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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO: 4439/2024

In the matter between:

METROPOLITAN LIFE

Applicant

(a part of Momentum Group Limited

FSP Number: FSP44637)

and

MANDISA TRUTH MAKASI N.O

Respondent

(in her capacity as the Executor of the Estate

Late Siyabulele Makasi

Estate Number: 0[...])

JUDGMENT

KRÜGER AJ:

Introduction

[1] This judgment concerns an interlocutory application by the respondent in the main application, Metropolitan Life. It seeks leave from this court to file a further answering affidavit in response to the applicant's replying affidavit.

[2] For convenience, I refer to the parties as they are in the main application.

[3] It is the respondent's case that the applicant's replying affidavit raised new cause of action, which requires a response from the respondent in order to determine the main dispute properly. The applicant opposes the interlocutory application on the basis that it did not introduce a new cause of action but simply responded to the answering affidavit.

The main application

[4] The applicant approached the court to obtain an order directing the respondent to pay out the proceeds of a life policy which belonged to the deceased. In her founding papers, she relied on what she termed representations made to her by representatives of the respondent over the course of two years to the effect that the life benefit in terms of the policy of the deceased would be paid to the estate. She also relied on the contractual obligations of the respondent in terms of the policy agreement. Thus, the applicant contended that she, as representative of the estate, established a clear right to the benefit by virtue of the deceased's ownership of the policy. Further, she asserted that harm was established as the estate cannot be finalised in the absence of the payment, and also in that certain traditional observations could not be performed because of the non-payment. Lastly, the applicant stated that she has no other remedy but to request the court to direct the respondent to make the payment as requested.

[5] In opposing the request for relief, the respondent stated that the applicant failed to establish a cause of action and that she lacks *locus standi* to bring the application. To substantiate this, the policy agreement was attached to its answering affidavit, as well as details of the deceased's particular policy. This included details of the named beneficiary of the deceased, his wife, Mrs Shirley Makasi. The

respondent's case is that the applicant as executor is not entitled to the benefits in terms of the policy the deceased named his wife, Mrs Shirley Makasi, as his beneficiary. However, as she had passed away on 9 June 2022, the respondent maintained that the benefit in terms of the policy accrued to her estate. The respondent indicated that it was unsure whether an executor was appointed for Mrs Makasi's estate.

[6] In her reply to the respondent's answering affidavit, the applicant stated that the respondent raised no defence to her cause of action based on estoppel. As such, its response amounted to a bare denial. Further, and at the core of this interlocutory dispute, the applicant placed reliance on a clause in the policy agreement which was attached to the answering affidavit. This clause relates to 'unclaimed benefits' under the policy, which may validly be claimed by the estate of the policyholder. The applicant contended that the relief that she seeks, i.e., payment of benefits in terms of the policy, falls within that definition. In reply, she thus maintained that this contractual basis for the relief sought should be considered as an alternative to the estoppel cause of action. It is to this contractual cause of action that the respondent wants to respond.

The parties' submissions on the current dispute

[7] Mr Wessels, who appeared for the respondent, requested the court to exercise its discretion to allow a further answering affidavit to respond to the new cause of action raised in reply for the first time. He contended that it would be prejudicial to the respondent if the applicant were to argue its case in the main application based on the payment of the benefit as an 'unclaimed benefit' without affording the respondent a chance to respond thereto.¹ Any prejudice to the applicant, he submitted, can be assuaged with an opportunity to reply to the further answering affidavit on the narrow issue introduced in the replying affidavit. In sum, the respondent's case is that the interests of justice require that this matter be decided on all the relevant facts.

¹ Reliance was placed on *Administrator, Transvaal v Theletsane* 1991 (2) SA 193 (A) 196-197.

[8] Mr *Windvogel*, for the applicant, submitted that this application is an attempt by the respondent to cure a defect in its response to the main application, as it provided no response to the applicant's case for a mandatory interdict. Instead, the respondent raised a defence of the nature of *in limine* points, relating to standing and the lack of a cause of action, which it now seeks to augment. It appended the contract and knew that Mrs Shirley Makasi lodged a claim in respect of the death benefit on 12 May 2022. The applicant first had sight of the agreement after delivery of the answering affidavit. The applicant was entitled to address the terms of the agreement in reply. Where, such as in this instance, the information provided by the respondent in its answering affidavit revealed the existence or the possible existence of a further ground for the relief sought by the applicant, the applicant is entitled to do so.²

[9] For the applicant, it was submitted that the respondent failed to meet the threshold of demonstrating that exceptional circumstances existed that warranted a fourth set of affidavits. In the context of this matter and how the respondent chose to respond to the main application, the applicant submitted that the respondent failed to provide a satisfactory explanation to negative *mala fides* or culpable remissness as to why the facts had not been placed before the court at an earlier stage.³

[10] The applicant, it was argued, will be prejudiced if the respondent is given a further opportunity to answer to the main application, which will delay finalisation of the matter further. Accordingly, I was asked to dismiss the interlocutory application with costs on scale B.

The legal framework considered

[11] In *Herbstein and Van Winsen's* commentary on civil procedure in the high court,⁴ the authors outline the various attempts that have been made to formulate a rule or test for the determination whether a further affidavit should be allowed. The

² Reliance was placed on *Shakot Investments v Town Council, Borough of Stanger* 1976 (2) SA 701 (D) 705.

³ Reliance was placed on *Afric Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA (N) 38-39.

⁴ M Dendy and C Loots *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed (2009) Ch14-p433.

tests range from requiring the applicant to demonstrate (a) 'exceptional circumstances' or (b) 'special circumstances' such as an unexpected or new matter raised in the replying affidavit, or (c) where the court requires fuller information on record, for example, where the interests of a minor are affected to (d) the possibility of prejudice to the respondent if a further set of affidavits is not allowed. However, they conclude that it is neither feasible or desirable 'to say more than that the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that basically "it is a question of fairness to both sides"'.⁵

[12] Corbett J in *Bader v Weston*⁶ expressed the relevant consideration in the following terms:

In the case of *Transvaal Racing Club v Jockey Club of South Africa*, 1958 (3) SA 599 (W), WILLIAMSON, J. (as he then was), stated (at p. 602):

"If a party to an application files and serves certain affidavits and before the other party has replied thereto he files additional affidavits, either because he had not had time to complete the whole of his affidavits before a fixed time or because new matter has been discovered or for any other good reason, I do not think a Court would reject such affidavits solely upon the basis of any alleged rule of practice against the filing of more than one set of affidavits."

I am in respectful agreement with this statement of the position. While I fully agree that litigants on motion or in proceedings instituted by petition should not be encouraged to present their cases in a piecemeal fashion, at the same time I consider that the Court should not allow an adjudication of the real issues in a case to be partially frustrated by too rigid an adherence to what is essentially a rule of practice. The approach indicated in the above-quoted statement achieves, in my view, a happy blending of these principles.'

[13] More recently, the Supreme Court of Appeal, in *De Kock v Du Plessis*,⁷ held that the court has to exercise its discretion to admit further an affidavit 'against the

⁵ Ibid. The quote inside the quote is from *Bangtoo Bros v National Transport Commission* 1973 (4) SA 667 (N) 680A.

⁶ 1967 (1) SA 134 (C) 138B-D.

backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in the dispute'. The SCA further stated that the court, in exercising its discretion must consider (a) whether the party has provided a proper and satisfactory reason as to why the new information in the affidavit was not placed before the court at an earlier stage; (b) whether any prejudice will be caused by the admission of the affidavit that could not be limited by an appropriate costs order and (c) the relevance and the importance of the evidence to the issue it has to determine.

[14] In the current instance, the applicant contended that she was permitted to raise the legal argument that became evident from the agreement attached to the answering affidavit of the respondent. It is evident from *Shakot Investments v Town Council, Borough of Stanger*⁸ that such reliance is permitted. But this principle has been qualified. In *Angus v Kosviner*,⁹ Streicher J held

The principle that a party to application proceedings is entitled to make any legal contention which is open to him on the facts (*Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 509H-510B) has been qualified, in the case of an applicant, by the proviso that it should not be applied if such application would be unfair to the respondent (see *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 (A) at 285E-I).

In *Minister van Wet en Orde v Matshoba*,¹⁰ on which reliance was placed in *Angus v Kosviner*, Grosskopf JA explained:

'This principle is, however, qualified by the proviso that the Court can only act [rely on legal argument evident from the facts] in this way if there is no unfairness to the respondent. In the case law this element is usually expressed by requiring that all relevant facts must be before the Court (cf.e.g., *Sentrale Kunsmis* case *supra* at 404F - G; the *Nationwide Truck Hire* case *supra* at 833H - 834A en *Chikane* se saak *supra* at 360G - H). This

⁷ (284/2023) [2024] ZASCA 117 (24 July 2024) paras 24-26.

⁸ At 705A-B.

⁹ 1996 (3) SA 215 (W) 222G-H.

¹⁰ 1990 (1) SA 280 (A) 285G. My translation from the original Afrikaans.

eliminates the most obvious source of possible unfair prejudice to the respondent.'

[15] It is trite that the notice of motion and the affidavits exchanged by the parties define the issues between them and provide the evidence on the basis of which the matter is to be decided.¹¹ As the main dispute currently stands, the applicant's case rests on a contractual entitlement to the payment of the policy, in reply specified to be 'unclaimed benefits', and on the basis of representations made to her, i.e. estoppel. The respondent's opposition rests on a lack of *locus standi* and that her estoppel cause of action is no cause of action. In its view, the named beneficiary's estate is entitled to payment in terms of the policy. Without a further answering affidavit, the dispute must be determined on the basis that the respondent has not answered to the allegation that it holds the money as an unclaimed benefit.

[16] In considering these facts to answer the questions outlined in *De Kock v Du Plessis*, in view of the qualified principle as stated in *Angus v Kosviner*, I am of the view that the respondent should be allowed to file a further answering affidavit to place all the relevant facts before the court determining the dispute. I outline the considerations relevant to each question briefly:

- a. The respondent did not answer to the applicant's reliance on specific clauses of the agreement, as these were not relied upon by the applicant in her founding papers. The specific reliance only came in the replying affidavit.
- b. In this instance, a costs order may address prejudice to the applicant. It is, however, unclear to what extent this application caused a delay in the determination of the main application. It must also be borne in mind that the applicant opposed this application.
- c. The respondent's answer to the applicant's reliance on a specific term of the contract stands central to the determination of the dispute, and the respondent will be prejudiced if it has to enter the proverbial battle with one hand tied behind its back.

¹¹ 2016 (3) SA 370 (CC) paras 27-28 (footnotes omitted).

[17] The respondent requested its costs of this application only in the event of opposition. The applicant opposed the application, adding to the delay. In my view, the respondent is entitled to its costs on scale B as requested.

[18] I make the following order:

- a. The respondent is granted leave to file a further answering affidavit to deal with the *causa* relating to an alleged unclaimed benefit as outlined in the applicant's answering affidavit within 10 days of this order.
- b. The applicant may file a further replying affidavit to the further answering affidavit within 10 days of receipt of the further answering affidavit.
- c. The applicant is directed to pay the respondent's costs for this application on scale B.

R KRÜGER AJ
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 31 July 2025
Date of judgment: 2 September 2025

APPEARANCES:

For the applicant	:	<i>Adv L Windvogel</i>
Instructed by:		Nkontso & Co Attorneys, Gqeberha
For the respondent:		<i>Adv LN Wessels</i>
Instructed by:		Fourie Basson & Veldtman, Tyger Valley c/o Lexicon Attorneys, Gqeberha