IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 41657/2020

DATE: 2023-02-14

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED. YES
DATE 17 March 2023
SIGNATURE

In the matter between

MARI HAYWOOD AND OTHERS Plaintiff

and

FORESTA TIMBER AND BOARD Defendant

---

**J U D G M E N T**

---

**WANLESS AJ**

**Introduction**

[1] This is an interlocutory application to compel discovery in terms of subrule 35 (1) of the Uniform Rules of Court ("the rules"). In the action MARI HAYWOOD NO; KGASHANE CHRISTOPHER MONYELE NO and ALLY SUMAYA MOHAMED NO are the First, Second and Third Plaintiffs respectively in their capacities as joint liquidators

of JURGENS Ci (PTY) LTD (in liquidation). The defendant is FORESTA TIMBER AND BOARD (PTY) LTD. Insofar as the application is concerned the defendant is the applicant and the plaintiffs are the respondents. The parties will be referred to as such in this judgment.

[2] The premise of the applicant's application is that the respondents' affidavit in support of its discovery is defective. In the applicant's replying affidavit and heads of arguments it is asserted that the affidavit is non - compliant with the rules of court for the following reasons:

1. Only one of the three respondents' (Mrs Haywood), being the first respondent, deposed to the affidavit;

2. Mrs Haywood only referred to documentation in her possession (ie to the exclusion of the other two respondents and Company in liquidation).

[3] The respondents' opposition to the application is that the applicant has failed to make out a case in its founding affidavit and that Mrs Haywood was duly authorised. The respondents further contend that the applicant's application amounts to an abuse of process.

**The facts**

[4] The facts which are common cause in this application or are not seriously disputed by either of the parties are as dealt with hereunder.

[5] As set out earlier in this judgment the respondents are the joint liquidators of Jurgens Ci (Pty) Ltd (in liquidation) and the plaintiffs in the main action.

[6] The applicant served its notices in terms subrules 35 (1), (6), (8) and (10) on the offices of the respondents' attorneys of record via email on 29 June 2021.

[7] On 29 July 2021 the applicant's attorney of record *("Stephens")* sent an email to the respondents' attorneys of record wherein a written request was made for the delivery of the respondents' discovery affidavit within ten (10) days of the email being received.

[8] On 5 August 2021 the respondents' attorneys of records sent an email to Stephens and advised him that the discovery affidavit was being finalised and would be served shortly.

[9] On 12 August 2021 the respondents' attorneys sent a further email to Stephens wherein a unsigned and uncommissioned discovery affidavit was attached. The respondents' attorneys also advised Stephens that they were waiting for the signed and commissioned version from their client which they hoped to receive by no later than Monday 16 August 2021 and that they would revert with the commissioned version as soon as possible.

[10] On 18 August 2021, Stephens served this application to compel discovery. As it is clear from the notice of motion and founding affidavit the application was based solely on the failure of the respondents to serve an affidavit in terms of subrules 35 (1), (6), (8) and (10) and not that any affidavit was defective for lack of compliance.

[11] On the same day (18 August 2021) the respondents' attorneys of record sent a letter to Stephens. In that letter it was stated that Stephens was in possession of the respondents' unsigned discovery affidavit and that respondents' attorneys were awaiting the signed and commissioned version from their client.

[12] On 19 August 2021, Stephens sent an email to respondents' attorneys. In essence, he accuses the

respondents of delaying the action which he describes as being vexatious and that the respondents are abusing the rules of court.

[13] On 19 August 2021 the respondents' attorneys of record again informed Stephens that their client is currently out of the province and for that reason she (being the deponent Mrs Haywood) was not in a position to have the affidavit signed and commissioned. The respondents' attorneys committed to have the signed and commissioned affidavit served by no later than Wednesday 25 August 2021.

[14] On 24 August 2021 the respondents' discovery affidavit was served on Stephens. The commissioned and uncommissioned affidavits are exactly the same.

[15] On 29 August 2021, Stephens sends a further email to the respondents' attorneys wherein he avers that the respondents' discovery affidavit is defective and informs the respondents' attorneys of record that he will proceed with the interlocutory application.

[16] The application was then opposed by the respondents who filed their answering affidavit. In response thereto the

applicant filed its replying affidavit and the application was placed on the opposed motion roll for hearing.

**The issues**

[17] In fact, the sole issue which this Court has been asked to determine is whether the respondents have complied with the provisions of subrule 35 (2). More specifically, whether the affidavit deposed to by Mrs Haywood (as the first plaintiff in the action) complies with the provisions of the said subrule.

[18] A number of "sub-issues" arise inn respect of the determination of this sole or central issue. These are:

> [18.1] whether the applicant has attempted to make out a case in reply and thus, since these are motion proceedings, is not entitled to any relief; and
>
> [18.2] in the event of the answer to the aforegoing being in the negative (that is that the applicant would be entitled to seek relief) is the affidavit deposed to by Mrs Haywood defective on the grounds as alleged by the applicant. In opposition thereto, it is essentially the case for the respondents that Mrs Haywood had the requisite

authority to depose to the affidavit which in any event was not properly challenged by the applicant.

**The law (in respect of new matter in reply)**

[19] Counsel for the respondents referred this Court to the matter of *Titty's Bar & Bottlestore (Pty) Ltd v ABC Garage (Pty) Ltd*[1] as support for the proposition that new matter may not be introduced in replying affidavits and stand to be struck out when the Court held[2] the following:

10

> *" It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits……."*

[20] This Court was also referred by Adv Basson to the matter of *Van Zyl v Government of Republic of South Africa*[3] where Harms ADP held,[4] in relation to prolix replying affidavits, that same should not only give rise to adverse
20 cost orders but should be struck out as a whole, *mero motu*.

[21] Of, course it is trite that an applicant must make out his or her case in the founding affidavit and cannot do so in

---

[1] *1974 (4) SA 362 (T).*
[2] At 368H.
[3] *2008 (3) SA 294 (SCA*).
[4] *At 308G-H.*

reply.[5] Moreover, a court will not allow the introduction of new matter if the new matter sought to be introduced amounts to an abandonment of the existing claim and the substitution thereof of a fresh and completely different claim based on a different cause of action.[6]

**The facts (in respect of new matter in reply)**

[22] The relief sought by the applicants as set out in the applicant's notice of motion reads as follows:

10

> "1. Directing the Respondents to make discovery under oath in accordance with the provisions of Uniform Rule 35 (1) and the Applicant's notice in terms Rule 35 (1), (6), (8) & (10) dated 29 June 2021, within ten (10) days of service of said order;
>
> 2. That the Respondent pay the costs of this application."

20 [23] The founding affidavit was deposed to by Stephens and consisted of four (4) paragraphs only wherein it briefly set out the fact that having been served the requisite notice to make discovery the respondents' attorneys had

[5] *Erasmus: Superior Court Practice: D1-58A: Cases at footnote 1*
[6] *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk 1984 (2) SA 261 (WLD) at 270A; Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd 1984 (40 SA 87 (T) at 91F-92F.*

undertaken that a discovery affidavit would be provided by 16 August 2021. It was further stated that discovery had not been made when the founding affidavit was deposed to on the 18th of August 2021 and that the respondents should have made discovery in terms of the rules by the 13th of August 2021. That was the extent of the averments as set out in the founding affidavit.

[24] The respondents then filed their answering affidavit. The deponent thereto, namely the respondents' attorney, one Jacobus Ignatius Van Niekerk *("Van Niekerk")* set out the history of this matter as dealt with earlier in this judgment. In addition thereto, he raised the fact that an unsigned and uncommissioned discovery affidavit had been provided which was not dealt with in the founding affidavit; Stephens had continued with the application despite the fact that a discovery affidavit had been filed and therefore the relief sought in the application was now moot.

[25] In response thereto the applicant filled a replying affidavit, also deposed to Stephens. This affidavit raises a number of new matters which are summarised in subparagraph 15.2 of the replying affidavit wherein it is stated:

"15.2 I submit that the Applicant persists with this

application inasmuch as;-

15.1.1 (sic) The First Respondent's purported discovery affidavit is faintly defective as aforesaid;

15.1.2 (sic) Neither the Second nor the Third Respondents have supported the First Respondent's aforesaid affidavit and/ or confirm the content thereof by way of confirmatory affidavit;

15.1.3 (sic) There is no resolution of the provisional liquidators/liquidators of Jurgens Ci (Pty) Ltd (in liquidation), annexure to the First Respondent's said affidavit that bears out her alleged authority to have deposed to said affidavit on behalf of the Respondents, either as alleged or at all;

15.1.3 (sic) On Van Nieker's (sic) own version, the Respondents (whether it would be one or all of them), *prima facie* appear no longer to be the provisional liquidators of Jurgens Ci (PTY) LTD (in liquidation), of whom there are now

> apparently only two liquidators, whose identities are not known and/or have not been disclosed to the Applicant.
>
> 15.2 (sic) It is submitted that in the circumstances, it is Van Niekerk and/or the Respondents who are *mala fide*, there having been no compliance with the provisions of Unform Rule 35 (1) by the Respondents (or at the very least, the Second or Third Respondents)."

[26] At the conclusion of the replying affidavit the submission is made that the Respondents' have failed to make discovery under oath in a manner required in Uniform Rule 35 (1), and for that reason the applicant continues to seek the relief sought in terms of its Notice of Motion.[7]

**Findings (in respect of new matter in reply)**

[27] When the matter came before this Court, it was submitted on behalf of the respondents that:

> (a) This Court should *mero motu* strike out the applicant's replying affidavit on the basis that it contained impermissible new evidence;

[7] *The emphasis is that of this Court.*

(b) The applicant had not sought leave to amend its Notice of Motion or supplement the application papers with new evidence to make out a “new case” on the basis that the respondents’ discovery affidavit was defective;

(c) In the premises the application was moot and should be dismissed;

(d) Alternatively to the aforegoing, the case now postulated by the applicant was misconceived and any relief sought should have been by way of Rules 7 and 30.

In the premises, the application should be dismissed.

[28] This Court must agree with those submissions. The application before this Court is (and should have remained) a relatively simple one. It was instituted in terms of subrule 35 (7) when the respondents failed to deliver their discovery affidavit timeously as required by the provisions of subrule 35 (2). Following the institution of the application to compel the delivery thereof the discovery affidavit was served and filed. At that stage the relief sought in the application became moot other than the issue of costs.

[29] The applicant now seeks to somehow have this Court decide whether the deponent to that discovery affidavit has the authority to depose to the discovery affidavit, on the basis that the Court can do so in terms of the provisions of subrule 35 (1). Clearly the provision subrule 35 (1) are not applicable insofar as the applicant may seek such relief.

[30] In the first instance the applicant cannot attempt to introduce a new cause of action by way of averments in the replying affidavit. An alleged lack of authority to depose to a discovery affidavit is a completely different matter to the late filing thereof. For the purposes of the present matter this Court hereby strikes out paragraph 6;7;13; and 15 of the applicant's replying affidavit. Following thereon, there is no evidence pertaining to this new cause of action before this Court and the application must be dismissed.

[31] Even if the event of this Court being incorrect and the applicant being entitled to introduce the evidence as set out in the replying affidavit it is clear that the applicant has adopted the incorrect procedure to challenge the authority of the deponent to the discovery affidavit and/or seek relief on the basis that the discovery affidavit is somehow defective. Following on from the well-known decision of

*Ganes and Another v Telkom Namibia Ltd 2004 (3) SA 615 (SCA)*, Adv Basson for the respondents, drew the attention of this Court, to the matter of Unlawful Occupiers of the School Site v City of Johannesburg.[8]

[32] The applicant was compelled to challenge the authority of Mrs Haywood in terms of rule 7 and follow the provisions of rule 30 should that authority have been lacking or the applicant had any other difficulties with the discovery affidavit on behalf of the respondents. Having this Court grant the relief sought in the applicant's Notice of Motion would not have cured those difficulties. In the premises the application would also have to be dismissed on these grounds.

**Costs**

[33] It is trite that the issue of costs falls within the general discretion of the court and, unless unusual circumstances exist, costs will normally follow the result. In the present matter it is abundantly clear that the applicant should pay the costs of the application. It is only the scale thereof that deserves consideration by this Court.

[34] The respondents have requested that this Court make

[8] *[2005] 2 All SA 108 (SCA) (17 March 2005).*

an order that the applicant's attorneys pay the cost of the application *de bonis propris.* Proper notice was given by the respondents to the applicant's attorneys in this regard. In the alternative thereto, the respondents seek an order that the applicant pay the costs on a punitive scale.

[35] This Court has given careful consideration as to whether the applicant should be ordered to pay the costs of the application on the scale of attorney and client, *alternatively*, whether the applicant's attorney should be ordered to pay the costs of the application *de bonis propris.* In this regard this Court notes:

1. The persistence with an application when the relief sought was moot and the only possible relief that could have been sought was one for costs of (at that stage) an unopposed motion to compel discovery;

2. The fact that the aforegoing has mulcted the Company in liquidation and the creditors thereof with the costs of a fully blown opposed application;

3. The application itself was completely devoid of any merits (apart from being moot) and based on

incorrect applications of law and the Rules of Court;

4. Whilst the applicant's attorney complains throughout that the respondents are apparently delaying the litigation (a fact upon which this Court pronounces no judgment) the applicant itself has contributed significantly to the delay of the finalisation of the action by way of this application;

10

5. The contents of the correspondence emanating from the applicant's attorney is noted by this Court with some displeasure, as is the threat by both sides to report matters to the relevant societies governing the legal profession;

6. The valuable court time wasted not only on the opposed roll hearing the matter but reading the papers before hand and preparing this judgment.

20

[36] In addition to the aforegoing this Court is well aware of the applicable principles in respect of the award of cost on a punitive scale and also costs *de bonis propris*.[9] When

[9] *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd and Others [2013]4 All SA 346 (GNP); Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd 2015 (5) SA 38 (SCA) at paragraph [27]; In re ; Alluvial Creek Ltd 1929 ECD at 535; Nel v*

applying the aforesaid principles it is the decision of this Court that in light of the fact that, *inter alia*, costs *de bonis propris* are only granted in exceptional circumstances, this Court declines to make an order of that nature. However, in respect of the costs to be paid by the applicant, in light of the factors set out above, it would be improper if this Court, in exercising its discretion judicially and taking into account all of the relevant facts, did not make an award whereby those costs were paid on a punitive scale. An appropriate order will therefore follow.

**Order**

[37] This Court makes the following order. The order reads as follows:

---

**ORDER**

---

1. Paragraphs 6, 7, 13 and 15 of the applicant's replying affidavit are struck out.

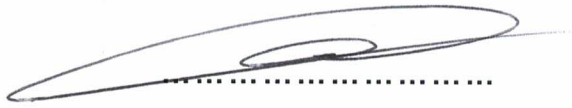
2. The application is dismissed.

---

*Waterberg Landbouers Ko-Operatiewe Vereniging 1946 AD 597 at 607;*

3. The applicant (Foresta Timber and Board (Pty) Limited) is to pay the costs of the application on the scale of attorney and client.

---



.....

**WANLESS AJ**

**ACTING JUDGE OF THE HIGH COURT**

**DATE**: 17 MARCH 2023

10