



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Reportable/Not Reportable

Case no: 295/2023

In the matter between:

**MEC FOR AGRICULTURE, ENVIRONMENTAL
AFFAIRS, RURAL DEVELOPMENT AND LAND
REFORM (NORTHERN CAPE)**

FIRST APPLICANT

**MINISTER OF FORESTRY, FISHERIES
AND THE ENVIRONMENT**

SECOND APPLICANT

and

HENDRIK (WICUS) DIEDERICKS

RESPONDENT

In re:

HENDRIK (WICUS) DIEDERICKS

APPLICANT

and

**MEC FOR AGRICULTURE, ENVIRONMENTAL
AFFAIRS, RURAL DEVELOPMENT AND LAND
REFORM (NORTHERN CAPE)**

FIRST RESPONDENT

**MINISTER OF FORESTRY, FISHERIES AND
THE ENVIRONMENT**

SECOND RESPONDENT

Neutral citation:

*MEC for Agriculture, Environmental Affairs, Rural Development and
Land Reform (Northern Cape) and Another v Diedericks (Case no
295/2023)*

Coram:

Tlaletsi JP *et* Lever J

Heard:

04 December 2024.

Delivered:

24 January 2025.

JUDGMENT

Lever J

[1] This is an interlocutory application to strike out a significant portion of the replying affidavit in the main application. The main application entails a review of the decision of the MEC, the first respondent in the main application, to refuse certain export permits for specimens that are deemed to fall under Schedule 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

[2] The main application was granted a special allocation of three days for two judges to hear the review that it entailed. The main application was to run from Wednesday 4 December 2024 until Friday 6 December 2024. The application to strike out brought under the provisions of Rule 6(15) of the Uniform Rules of Court (the Rule/s) was served and filed on 20 November 2024. This is in circumstances where the replying affidavit itself was served and filed in January or February 2024, although it is not clear from the papers before us precisely when the replying affidavit was served and filed, it is clear that the replying affidavit in the main application was served and filed many months before the special allocation for a hearing whilst the application to strike out was served and filed a little more than a week before the specially allocated hearing date.

[3] Given the extent of the application to strike out, we as the presiding judicial officers felt that we could not proceed to deal with the main application without first knowing what evidence was properly before the court so that we could fully and properly engage with such evidence before being able to decide the main application. For this reason, we requested the parties to argue the application to strike out and after reserving judgment in the application to strike out, postponed the main application to dates to be arranged between the parties and the court. This is that reserved judgment.

[4] To avoid confusion, the applicant in the main application and the respondent in the interlocutory application to strike out will be referred to herein as Diedericks or the applicant, as in the main application. The first respondent in the main application, being the first applicant in the interlocutory application to strike out will be referred to as the MEC. The second respondent in the main application, being the second applicant in the present interlocutory application to strike out will be referred to as the Minister. Collectively, the MEC and the Minister will be referred to as the respondents, as in the main application.

[5] The complete application to strike out comprises some 15 typed pages, divided into seven categories of complaints or groups of passages to be struck out. The respondents seek to strike out approximately 116 passages as well as some 8 annexures from the applicant's replying affidavit. As indicated earlier, these are dealt with in some 7 groups of passages or categories of complaints.

[6] Ms Ellis SC, who appeared for the respondents, did not take us through each of the passages which the respondents sought to have struck from the applicant's replying affidavit. Ms Ellis contented herself with dealing with the seven groups or grounds to strike out the passages within such groups in broad and general terms and also dealt with the annexures the respondents sought to have struck out in a similar fashion.

[7] Mr Hopkins SC for the applicant adopted a similar approach.

[8] Accordingly, this court will also not deal with each individual passage which the respondents seek to have struck out of the applicant's replying affidavit. The court will deal with each group or ground of the application to strike out. The court will characterise the relevant passages referred to in each one of the said groups and assess on the relevant ground whether a case has been made out to strike out the passages relevant to such a group. The annexures concerned will be dealt with as part of the relevant group to which such annexure relates. It is only in such instances where the annexures might demand individual attention that they will be considered individually.

[9] The requirements for an application to strike out are set out in Rule 6(15) itself. The said Rule reads:

“The 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 may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.” (my emphasis)

[10] What is apparent from a proper reading of the said Rule is that even if all the requirements are met, the court has an overriding discretion to strike out or not.¹ It is trite that such discretion must be exercised judicially. Second, it appears from the Rule, that there are three grounds upon which material may be struck out of an affidavit, being, if such material is scandalous, vexatious or irrelevant.² Thirdly, the court may not strike out such material unless it is satisfied that the applicant in such application will be prejudiced if the relevant material is not struck out of the affidavit concerned. This much appears from the Rule itself. How the Rule is applied depends very much on context given the discretion the court has.

[11] This court accepts that the reference to scandalous matter, vexatious matter or irrelevant matter in Rule 6(15) is not intended to be a closed or comprehensive list of material that may be struck out of an affidavit in an appropriate application. As was decided in the *Titty's Bar and Bottle Store* case referred to above.

[12] Turning now to the first ground raised by the respondents to strike approximately 31 passages out of the applicant's replying affidavit. The grounds for striking out these passages in the replying affidavit are that they repeat what the applicant set out in his founding affidavit.

¹ *Titty's Bar and Bottle Store (Pty) Ltd v ABC. Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 368G.

² It has been held that this is not a closed or exhaustive list of grounds upon which a court may strike out material. See *Titty's Bar and Bottle Store* case above at 368G-H.

[13] Ms Ellis was asked by the court how the respondents were prejudiced by the inclusion of the relevant passages in the applicant's replying affidavit. The only potential prejudice that Ms Ellis could point to was that it was repetitive material. In a proper case, this may well be an appropriate ground to strike out material from an affidavit.

[14] Mr Hopkins placed this first ground for striking out in its context. The genesis of the present application is a composite application to compel a decision relating to the relevant export permits which foresaw the possible need for a review of such decision. As it turned out, the relevant export permits were refused, and a review of such a decision is the main application in this matter. Both respondents originally opposed this first application. However, they subsequently withdrew their opposition and filed a Notice to Abide the first application. The first Order was thus taken unopposed. The MEC then made her decision and refused the relevant permits. Subsequently, the applicant called for the record of the decision and in due course filed a supplementary founding affidavit and an amended Notice of Motion indicating that such a decision to refuse the relevant permits would be taken on review.

[15] The MEC and the Minister both oppose this review. However, in their respective answering affidavits, they did not deal with the founding affidavit at all and confined themselves to dealing with the supplementary founding affidavit only. Both the Minister and the MEC purported to issue a blanket denial of everything contained in the founding affidavit. In motion proceedings, such an approach is neither competent nor allowed. In these circumstances, the applicant, in his replying affidavit, pointed this out and indicated, so that there could be no confusion or ambiguity, that the contentions made in his original founding affidavit formed an integral part of his review application, and, so that all doubt could be removed, he repeated those passages in such replying affidavit which he considered to be material to his review application.

[16] If the applicant can be faulted at all, it is for being overcautious. In the ordinary course, the failure of the respondents to appropriately deal with the founding affidavit would mean that the respondents admitted the contentions in such founding affidavit.

However, in this case, the blanket denial by both respondents remained problematic and the only avenue available for the applicant to deal with that situation was to repeat those passages in the founding affidavit that he considered material to the review.

[17] An application to strike out is not merely a technical or mechanical exercise. In the present circumstances, there is no material prejudice to the respondents or their respective cases by repetition of the relevant passages. In these circumstances, the application to strike out the passages relevant to this first ground/group is refused.

[18] Turning now to the second ground/group for striking out certain passages from the applicant's replying affidavit. This involves approximately seven passages in the replying affidavit and one annexure. The annexure concerned is what is referred to as the Deloitte report. The Deloitte report appears to collect and categorise data. This data is from a publicly accessible source, being the official website of the international body that administers the CITES treaty.

[19] The basis upon which the respondents seek to strike out the said passages and the Deloitte report is that it constitutes new evidence which the respondents submit ought to have been in the founding affidavit or the supplementary founding affidavit. The respondents also argue that this is an attempt to bolster the applicant's arguments around Annexure FA11.

[20] Annexure FA11 to the founding affidavit is an affidavit by Mr Derek Lewitton. Mr Lewitton's affidavit preceded the Deloitte report, his affidavit collected and categorised information from the same website as the source of the information contained in the Deloitte report, being the website of the international body that administers the CITES treaty.

[21] The respondents further contend that the relevant paragraphs contain inadmissible hearsay evidence. If indeed these passages contain hearsay evidence, the respondents would not be required to show any prejudice, and the offending passages would be struck

out on that ground alone. However, Ms Ellis in relation to the ‘hearsay’ only deals with an affidavit by Mr Du Plessis. Mr Du Plessis affidavit is not one of the annexures sought to be struck out under this second group or second ground for striking out parts of the replying affidavit.

[22] It was common cause that the information published by the international body that administers the CITES treaty, insofar as South Africa is concerned, is collected, collated and sent to the international body concerned for publication on their website by the Minister’s Office. Ms Ellis faintly suggested that there was no way to verify this information. In circumstances where the Minister’s office collects and collates such information, this suggestion cannot be seriously entertained. In these circumstances, the Minister ought to have engaged with the Deloitte report and pointed out any inaccuracies wherever they occurred. The respondents did not engage with the Deloitte report, or the passages objected to under this second ground/group. The Minister is in my view directly responsible for this data as well as its accuracy and is obliged by the relevant treaty and its related agreements and regulations to supply such data to the relevant international body for publication. In these circumstances, it cannot raise the spectre of inaccuracy, nor can respondents rely on it being hearsay. It is after all not disputed that the Minister is the ultimate author of the information concerned even though it is published on the CITES website.

[23] This information is largely contained in the affidavit of Lewitton (FA11). However, the respondents pointed out that Lewitton would be a buyer of the rhino horn concerned in several of the applications for the relevant export permit. In light of this an independent audit firm, Deloitte, was engaged to collect and categorise the relevant data.

[24] The applicant contends that this data is evidence that Article VII (5) of the CITES treaty was incorporated into our domestic law. The respondents dispute this and present their own contentions to show that the said article of the treaty was excluded from our domestic law. This is not a question for this court to decide in the present judgment. I

merely point out that this court is quite capable of sorting the wheat from the chaff on this question.

[25] The respondents have not shown that they will suffer any prejudice if the Deloitte report and the relevant passages are not struck out. In these circumstances, the application to strike out this group/ground cannot succeed.

[26] Turning now to the third ground or group of passages that the respondents seek to strike out of the applicant's replying affidavit. These passages in the main deal with the case that the Minister put up in her answering affidavit, and the evidence that was adduced by the applicant in reply was to answer to the case put up by the Minister in her answering affidavit.

[27] There are seven passages and two annexures that the respondents seek to have struck out in this third group.

[28] The grounds that the respondents seek to have these passages and annexures struck out are that they contain new matter not referred to in the second group for striking out. That the annexures and the passages concerned ought to have been dealt with in the founding or supplementary founding affidavit. Again, respondents contend that they would be prejudiced if such annexures and passages are not struck out.

[29] The first annexure relevant to this third group is the confirmatory affidavit of Mr Pieter van Niekerk. I do not believe that this affidavit takes the issue between the parties any further. It does, however, deal with aspects raised in the answering affidavits. In my view, the respondents have not shown that they will suffer any prejudice if the said confirmatory affidavit is not struck out.

[30] The next annexure relevant to this ground for striking out is the confirmatory affidavit of Dr George Hughes. This affidavit is very relevant to the case the applicant

seeks to make out. The applicant and his representative Mr Hopkins concede that this is new matter.

[31] Mr Hopkins submits in relation to this new matter that it is a direct response to the case made out by the Minister, and that nobody could have foreseen the approach that the Minister took. It is implicit in this argument that the relevance of this new evidence only became apparent to the applicant upon reading the answering affidavits filed on behalf of the respondents.

[32] Further, Mr Hopkins argued that the purpose of an affidavit, including a replying affidavit, is to adduce evidence. That the evidence of Dr Hughes was to show that there was no real or *bona fide* dispute of fact. That this was necessary to escape the general rule relating to motion proceedings for final relief set out in the *Plascon Evans* case.³

[33] Ms Ellis conceded that it was usual for this new evidence to be dealt with simultaneously with the application to strike out. In fact, the respondent is required to deal with the evidence they seek to strike out.⁴ I am aware that this rule exists because applications to strike out are heard only with the main application. However, as set out above, the sheer magnitude of the application to strike out compelled us to decide what evidence was properly before the court first before dealing with the main application. In the ordinary situation, there would be no indulgence to deal with the relevant evidence later. If the respondents seek an indulgence in the present circumstances such application will have to be dealt with on its own merits.

[34] The respondents ought to have dealt with the evidence of Dr Hughes. They chose not to. There may well be consequences that follow this choice. That, however, is a decision for another day.

³ A reference to the well-known case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) and specifically the passage at 634H-I.

⁴ *Gore v Amalgamated Mining Holdings* 1985 (1) SA 294 (C) at 295H to 296B.

[35] In my view, the applicant was compelled to deal with the defence raised by the respondents in their answering affidavits. The applicant went no further than was required. It was new evidence in the sense that it dealt with the defence of the respondents and the way such defence was raised, it was not a new case or cause of action. In the present context, the distinction is important.

[36] It is clear from the context that the respondents must have made a conscious choice not to deal with this new evidence. As already stated, whether this has consequences is a decision for another day. Clearly, other than not dealing with this new evidence, which the respondents chose not to engage, the respondents have not shown that they would suffer prejudice if the relevant passages and confirmatory affidavits are not struck out. In these circumstances, the application to strike out this third group of passages and confirmatory affidavits must fail.

[37] Turning now to the fourth group of passages which the respondents seek to have struck out. In this fourth group, there are approximately eleven passages and two annexures that the respondents seek to have struck out of the applicant's replying affidavit. The basis upon which the respondents seek to strike out the relevant passages and annexures is that they constitute new evidence not covered by groups two and three above. That this evidence should have been incorporated into the supplementary founding affidavit.

[38] Further, the respondents contend that the evidence contained in the relevant passages and annexures is not expert evidence as proffered by the applicant, but that it is inadmissible hearsay and/or argumentative matter which must have been within the applicant's knowledge when he filed the supplementary founding affidavit.

[39] The respondents made the *pro forma* contention that they would be prejudiced without specifying how, either in the notice, heads of argument or in oral argument.

[40] This group of passages and the two annexures referred to in this group relate to the standing and opinion of Professor Strydom. The evidence shows that indeed Professor

Strydom is an expert in the field of public international law. His opinion is set out in the passages and annexures referred to in this group. His opinion was sought and provided in the replying affidavit in response to a contention made by the Minister in her answering affidavit. In my view, this was both necessary and appropriate given the circumstances and in the context of the position taken by the Minister. The respondents ought to have engaged with this opinion expressed by Professor Strydom. For their own reasons, they chose not to do so in the papers. However, the respondents will have a further opportunity to engage with Professor Strydom's views when this court hears argument on the merits of the review application.

[41] To state the obvious, this court, at this point in time, will not decide on the veracity of Professor Strydom's views, but it may legitimately assist this court in reaching a conclusion in the main application. Courts on a daily basis consult the texts written by academics and experts in many fields, at the end of the day the court sets out and states what the law is, in a particular case. A dynamic relationship exists between 'writers' on law on the one hand and courts on the other. This helps to develop and refine the law to the benefit of society in general. However, this dynamic relationship is not always pleasing to the courts or the experts concerned in every situation. Nonetheless, it serves society.

[42] The views stated by Professor Strydom were verified by an appropriate affidavit, which forms part of the papers before the court. Accordingly, they cannot fairly be described as hearsay. The respondents will have a further opportunity to engage with Professor Strydom's views when the main application is debated in court. How they do so is up to them.

[43] In my view, in the present context, it would be wrong to describe Professor Strydom's views as argumentative or irrelevant. Even if these passages are struck out, the respondents will have to deal with the very issues raised by Professor Strydom in debating the merits of the main application, when the main application is heard by this court.

[44] In this context, there is no prejudice to the respondents if the relevant passages and annexures are not struck out of the replying affidavit. Certainly, the respondents have not shown that they would suffer prejudice.

[45] Turning now to the fifth group of passages that the respondents seek to strike out.

[46] In the fifth group, there are seven passages the respondents seek to strike out. The basis upon which the respondents seek to strike out the passages in this fifth group as set out in the Rule 6(15) Notice is that it constitutes new relief. Somewhat ambiguously, the respondents add, in parentheses, that these constitute new legal arguments in the said Notice.

[47] The applicant seeks no relief in relation to the 2010 CITES regulations promulgated by the Minister. The applicant argues that these regulations are *ultra vires* for certain reasons. This, again, is not an issue to be decided in the present judgment. This is indeed a legal argument, but it is one the applicant would be entitled to raise when the merits of the main application are argued.

[48] Mr Hopkins concedes that this is indeed a legal argument, and that ordinarily legal arguments are not allowed in affidavits. However, he submits that there is one exception to this general rule, being that legal argument is allowed when it involves a constitutional issue. Mr Hopkins submits that an international treaty is incorporated into our domestic law by a legislative act, and that the Minister's authority does not extend to being able to effect a legislative act. Accordingly, Mr Hopkins argues that the issues relevant to this group of passages which the respondents seek to strike out directly involve constitutional issues.

[49] The incorporation of an international treaty into domestic South African law is now governed by section 231 of our current constitution.⁵ Clearly, the matters raised by Mr Hopkins are constitutional issues. That is the only conclusion I need to reach to refuse the

⁵ The Constitution of the Republic of South Africa, 1996.

application to strike out these passages. Naturally, the merits of the arguments raised in the relevant passages will be decided in the main application.

[50] Turning now to the sixth group of passages which the respondents seek to strike out of the applicant's replying affidavit. This sixth group involves approximately seventeen passages which the respondents seek to strike out.

[51] The grounds upon which the respondents seek to strike out these passages are that they constitute scandalous and/or vexatious material that causes embarrassment to the respondents.

[52] The terms 'scandalous' and 'vexatious' have been defined by Mogoeng CJ in the matter of *Helen Suzman Foundation v President of the Republic of South Africa and Others*⁶ as follows:

“‘Scandalous’ allegations are those which may or may not be relevant but which are so worded as to be abusive or defamatory; a ‘vexatious’ matter refers to allegations that may or may not be relevant but are so worded as to convey an intention to harass or annoy; . . .” (references omitted)

[53] With this definition in mind, I have read all the passages referred to in this group and save for one, none of them fit comfortably within either definition. Save for the one passage referred to, there can be no prejudice to the respondents resulting from any of the other passages from this group.

[54] The one passage which I think crosses the line and is at least abusive is paragraph 116.15, which reads as follows:

“The unanswered question, however, is this: why is the government not willing to legalise the trade in rhino horn? Stated slightly differently, why does the government want to keep the illegal trade in rhino horn alive? What possible motive can the government or government officials have in wanting to prolong a situation in which rhino have to be poached and killed in order to satisfy the

⁶ 2015 (2) SA 1 (CC) para 28.

seemingly insatiable appetite of the Black Market in the Far East? I have already indicated that there are a great number of highly skilled and qualified conservationists, economists, and biologists who believe that legalising the trade in rhino horn is the best way of ensuring the safety and survival of the species. I have also indicated that the Minister's own statutory body created to advise her on this topic shares that view."

[55] This passage is problematic for a number of reasons. Firstly, it implies that the government or its officials are acting with some sort of nefarious purpose. Secondly, it implies that the government or its officials have some sort of vested interest in keeping the illegal black market in rhino horn viable and alive. Finally, it implies that the Minister is acting improperly. In this context, I find that the respondents are prejudiced by the passage if it is not struck out. In the circumstances, paragraph 116.15 is struck out of the applicant's replying affidavit.

[56] Turning now to the seventh and final group of passages that the respondents seek to have struck from the applicant's replying affidavit.

[57] This seventh group involves approximately thirty-six passages and some three annexures. The grounds upon which the respondents seek to strike out this material are that it is an argumentative matter which is irrelevant.

[58] A large proportion of these passages are a response to contentions made by both the MEC and the Minister that the conduct of the applicant's counsel and attorney was improper and unethical. These contentions placed the applicant in a poor light. These contentions called for a response.

[59] The remaining passages were also in response to contentions made by either the Minister or the MEC. The passages concerned may well be described as argumentative, but given that they are in response to contentions made by the Minister and/or the MEC, they cannot be described as irrelevant.

[60] In any event in relation to all these passages, the respondents were unable to show that they would suffer prejudice if they were not struck out. In these circumstances, the application to strike out these passages must fail.

[61] This leaves us with the question of costs. The respondents sought to have approximately 116 passages struck from the applicant's replying affidavit. The respondents succeeded in having one passage struck from the applicant's replying affidavit. In the circumstances, this amounts to a substantial failure. Both Ms Ellis and Mr Hopkins sought orders that were based on the principle that the successful party should have its costs. I can find no reason why the ordinary rule relating to costs, that costs should follow the result, should not apply.

[62] The next question is on what scale should such costs be awarded. Mr Hopkins argued that the application to strike out was an abuse of the process of this court and on that basis, the costs should be awarded on scale "C". The new rule that the court should order whether costs are awarded on scale "A", "B" or "C" probably has several objectives. This would include *inter alia*: controlling the cost of litigation so that it is affordable for a greater range of people; punishing misconduct in an appropriate case to the appropriate degree; and easing the task of the Taxing Master.

[63] Mr Hopkins has asked this court to punish the respondents. In my view, it is not necessary to go this route. Clearly, the issue is of great importance to all of the parties. They have all engaged the services of Senior Counsel. The scale of costs awarded should reflect this by ordering the appropriate scale. In these circumstances, the appropriate scale is scale "C".

[64] There is one further aspect relating to costs that needs to be decided. That aspect relates to the costs associated with hearing the application to strike out and postponing the main application. Whilst no party was restricted in any way on the submissions they made in regard to costs, none of the parties directly addressed this issue. In these circumstances,

I think it would be appropriate to reserve these costs for the court dealing with the main application.

[65] In these circumstances, the following order is made:

- 1) Paragraph 116.15 of the applicant's replying affidavit is struck out of the record.
- 2) Save for the passage referred to in order 1 above, the remainder of the application to strike out is dismissed.
- 3) The respondents (in the main application) are to pay the costs of the application to strike out, jointly and severally, the one paying the other to be absolved, on a party and party basis to be taxed or calculated on scale "C".
- 4) The costs relating to the postponement of the main application are reserved for the decision of the court entertaining the main application.



L. Lever
Judge
Northern Cape Division

I agree.



Tlaletsi JP
Judge President
Northern Cape Division

Appearances

For applicant: Adv K Hopkins (SC)
Instructed by: PGMO Attorneys Inc.

For respondents: Adv I Ellis (SC)
Instructed by: Office of the State Attorney