

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 34272/16

DATE: 2017/11/17

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED. ✓

DATE

SIGNATURE

16/05/18
[Signature]

10 In the matter between

CONSTANTIA INSURANCE COMPANY & OTHERS APPLICANT

and

ABSA BANK LTD & OTHERS RESPONDENT

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J U D G M E N T

WEPENER J: This is an application by a co-respondent, Constantia, in an application of the main proceedings in which it seeks the affidavit of another respondent, ABSA, as well as its counter application to be set aside as an irregular step in the main proceedings.

The liquidators of a company, Pela Plant (Pty) Ltd, brought an application against several respondents, including Constantia,

and ABSA. Constantia duly filed an answering affidavit in the main proceedings. Some months later ABSA also filed an answering affidavit as well as a counter application. Regardless of the relief sought by either the liquidators or ABSA, Constantia submitted that ABSA should not be permitted to file an affidavit firstly out of time and secondly, one which purports to substantially support the case of the liquidators.

As far as the complaint that the affidavit is out of time is concerned I make the following observations. Firstly, the affidavit is
10 in answer to the liquidators, not Constantia. In essence, although it does contain references to what Constantia had said, is for the liquidators to complain if they have a difficulty with the late filing of ABSA's affidavit. They do not take issue with it and I am of the view that there is a non-issue as far as the main proceedings are concerned.

In addition, a party to proceedings is entitled to bring a counter application and there is no substantial reason to strike out the affidavit and counter applicant as an irregular step when the opposing party is not seeking such, in this case the liquidators. The
20 papers were served on the liquidators and it was for them to take steps to have the late affidavit expunged if they so elected on the basis of its lateness. The particular *lis* is between the liquidators and ABSA, not between ABSA and Constantia.

Having said that, I come to the second point raised by Constantia, namely, that the affidavit is in support of the liquidators

and not an opposing affidavit in the true sense of the word. As a first reaction, I would have and did ask counsel why respondent could not file an affidavit which supports a founding affidavit. There is nothing that obliges a party to only file affidavits if such party wishes to raise opposition and opposing facts. By agreeing with the raised opposition and opposing affidavits. By agreeing with the applicant, such a party's conduct may be tantamount to consent to judgment.

Counsel for the applicant argued that such an affidavit is not permissible by virtue of the judgment in *Kruger and others v ACL*
10 *Geometrics*, an unreported judgment of the Labour Appeal Court case number JA87/2014 where it was held that a respondent in motion proceedings cannot become an applicant in the matter. But I do not see why a respondent is restricted to the three options referred to by the learned Judge in para 10 of the judgment. If Constantia was not a party to the proceedings would ABSA have been entitled to file an affidavit agreeing with the applicant and seek counter relief? I have little doubt that it would have. There could be no objection to it.

The objection by Constantia to ABSA's affidavit appears to be
20 because Constantia finds it unacceptable. As far as the *lis* between the liquidators and ABSA is concerned, both parties are entitled to place their evidence before a Court. The relief sought by the liquidators and that sought by ABSA has a fundamental difference and may have fundamental different consequences although these issues were not argued before me.

ABSA, if successful, may well be entitled to the consequences it seeks from the declaring the decisions of the meeting to be void *ab initio*. In any event, the Kruger matter was decided on the basis that the respondent's affidavit, which was objected to, was filed with the sole purpose to build the case for the relief sought by the applicant in that case. In the matter under consideration there is no reason why ABSA should not be able to advance its own case for the leave sought by it, which relief is fundamentally different to the relief sought by the liquidators.

10 It is noteworthy that rule 6(5)(d) allows for a party opposing an order to file affidavits. ABSA is indeed opposing the relief sought by the liquidators and seeking different relief in the counter application. This is also so as far as the counter application is concerned as set out in rule 6.7 which allows a party to any application proceedings to bring a counter application in a matter. It cannot be expected of ABSA, if it has a good case, to be content with the order sought by the liquidators.

 In this matter ABSA did not file an affidavit with the sole purpose of building the case of the liquidators. It seeks its own
20 substantive relief and in this sense the matter before me is distinguishable from the Kruger judgment.

 This matter is virtually on all fours with a judgment of Dlodlo J in *Clairison's cc v MEC of Local Government, Environmental Affairs and Development Planning and another* 2012 (3) SA 128 (WC) where it was held that a party may file an affidavit in support of the

applicant's case. I say virtually on all fours because there is an important distinction in this matter whether ABSA seeks its own counter relief based on the facts deposed to by it. The relief that ABSA seeks is against the liquidators and no one else.

It seeks no relief against Constantia and if it had, the reliance on counsel for Constantia on *Soundprops 1160 CC and Another v Karlshaven Farm Partnership and Others* 1996 (3) SA 1026 (N) may have required consideration. That matter dealt with a defendant making a claim against another defendant which is not the case
10 here.

I am of the view that Constantia failed to show any prejudice, the latter being a requirement for relief under rule 30. Only if it is not afforded an opportunity to file further affidavits if it applies to do so in terms of rule 6(5)(e) can there possibly be argued that there is prejudice although I make no finding in this regard. The perceived prejudice is consequently perceived prematurely.

The parties were in agreement that the cost of two counsel should be allowed. I make the following order:

The application is dismissed with costs, such cost to include
20 the cost of two counsel.
