

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 13/26920

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED.

DATE

SIGNATURE

In the matter between:

LIFE AND ANALYTICAL SCIENCES (PTY) LTD
SEPARATION SCIENTIFIC (SA) (PTY) LTD

First Applicant
Second Applicant

And

PERKIN ELMER ITALIA SpA

Respondent

In re:

PERKIN ELMER ITALIA SpA

Applicant

And

LIFE AND ANALYTICAL SCIENCES (PTY) LTD
SEPARATION SCIENTIFIC (SA) (PTY) LTD

First Respondent
Second Respondent

Summary:

Interlocutory application for leave to file a fourth set of affidavits and postponement of the main application – leave to file a fourth set of affidavits granted and main application postponed sine die – applicants to pay the wasted costs occasioned by the postponement.

JUDGMENT

MAENETJE AJ:

Introduction

1. This is an interlocutory application in which the applicants, being the respondents in the main application, seek the following orders:
 - “1. The First and Second Applicants are granted leave to file a fourth set of affidavits within 10 (ten) days of this order;
 2. The main application is postponed *sine die*, costs thereof are reserved;
 3. Costs of this application to be paid by the Respondent (Applicant in the main application), on the scale as between attorney and client;
 4. Further and/or alternative relief.”
2. I heard the interlocutory application on 21 November 2014, and gave the following order:
 - “1. The First and Second Applicants are granted leave to file a fourth set of affidavits within 5 (five) days of this order;

2. The main application is postponed *sine die*, and costs thereof are reserved;
 3. Costs of this application to be paid by the First and Second Applicants (the Respondents in the main application), on a party and party scale.”
3. I did not give reasons for granting the above order, and indicated that my reasons would follow. These are my reasons.

Brief factual background

4. The respondent, which is the applicant in the main application, brought an application in which it seeks mainly an order against the first applicant, which is the first respondent in the main application, for:
 - a. payment of an amount of US\$424 822,12;
 - b. interest on the amount of US\$424 822,12 at the rate of 15,5% per annum calculated from 25 February 2013 to date of payment.
5. It is clear from the affidavits filed in the interlocutory application that the amount of US\$424 822,12 has been reduced by payments that the first applicant has made to the respondent over time, since the institution of the main application. There appears to be some dispute as to the exact amount outstanding, and in respect of which the respondent will still pursue judgment against the first applicant in the main application. This dispute seems to centre, *inter alia*, around certain credit that should be passed to the first respondent. The first applicant contends that the correct credit that should be passed in its favour is 22 000 Euros but that the respondent misstates the credit to be passed as US\$18 000,00.
6. The applicants state in their founding affidavit that the respondent has raised new matter in its replying affidavit in the main application, to which they wish to respond. The respondent filed its replying affidavit in the main application on 6 August 2014. The applicants’ attorneys sent a letter to the respondent’s attorneys dated 15 September 2014 in which they stated, *inter alia*, that it was patently clear that the replying affidavit raised new matter, which came into existence subsequent to the applicants filing their answering affidavit in the main application. The respondent’s

attorneys replied to the letter from the applicants' attorneys by letter dated 22 September 2014. The respondent's attorneys stated, *inter alia*, the following in their reply:

- "3. Our client's Replying Affidavit was delivered on 5 August 2014. Accordingly, your client has had over a month to deliver any further affidavits it believes is necessary but has inexplicably failed to do so. It is further noted that no explanation as to your client's delay is proffered in your communication under reply either.
 4. Our client's consent to the filing of a further affidavit by your client is not a necessary precursor to your client filing a further affidavit if it deems it necessary to do so. The parties are not entitled simply by their own arrangements to file as many affidavits as they wish and the filing of further affidavits is a matter for discretion of the court."
7. The applicants did not bring an application for leave to file a further affidavit after receipt of the letter of 22 September 2013 from the respondent's attorneys. They delayed. Instead, the applicants' attorney sent a further letter to the respondent's attorneys dated 11 November 2014. This letter was sent after the respondent's counsel had delivered his practice note and heads of argument in the main application. This is recorded in paragraph 1 of the letter. The letter states again that the respondent's replying affidavit in the main application raises new matter. It is then contended in the letter that the applicants were entitled to respond to the new matter or to have it struck out. An offer of settlement is made in the letter, and it is stated that if settlement fails the attorneys hold instructions to bring an application for leave to file further affidavits, *inter alia*, to deal with issues relating to the arbitration clause in the agreement that forms the subject matter of the main application.
8. When the matter was called on 17 November 2014, counsel requested that it be stood down until Friday, 21 November 2014, when they likely would be arguing postponement. In the meantime, and on Thursday, 20 November 2014, I was furnished an indexed and paginated bundle containing the interlocutory application. It is clear from the notice of motion in the interlocutory application that the interlocutory application was issued on 17 November 2014. During oral argument, counsel for the applicants submitted that the applicants had, on 17 November 2014, tendered the wasted costs of the postponement in order to get the respondent to

agree to a postponement of the main application. This was not accepted. There was no objection from the respondent's counsel to this submission by the applicants' counsel, or an endeavour to correct or contradict it.

9. In its answering affidavit in the interlocutory application, the respondent does not really dispute that its replying affidavit in the main application raises new matter, which the applicants would be entitled to respond to. Nor was this disputed in oral argument. Instead, the respondent states the following in its answering affidavit:

"19. I do not, in this affidavit, deal with the respondents' 'version' as far as the alleged new matter is concerned. This can and will be done, as and when the respondents deliver their further affidavit and should the main application be postponed for that purpose.

20. I do, however, state that:

20.1 the respondents have no valid defence to the merits in the main application. Argument will be addressed at the hearing of this application, on this issue, with reference to the affidavits in the main application;

20.2 on any basis (at best for the respondents and on an acceptance of the 'version' stated in the founding affidavit in the application for postponement), the respondents remain indebted to the applicant:

20.2.1. in the amount of US\$135, 101.32; and

20.2.2. interest on that amount.

20.3 the fact that the respondents admit being indebted in this amount, but, instead of making payment of the amount, 'tender' the payment is further indicative of *mala fides* on the part of the respondents. The same consideration applies to the fact that the respondents choose not to explain why, when this amount is payable, it has not been paid;

20.4 the applicant is entitled to the costs:

20.4.1. of the main application (on the basis of the payments made after the application had been launched and the admitted indebtedness of US\$135, 101.32);

20.4.2. of the application for postponement (on the basis of the respondents, by making application for postponement, seeking an indulgence)

20.5 the fact that the respondents have delayed (deliberately) in launching the application for postponement and the fact that the respondents give no clue as to the reasons for this delay:

20.5.1 is indicative of *mala fides*; and

20.5.2 justifies an order directing the respondents to pay the costs of the application for postponement on the scale as between attorney and client.”

10. The respondent then submits in its answering affidavit that the interlocutory application falls to be dismissed. In the alternative, the respondent submits that if the main application is to be postponed, it must be on the basis that:

- a. the respondents are directed to pay the costs of the application on the scale as between attorney and client; and
- b. judgment is granted in favour of the respondent in the amount of US\$135, 101.32, together with interest *a temporae morae*, calculated from 25 February 2013, to date of payment.

Leave to file a further affidavit

11. It is fair to say that it is common cause between the parties that the respondent's replying affidavit in the main application raises new matter, which only arose after the applicants had filed their answering affidavit in the main application.

12. A fundamental consideration in deciding whether or not the applicants should be afforded an opportunity to file a further affidavit to deal with the new matter in the respondent's replying affidavit in the main application, is that a matter should be adjudicated upon all the facts relevant to the issues in dispute. It is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be permitted for that purpose.¹
13. I can find no reason of principle why the applicants should not be afforded an opportunity to file a further affidavit to deal with the new matter in the respondent's replying affidavit in the main application. No such reason was submitted to the Court in oral argument.
14. However, given the history of the matter, I am of the view that a period of 10 days to file such an affidavit is not justified. It is clear from the applicants' founding affidavit in support of the application for leave to file a further affidavit and for postponement that they have a very good idea of what they wish to say in such further affidavit. Given that they, through their attorneys, indicated as far back as September 2013 the wish to address the new matter in a further affidavit, a period of 5 days to file such an affidavit would be appropriate. It would also go some way in reducing the prejudice that the respondent stands to suffer as a result of a further delay in the matter.

Postponement and costs

15. Once the applicants are afforded a period of 5 days in which to file a further affidavit in the main application, it follows that the main application must be postponed. It cannot be finally determined until the applicants' further affidavit is filed, or the time period within which they have to file it runs out without them filing the affidavit and not seeking any further indulgence in that regard.
16. The applicants must bear the wasted costs occasioned by the postponement. They delayed in bringing the application for leave to file a further affidavit.² They could have brought the application at an earlier date, which would probably have avoided the necessity for a postponement of the matter on 21 November 2014.

¹ Erasmus *Superior Court Practice* at B1-47.

² They ought to have known that the Court's leave was required for the filing of such a further affidavit. *Sealed Africa (Pty) Ltd v Kelly and another* 2006 (3) SA 65 (W).

17. I do not, however, find that the applicants should pay such costs at a punitive scale. As I stated above, the applicants' counsel submitted in oral argument that the applicants tendered to pay the wasted costs when the matter was first called, which tender was rejected. The tender was rejected in circumstances where it was common cause that the respondent's replying affidavit in the main application raises new matter, in respect of which it would be fair to afford the applicants an opportunity to respond. In addition, it seems from correspondence attached to the affidavits that the parties were engaged in settlement discussions, during which they agreed to pend the main application. I cannot, in such circumstances, easily find *mala fides* on the part of the applicants to justify a punitive costs order, as the respondent submits.

Judgment for the respondent

18. It would be inappropriate to enter judgment in favour of the respondent in the main application in any amount. First, the applicants have been afforded an opportunity to file a further affidavit in the main application in order to place before the Court all the relevant facts upon which the main application must be decided. I would be prejudging what they are likely to say in the further affidavit if I entered judgment against them. In this regard, the applicants' counsel raised the possibility that the applicants might want the matter referred to arbitration, which is a matter that is identified as one of those that might be dealt with in the further affidavit.
19. Secondly, the main application is postponed *sine die*, which means that it will be determined on another future date.
20. Thirdly, the amount of US\$135 101, 32 that the respondent says I must order the applicants to pay in the meantime was the subject matter of a settlement proposal by the applicants to the respondent. The applicants state in their founding affidavit that the respondent failed to accept the settlement proposal in time and it has since been withdrawn. It is therefore not before me for consideration, including whether or not the applicants should be ordered to pay it to the respondent. It is also difficult to make a finding that, by virtue merely of making a settlement offer, the applicants unequivocally admit liability to the respondent in that amount. The issue of liability and the extent of it will be determined at the hearing of the main application.

Order

21. For the reasons above, I made the following order on 21 November 2014:

- a. The first and second applicants are granted leave to file a fourth set of affidavits within 5 (five) days of the order;
- b. The main application is postponed *sine die*, and costs thereof are reserved;
- c. Costs of this application to be paid by the first and second applicants.

MAENETJE AJ

Appearances:

Counsel for applicants:	C Garvey
Attorneys for applicants:	Otto Krause Incorporated
Counsel for respondent:	J Daniels
Attorneys for respondents:	Webber Wentzel
Date of hearing:	21 November 2014
Date of judgment:	28 November 2014