REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

JUDGMENT

Case no: 2012/42735

Reportable: **Yes**

Of Interest to the Other Judges

Date: 15 April 2013

Signature:

In the matter between:

FABER LOLA **Applicant**

And

NAZERIAN RIMON **Respondent**

Heard: **26 February 2013**

Delivered: **April 2013**

Summary: Enforcement of usufruct agreement. Agreement providing for respondent to maintain the building. Principles dealing with new material in replying affidavit. The discretion of the Court permit reliance on new material in replying affidavit. Approach to conflicting affidavits.

JUDGMENT

MOLAHLEHI, AJ

Introduction

[1] This is an opposed application in terms of which the applicant seeks an order in the following terms:

> '1 The respondent is ordered to comply with his obligations in terms of paragraph 1, page 4, of the "Notarial Deed of Usufruct" agreement in respect of the immovable property more fully described as Section 10 in the Scheme known as Shannon Schiphol, situated at Hyde Park, Johannesburg ("the property");
>
> 2 In particular the respondent is ordered to:
>
> 2.1 Arrange for the property to be repainted;
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> 2.2 Arrange for the installation of curtains in the main bedroom, entrance hall and dining room of the property;
>
> 2.3 Arrange for the replacement of the tumble dryer situated in the property; and
>
> 3 The respondent is further ordered to attend to the general maintenance and upkeep of the property when requested to do so by the applicant.'

[2] The above issues arose from the interpretation of the usufruct agreement between the parties which reads as follows:

> 'Lola s[1]hall enjoy the complete and undisturbed occupation of the PROPERTY during her lifetime and OWNER or his estate should keep predecease her shall have the responsibility and the ability to maintain the PROPERTY in which respect LOLA is absolved of her, common-law duty. LOLA shall be entitled to let the property should she not occupy it personally.' (my underlining)

[3] The background facts to the conclusion of the agreement between the parties are fairly straight forward and generally common cause. The parties had a romantic relationship for a period of over 14 years during the cause of which they bought and owned jointly the property, which is the subject of these proceedings.

[4] It is common cause that after the purchase of the property the applicant's health deteriorated to the extent that her illness was regarded as life threatening. It was as a result of this that the parties agreed that the applicant would transfer her half share in the ownership of the property to the respondent.

[5] In return, the respondent agreed to allow the applicant the use and occupation of the property for the remainder of her life. According to the applicant, in addition to agreeing to financially supporting her, the defendant further amongst others agreed to allow the applicant 'to enjoy the complete and undisturbed occupation of the property during her lifetime,' and the respondent, would 'maintain the property in which respect the applicant is absolved of her common-law duty.'

[6] The transfer of the applicant's half share to the respondent was effected during July 1996 and the agreement was registered in the deeds office on 7 January 1997. The applicant contends that the respondent is in breach of the usufruct agreement in that he failed to comply with all the provisions of the agreement which are set out above.

[7] In his defence, the respondent contends that the property is currently in a good state and, therefore, the demand by the applicant to have the property painted is a luxurious expense and is therefore not necessary. According to him, his duty

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arises only in relation to the necessary repairs for the purposes of maintaining the property. In relation to the demand that the curtain should be replaced and the purchase of a new tumble dryer, the respondent contends that that is not part of responsibility. In this respect, the respondent states, in his answering affidavit, that:

> '19.2 In amplification of the aforesaid denial, I reiterate that I agreed to maintain the property. This does not include repainting the property where not necessary, the installation of curtains or the replacement of a tumble dryer.
>
> 19.3 ...
>
> 19.4 However, I recently purchased a washing machine for Farber, which I did out of the goodness of my heart, there being no obligation to do so.
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> 19.5 Also in January I replaced the sink as it was deteriorating, as well as the pipes connected thereto, which I did as am obliged to in terms of the Notarial Deed.
>
> 19.6 During the same period I also organised that various goods belonging to her to be removed as she requested.
>
> 19.7 ...
>
> 19.8 I reiterate that I have been maintaining the property in accordance with my means, from time to time, and as agreed and as is evident from the above.'

[8] In the replying affidavit, the applicant contends that the property is not in good state and that the repainting is not a luxurious expense. In support of her contention that the property needs to be painted, the applicant states that:

> 'There is rising damp and peeling paint in both bathrooms and ceilings that require repainting due to damage sustained from the heat given off light fittings, all of which requires urgent attention.'

Evaluation

[9] The case of the applicant, in the founding affidavit, is based on breach of the usufruct agreement and an oral undertaking which the respondent is alleged to have made in relation to the painting of the house, the purchase of the tumble dryer and the purchase of new curtains.

[10] The respondent, in his answering affidavit, denies ever making any undertaking to the applicant in relation to the items referred to by her. The respondent, specifically, deals with the denial of the alleged undertaking at paragraphs 19.1, 19.2 and 19.3 of his answering affidavit.

[11] In her replying affidavit, the applicant does not deal with the two paragraphs where the respondent denies ever making the alleged oral undertaking. The applicant in this respect deals in her reply with paragraphs 19.4 to 19.7 of the respondent's answering affidavit. In the heads of argument, counsel for the applicant argues that paragraph 19.3 is a bare denial and further that the undertaking must be read in conjunction with all the sub-paragraphs of paragraph 19 of the answering affidavit.

[12] In my analysis, I have not been able to find any evidentiary connection between the purchase of the washing machine and the replacement of the kitchen sink with the alleged undertaking that the respondent would repaint, purchase the tumble dryer and the curtains. It seems, to me, that if this was the case, then the applicant would have dealt with that in the replying affidavit. In other words, the applicant would in the replying affidavit have stated that the purchase of the washing machine and the replacement of the sink occurred in the context where the respondent had also made the undertaking as alleged. In my view, the relationship between the alleged undertakings, the purchase of the washing machine and the replacement of the sink is an evidentiary matter that ought to have been dealt with in the replying affidavit. It is not a matter to be dealt with in the heads of argument and it be assumed that that was enough to address the

burden of the applicant. In fact, it is a matter that strictly speaking ought to have been dealt with in the founding affidavit.

[13] In light of the above analysis, I am, accordingly, of the view that the applicant having failed to deal with the denial of the alleged undertaking in the replying affidavit, a dispute of fact exists as to the alleged undertaking. Faced with the dispute of facts, the test to apply is that enunciated in *Plascon Evans v Van Riebeeck Paints,*[2] in terms of which the version to be accepted is that of the respondent. In other words the version to accept is that the respondent never made any undertaking as alleged by the applicant.

[14] The case of the applicant would still fail even if the facts regarding the alleged undertaking by the respondent were to be treated as not being in dispute. The applicant does not in this regard indicate the date when the undertaking was made neither does she attach the SMS in which it is alleged that the respondent confirmed the undertaking. The date of the undertaking is also important, as an evidentiary aspect of the case of the applicant and relates to the question of whether it was made prior to the purchase of the washing machine and the replacement of the sink. In dealing with the approach to adopt when dealing with contradictory affidavits the Supreme Court Appeal in *Fakie NO v CCII Systems (Pty) Ltd,*[3] per Cameroon JA held:

> 'That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be "a bona fide dispute of fact on a material matter". This means that an uncreditworthy denial, or a palpably implausible

[2] 1984 (3) SA 623 (A) at 634E-635C.
[3] 2006 (4) SA 326 (SCA) at paragraph [55].

> version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is "fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.'

[15] In my view, the credit worthiness of the respondent's denial has to be assessed in the context of the allegation made by the applicant that an undertaking was made by the respondent. Having regard to the unsubstantiated allegation made by the applicant, it cannot, on the proper analysis, be said that the denial of the allegation by the respondent is far-fetched or not genuine. It was indicated earlier that the applicant does not state the date when the alleged undertaking was made neither does she attach the SMS wherein the undertaking was alleged to have been confirmed.

[16] Accordingly, the applicant has in my opinion failed to make out a case that the respondent has failed to comply with an undertaking to purchase a tumble dryer and curtains for the house. In any case, the case pleaded by the applicant in the notice of motion is not based an oral agreement but rather on the written usufruct agreement. The applicant has also not made out a case as to why this Court should go outside the written usufruct agreement between the parties, to determine the obligation of the respondent.

[17] I now turn to deal with the alleged breach of the provision of the usufruct agreement by the respondent in failing to paint the house. In this respect, it is evident that the issue for determination revolves around the interpretation of the

word "maintain." In relying on the definition of the word "maintain" as set out in Merriam-Webster dictionary, the applicant contends that it is necessary to look at the background circumstances that gave rise to the agreement. I have already indicated earlier that the applicant has not made out a case justifying going outside the written usufruct agreement. The word "maintain" is defined in the Merriam-Webster dictionary as follows:

> 'To keep in an existing state (as of repair, efficiency or validity) preserve from failure or decline.'

The word has also been defined in similar terms in Blacks Dictionary- Seventh Edition in the following terms:

> 'To care for (property) an appearance, to engage in general repair and upkeep.'

[18] It would appear from the proper reading of the respondent's answering affidavit that he does not dispute that he is in terms of the usufruct agreement obliged to maintain the "property in the state that it was at the time" of the registration of the usufruct. He, however, contends that his duty is limited to effecting the necessary repairs in order to maintain the property in its state as at the time of the registration of the usufruct.

The issue for consideration

[19] The issue in this matter is whether the applicant has made out a case showing that the respondent has, by not repainting the house, failed to maintain the property in the state that it was at the time that the usufruct agreement was concluded. In my view, the issue, from the proper interpretation of the terms of the usufruct agreement, is not the length of time it has taken since the last time the house was painted but rather whether the maintenance of the house has due to old painting deteriorated to an extent that it can be said that the respondent is in breach of maintenance of the property as required by the usufruct agreement. The onus is on the appellant to produce evidence that show that the property is

not in the same condition that it was at the time of the conclusion of the usufruct agreement and that is due to the condition of the painting.

[20] In her replying affidavit, the applicant testifies that the need for the painting arose from the damp walls and paint of the ceiling which has been damaged by the heat from light fittings. This is not the case made out by the applicant in the founding affidavit. It was for this reason that it was argued on behalf of the respondent that this was new matter raised for the first time in the replying affidavit and should for that reason be rejected. In support of this proposition, the respondent's counsel relied on the case of *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another*,[4] where the Court upheld the principle that the applicant in motion proceedings has to make out his or her case in the founding affidavit and was not permitted to supplement it in the replying affidavit unless done due to special circumstances.

[21] It was argued on behalf of the applicant, in response to the above point that the new testimony was due to the fact that the applicant was not aware of the defence which the respondent was to raise in his answering affidavit. It was further argued that the point raised by the respondent was unsustainable because the application to strike out was not made. The applicant's counsel further argued, relying on the authority of *Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate and Others*,[5] that the rule against raising new material for the first time in the replying affidavit was not rigid and inflexible.

[22] The general rule which is well established in our law is that in motion proceedings, the applicant is required to make his or her case in the founding affidavit and not in the replying affidavit.[6] This rule is based on the principle that

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[4] 1980 (1) SA 313 (D) at 315H-316 A.
[5] 2003 (5) SA 1 (C).
[6] See *Kleynhaans v van der Westhuizen* NO 1970 (1) SA 565 (O) at 568E, where the Court in dealing issue of inserting new facts in the replying affidavit had the following to say: 'Normally the Court will not allow the applicant to insert in a replying affidavit which should have been in the petition or the notice of motion.'

the applicant stands or falls by his or founding affidavit.[7] The rule is also based on the procedural requirement of the motion proceedings which requires that the applicant should set out the cause of action in both the notice of motion and the supporting affidavit. The notice of motion and the founding affidavit form part of both the pleadings and the evidence. The basic requirement is also that the relief sought has to be found in the evidence supported by the facts set out in the founding affidavit.[8]

[23] The exception to this rule is found in *Body Corporate, Shaftesbury Sectional Title Scheme,* (supra) where the Court in upholding what was said in *Shephard v Tuckers Land and Development Corporation (Pty) Ltd,*[9] and after confirming the general rule applicable in motion proceedings, held that the rule was not absolute and that the Court has a discretion to permit new material in the replying affidavit.[10]

[24] In considering whether to allow new material introduced for the first time in the replying affidavit, the Court has a judicial discretion to exercise. The indulgence of allowing new material in the replying affidavit will generally be allowed when warranted by special circumstances. It is important to note that the rule does prohibit the applicant to explain matters stated in the founding affidavit.[11] The Court may also, after permitting the use of new material in a replying affidavit, allow for further answering affidavit by the respondent. The new issue/s in a replying affidavit will generally be allowed in circumstances where the applicant could not have known of such issues at the time of deposing to the founding affidavit. In other words, the Court will not permit or will strike out new issues raised in a replying affidavit if the applicant knew or ought to have known of the

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[7] See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 645H.
[8] See *Kleynhaans v van der Westhuizen* (supra)
[9] 1978 (1) SA 173 (W) at 177G–178A.
[10] *Body Corporate, Shaftesbury Sectional Title Scheme* above n 3 at 6D-F.
[11] See *Nedbank Ltd v Hoare* 1988 (4) SA 541 (E) at 543E.

existence of such issues but failed for whatever reason to raise them in the founding affidavit.[12]

[25] The approach to adopt, in considering whether to allow new matter in the replying affidavit, received attention in Juta *and Co Ltd and Others v De Koker*,[13] where the Court accepted and quoted with approval what was said in the headnote in *Shakot Investment (Pty) Ltd v Town Council of Borough of Stanger*,[14] where the Court held that:

> 'In consideration of the question whether to permit or strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be between a case in which the new material is first brought to light by the applicant who knew of it at the time the when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence of a further ground for relief sought by the applicant. In the latter type of case the Court would obviously more readily allow the applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.'

[26] In the present instance, I am not persuaded that there is a basis upon which I should exercise my discretion in favour of allowing the new evidence introduced by the applicant in the replying affidavit. The new material introduced by the applicant in the replying affidavit relates to the evidence that seek to support the applicant's cause of action. This is evidence which the applicant ought to have known about even before she received the respondent's answering affidavit.

[27] I do not agree with the suggestion which was made on behalf of the applicant that the objection to raising new material in a replying affidavit can only be dealt with by way of an application to strike out. The issue of introducing new material

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[12] See *Bayat and Others v Hansa and Another* 1955 (3) SA 547 (N) and *Dawood V Mahomed* 1979 (2) SA 361 (D).
[13] 1994 (3) SA 499 (T) at 510F-H.
[14] 1976 (2) SA 701 (D).

in a replying affidavit is a point of law which in my view can be raised even at the hearing of the matter.

[28] In the circumstances, I find that the applicant has failed to persuade this Court to indulge and permit the use of the new evidence raised for the first time in the replying affidavit. The new evidence so introduced forms the essential aspect of the case of the applicant and is evidence based on the facts which, if they indeed existed, ought to have been known to the applicant and should, therefore, have been raised in the founding affidavit. The new evidence introduced in the replying affidavit will accordingly be ignored.

[29] In light of the above, I now have to consider the case of the applicant with the exclusion of the new evidence introduced in the replying affidavit. Whilst I accept that the respondent has a duty in terms of the usufruct agreement to preserve and maintain the property, the applicant has, however, failed to show that the repainting which she is demanding is related to the maintenance of the property or its preservation as envisaged in the usufruct agreement. There is insufficient evidence that the condition of the property has deteriorated to the extent that it can be said that the respondent has failed in his obligation to maintain and upkeep the property.

[30] In my view, the applicant would still have not succeeded in her case even if the evidence introduced for the first time in the replying affidavit was taken into account. In this respect, the evidence before this Court including that in the replying affidavit is insufficient to discharge the onus on the applicant of showing that the respondent was in breach of the provisions of the usufruct agreement and, therefore, specific performance should be ordered against the respondent. The Court remains in darkness even when the new evidence in the replying affidavit is taken into account. The applicant has not presented evidence showing the extent to which it is alleged that the property is in state of disrepair in relation to its painting. There is also no evidence describing the area which need to be repainted, for instance is it only one wall, or one or two rooms that need to be

repainted. There is no evidence showing the areas affected by the alleged rising damp and peeling of paint in the bathrooms and the damage caused by the extent of the lighting fittings on the ceiling.

[31] The applicant has also failed to make a case in terms of which this Court should order the respondent to attend to the general maintenance and upkeep of the property as and when so requested by her.

[32] In light of the above consideration, I am of the view that the applicant's application stands to fail.

Order

[33] In the premises, the following order is made:

1. The applicant's application is dismissed.

2. The applicant is to pay the costs of the respondent.

MOLAHLEHI, AJ

Acting Judge of the South Gauteng

Appearances:

For the Applicant:	Advocate M G Gioia
Instructed by:	Routledge Modise Inc.
For the Respondent:	Advocate A Milovanovic
Instructed by:	Biccary, Bollo and Mariano Inc.