

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION : MTHATHA)**

CASE NUMBER: 2362/2018

In the matter between:

QUENTIN LESSING

Applicant

and

QUANZA HOLDINGS (PTY) LTD

Respondent

JUDGMENT

NDAMASE, AJ:

[1] This is an interlocutory application in which the applicant seeks leave to deliver an affidavit to supplement that delivered in opposition to a summary judgment application.

[2] By way of background, the respondent who is the plaintiff in the main action issued summons against the applicant, the defendant in the main action, on 25 May 2018. For ease of reference, I shall continue referring to the parties as they are referred to in the present proceedings.¹ Subsequent to the entry of an appearance to defend, the respondent launched an application for summary judgment in terms of rule 32 of the Uniform Rules of the Superior Court Practice,² on the 11 July 2018.

[3] It is averred in the particulars of claim that the parties concluded a written lease agreement in respect of commercial premises situated in Mthatha from which the applicant conducts the business of tyre and exhaust fitment and repair centre. The respondent is seeking to recover rental allegedly due and payable by the applicant over 10 (ten) months, from 01 August 2017 to 01 May 2018, totaling R588 659. 98.

¹ The applicant and the respondent

² The Uniform Rules of Court

[4] The applicant filed an affidavit resisting summary judgment in which he sought to challenge the respondent's lack of ownership over the premises. In disclosing his *bona fide* defence he annexed the title deed showing that the respondent is not the owner of the premises. He further attached a letter from the attorneys acting on behalf of one Yoliswa Dweba who is an executrix of the estate of the late Daniel Dweba, the apparent title holder of the premises, threatening to evict the applicant from the said premises. It is accordingly this opposing affidavit which the applicant now seeks leave to supplement.

[5] The grounds set out by the applicant as to why the supplementary affidavit should be allowed are-

[5.1] The applicant's quest is to place additional information before Court to explain why the respondent in his particulars of claims relies on the terms of the Court Order granted on 23 September 2016 under case no. 3347/2017 of this Court, in addition to the aforesaid lease agreement.

[5.2] Subsequent to the filing of the affidavit in opposition to the summary judgment application, it seems the applicant was, on 05 September 2018, served with eviction proceedings from the executrix of the estate of the late owner of the premises and for the same period upon which the respondent's claim is based. The applicant has attached eviction papers served upon him in substantiating the reasons for the last hour need to supplement his affidavit.

[5.3] Subsequent to the delivery of the opposing affidavit the executrix of the estate of the late owner of the premises served both the applicant and the respondent with summons for recovery of rent in respect of the same premises on 05 September 2018. Again, the applicant has attached the copy of summons to substantiate the reasons for bringing this application. Both the action and applications referred to above were, however, later withdrawn on the 16 November 2018.

[5.4] As the respondent's claim in the main action is founded largely on arrear rent, the application seems to contain information relating to payments purportedly made to both the executrix and the respondent in respect of the same premises and purportedly in accordance with some agreement concluded between and among the parties on 15 February 2018 in the presence of the parties' legal representatives. This is the basis for seeking permission to file a supplementary affidavit.

[6] The respondent is opposed to the application to file a supplementary affidavit.

[7] The opposition hinges largely on rule 6 (5) (e) which establishes that the delivery of further affidavits in motion proceedings is only permissible with the indulgence of the court. It avers that it is only in exceptional circumstances where something unexpected or new emerges, that the filing of further affidavits is permitted and that, even so, there should be a proper explanation which negates *mala fides* or culpable remissness as to why the information was not placed before court earlier by a party.³

[8] The respondent's main contention is that the alleged subsequent events relating to eviction action and application proceedings against both the applicant and the respondent have nothing to do with the main action forming the subject of the summary judgment application. Further it is the respondent's position that the issues raised in the applicant's affidavit fall within the realm of the Administration of the Deceased Estates Act 66 of 1965 and are yet to be determined by the Master of the High Court, Mthatha where the Estate of the late Daniel Dweba is registered.

[9] Summary judgment proceedings are relatively an expeditious way of resolving disputes. In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*⁴, Navsa JA set out a brief history of the summary judgment procedure and pointed out that:

³ *Bangtoo Bros and Others v National Transport Commission and Others* 1973 (4) SA 667 (N); *Africa Oil (Pty) Ltd v Ramadan Investment* 2004 (1) SA 35 NPD at 38 I-J

⁴ 2009 (5) SA 1 (SCA) at para [31]

“... [T]he summary judgment procedure was not intended to ‘*shut (a defendant) out from defending*’, unless it was very clear indeed that he had no case in the action but it was intended to prevent sham defences from defeating the rights of parties by delay and at the same time causing great loss to plaintiffs who were endeavoring to enforce their rights.”⁵

[10] Rule 32 (3) (b) obliges a respondent in summary judgment proceedings to adduce a *bona fide* defence to the action which is good in law by way of an affidavit which discloses fully the nature and grounds of the defence and the material facts relied upon therefor. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment.

[11] In *Maharaj v Barclays National Bank Ltd*,⁶ Corbett JA, as he then was, emphasized that “*the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the court examine it by the standard of pleadings. It is sufficient that the defendant discloses his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence.*”

[12] Against this backdrop, a court seldom allows the filing of supplementary opposing affidavits in summary judgment proceedings. In *Gani v Crescent Finance Corporation (Pty) Ltd*,⁷ a request for a postponement to enable the filing of a supplementary affidavit was granted because of the particular circumstances of that case, namely, that the defendant’s affidavit was by mistake technically defective. A court has a discretion in an appropriate case to allow an additional affidavit by a defendant in order to improve a defective attempt to set out a defence to the plaintiff’s claim to prove his *bona fides*.

[13] Coming to the facts of the present case, as contended by the respondent, the question is whether the supplementary affidavit in this instance is a further affidavit as contemplated in rule 6 (5) (e). The rule deals generally with the delivery of affidavits in application proceedings. It provides:

⁵ See *Schoeman v Newmark Ltd* 1919 CPD 55

⁶ 1976 (1) SA 418 (A) at 426 A-E

⁷ 1961 (1) SA 222 (W)

“6 Applications (rules of the court)

(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.

(2)...

(3)...

(4)...

(5) (d) Any person opposing the grant of an order sought in the notice of motion shall

(i)...

(ii)....within fifteen days of notifying the applicant of his intention to oppose the application deliver his answering affidavit, if any, together with any relevant documents; and

(iii)....

(e) Within 10 days of the service upon him of the affidavit and documents referred to in subparagraph (ii) of paragraph (d) of sub rule (5) the applicant may deliver a replying affidavit. The court may in its discretion permit the filing of further affidavits”

[14] From the above, it is clear that this rule 6 is applicable in motion proceedings where only three sets of affidavits are allowed, being the founding affidavit, the answering affidavit and the replying affidavit. Any other affidavit besides these three is a further affidavit. In my view, the essence of the respondent’s argument in placing reliance on rule 6 (5) (e) in opposing the delivery of a supplementary affidavit in the present circumstances is misplaced.

[15] Applying the principles stated in *Gani*⁸ to the instant matter, the procuring of additional information relevant to the facts of what was originally contained in both the affidavit supporting summary judgment and the opposing affidavit, in my view rendered the circumstances to be extra ordinary to warrant the augmentation of his opposing affidavit. It is of no consequence that the intervening proceedings were subsequently withdrawn. Consequently, I believe that it is a correct and advisable approach to allow the filing of a supplementary affidavit in the interest of justice, to enable the applicant to augment his *bona fide* defence.

⁸ *Supra*

[16] I am therefore satisfied that the explanation given by the applicant in relation to the grounds for the filing of the supplementary affidavit is acceptable in the circumstances and within the context of this matter.

[17] It is common cause that the applicant who seeks to file a further affidavit is seeking an indulgence from the Court. It is trite that an applicant for an indulgence should pay all such costs as could reasonably be said to have been wasted because of the application, including the costs of such opposition as was in the circumstances reasonable and not vexatious or frivolous.⁹

[18] I consider the opposition to this application as having been neither vexatious nor frivolous, hence the general principle should apply. The respondent should not be obliged to pay the costs of its unsuccessful opposition.

[19] In the result, the following order is made:

(a) The applicant is granted leave to deliver a supplementary affidavit in pursuit of his opposition to the summary judgment launched against him by the respondent.

(b) The applicant shall pay the respondent's costs, such costs to include the respondent's costs of opposition.

B NDAMASE

ACTING JUDGE OF THE HIGH COURT

Counsel for the applicant : *D C Botma*

Instructed by : Peter Allams Attorneys

⁹ *Meyers v Abramson* 1951 (3) SA 438 (C)

C/o Chris Bodlani Attorneys

Attorney for respondent : *S C Vuthula*

Instructed by : SC Vuthula & CO

Heard on : 22 November 2018

Judgment delivered on : 26 February 2019