evidence before court which recently came to the attention of the applicant and its attorneys. The facts are said to have come to his knowledge very recently when he was instructed by his principal to investigate the matter, subsequent to the matter having been enrolled for hearing on 5 August 2024, which is today. The deponent avers that the affidavit will provide the court with information that will assist the court in coming to an informed decision having considered all the facts pertaining to the issue to be decided. The facts refer to the status of the criminal case that was instituted against the respondent (the applicant in the main application).

[5] The application is opposed on the basis that the information of the status of the criminal case against the respondent, set out in the affidavit is irrelevant and does not have anything to do with this matter. The criminal case, whether the applicant is to be charged and found guilty or not, is of no assistance in the main application.

[6] Ordinarily only three sets of affidavits are filed in motion proceedings. These are: the founding affidavit, the answering affidavit and the replying affidavit.

[7] Rule 6(5)(e) give the court a discretion to allow the filing of further affidavits, that is, supplementary affidavits.

[8] A party cannot take it upon herself or himself to simply file further affidavits without first having obtained leave of the court to do so. Where affidavits have been filed without first obtaining leave of the court, such affidavits will be regarded by the court as *pro non scripto*.

[9] In the short space of time for delivering this judgment a research of this topic was undertaken in *Erasmus: Superior Court Practice* Volume 2 at page D1-67 to D1-68.

[10] The author *Erasmus*, correctly so, opines firstly that a court will exercise its discretion in permitting the filing of further affidavits against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute.

[11] Secondly, the author opines that it is also a question of fairness to both parties as to whether or not a further affidavit be allowed. There should be a proper and satisfactory explanation which negatives *mala fides* and culpable remissness as to why the facts and information had not been put before the court earlier. Of importance, the court must be satisfied that no prejudice is caused by the filing of the additional affidavits which cannot be remedied by an appropriate order as to costs.

[12] Based on the above reasoning, this court is satisfied about the explanation proffered by the applicant why it is only seeking to file the affidavit now.

[13] The *mala fides* which the respondent seeks to bring to the table, are only speculative in nature and there is no remissness on the part of the applicant. It is evident that the applicant did not have the information sought to be brought before the court at the time of filing the answering affidavit to the main application. The application for leave to file the supplementary affidavit was done as soon as the information was discovered. The court is, furthermore, satisfied that there appears to be no prejudice evident from the papers which cannot be remedied by an appropriate cost order.

[14] In the premises, the affidavit ought to be allowed.

[15] Before the commencement of the hearing of the application the respondent's counsel intimated that if the application is granted in favour of the applicant, the respondent should be afforded an opportunity to respond to these new serious allegations that want to paint the respondent as a criminal and her attorneys as unethical.

[16] The applicant on the other hand, argued against such proposition indicating that the respondent had ample time within which to address the allegations and should have come prepared to argue both applications irrespective of the outcome of the application for leave to file a supplementary affidavit. Counsel also argued that the respondent does not have a defence to the allegations as they are truthful, and that the respondent opted at her own peril not to attend to the allegations.

[17] There are no solid grounds proffered why the respondent should not be given an opportunity to respond to the new allegations. It is in the interest of justice that she be allowed to respond and there is no prejudice that the applicant may suffer, none was tendered, if the respondent is given leave to respond to the allegations. Such an opportunity can only be granted by way of a postponement of the main application.

[18] As to the cost. Both parties argued for costs in the event the matter is decided in their respective favour. In its discretion the court is of the view that each party should be settled with their own costs.

[19] The following order is made:

- a. Condonation for the late filing of the answering affidavit in the main application, is granted. Costs to be costs in the main application.
- b. The application by the applicant in the main application for leave to file a further affidavit, is granted. Costs to be costs in the main application.
- c. The application by the applicant (the first respondent in the main application), for leave to file a further affidavit is granted. No order of cost is made.
- d. The main application is postponed *sine die*, and costs for the postponement are reserved.

- e. The respondent (the applicant in the main application), is granted leave to respond to the allegations contained in the supplementary affidavit of the applicant (the first respondent in the main application).


KUBUSHI J

Judge of the High Court

Gauteng Division

Appearances:

For the Applicant:

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For the Respondent:

Adv N Luthuli (1st respondent)

E Lebeko (2nd & 3rd respondent)

Date of argument:

05 August 2024

Date of judgment:

05 August 2024