

## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 29646/16

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

SIGNATURE

DATE

In the matter between:

MEROPA COMMUNICATIONS (PTY) LTD  
JENNY NEWMAN PUBLIC RELATIONS

FIRST APPLICANT  
SECOND APPLICANT

And

VERB MEDIA (PTY) LTD

FIRST RESPONDENT

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 JUDGMENT
 

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Windell J:

## INTRODUCTION

[1] This is an application in terms of Rule 30(1) of the Uniform Rules of Court to strike out the respondent's (applicant in the main application) supplementary founding affidavit.

[2] The supplementary founding affidavit was filed without a substantive interlocutory application seeking leave from the court to file the additional affidavit. The issue is whether the filing of the supplementary founding affidavit prior to the adjudication of the main application, without first seeking leave from the court by way of a substantive application, constitutes an irregular step.

## BACKGROUND

[3] The respondent launched an application (the main application) against the applicants on 22 August 2016. In the main application the respondent seeks payment for entertainment services which it provided to the applicants. Applicants opposed the main application and filed their answering affidavit on 14 October 2016. The respondent subsequently filed a supplementary founding affidavit on 9 November 2016.

[4] The supplementary founding affidavit was served on the applicants' attorneys *via* email and the attorneys for the respondent also send a letter to applicants' attorneys advising them of the supplementary affidavit. The applicants were also requested to answer to the supplementary founding affidavit within 15 days after which the respondent will serve their replying affidavit.

[5] The applicants' attorneys responded on 21 November 2016 with a notice in terms of Rule 30 (2)(b). In the notice the applicants contend that a party cannot take it upon himself to simply file further affidavits without first obtaining leave from the court to do so, and there is no proper and /or satisfactory explanation why the further affidavit should be allowed into evidence. It is contended that the filing of the further affidavit amounts to an irregular proceeding and/or step. It further contended that it does not assist the respondent to seek to have its irregular step condoned by inviting the applicants to, in turn, commit the same violation of the provisions of the Rules of Court by filing a supplementary answering affidavit. The proper course where any proceeding in a case is irregular is not to proceed as if there had been no such proceeding at all, but to apply to court under Rule 30 for an order setting it aside.

[6] The respondent submitted that an application for leave to file a supplementary affidavit can be heard simultaneously with the main application in the discretion of the court, and that the supplementary affidavit seeks to do just that. It is submitted that it is pragmatic and cost efficient for both applications to be heard at the same time and the court has a discretion to do so.

[7] The respondent further submits that the supplementary affidavit corrected a *bona fide* error in the founding affidavit pertaining to an allegation of a term of the oral entertainment services agreement between the parties. The supplementary founding affidavit was necessary to permit a proper and fair ventilation of the case to be determined. It is submitted that the Rule 30 application amounts to technical point taking and unnecessarily burdens the parties with additional legal costs and is

tactical in delaying the determination of the main application. The respondent seeks attorney client scale costs against the applicants jointly and severally.

### THE LAW

[8] It is trite that there are normally three sets of affidavits in motion proceedings. In terms of Rule 6(5)(e) the court may in its discretion permit the filing of further affidavits.

[9] Through the cases it had been established that a court has a wide discretion to permit or refuse the filing of additional affidavits. A litigant who seeks to serve an additional affidavit must provide an explanation that negatives *mala fides* or culpable remissness, and must furnish a proper and satisfactory explanation as to why the information contained in the affidavit was not put up earlier. The court must also be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs.<sup>1</sup>

[10] In *Standard Bank of SA Ltd v Sewpersadh and Another*<sup>2</sup> Dlodlo J held that a litigant who wishes to file a further affidavit must make a formal application for leave to do so and it cannot simply slip the affidavit into the court file. He remarked as follows:

“[12] The applicant is simply not allowed in law to take it upon himself and file an additional affidavit and put same on record without even serving the other party with the said affidavit. . . .

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<sup>1</sup> *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) and *Cohen NO v Nel and Another* 1975 (3) SA 963 (W).

<sup>2</sup> 2005 (4) SA 148 (C)

[13] Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as *pro non scripto*.<sup>3</sup>

[11] In the matter of *Long Beach Home Owners Association v Great Kei Municipality, Amathole District, Eastern Cape and 9 Others*,<sup>3</sup> Murphy J dismissed an application in terms of Rule 30 on a jurisdictional point and directed that the application for leave to file a supplementary replying affidavit be heard together with the main application. He also ordered that the supplementary affidavit and application for leave be bound in the record of the main application. The learned Judge however went further and stated that even if this jurisdictional point had not been decisive of the application, the application would have been dismissed for the following reasons: It is trite that the court has the sole discretion to allow for the filing of further affidavits in terms of Rule 6(5)(e), but the rule does not explicitly indicate when the court must permit the filing of further affidavits. A court can therefore grant leave before the affidavits are filed, or condone the filing of further affidavits subsequent to their being filed of record. It can therefore not be considered irregular *per se* for the tendering party to file an application for leave together with the supplementary affidavit and to set the application for leave down with the main application in the hope of persuading the judge to exercise his or her discretion to grant leave for the affidavit to be admitted. Murphy J held, in my view correctly, that arguing the application for leave to admit additional affidavits together with the main application is efficient and cost effective and in most instances it would be unduly technical and formalistic to file an

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<sup>3</sup> Unreported decision of Murphy J delivered on 11 September 2015 (92050 ZAGPPHC 642)

application explaining why a party wishes to file additional affidavits and then later to tender those affidavits separately. He stated that:

"It ordinarily will be better practice for the application for leave, filed together with the affidavits in question, to be heard with the main application in order to allow the court to make the decision in relation to the supplementary affidavits with a fully pleaded application before it. For that reason it is also accepted practice for the additional sets of affidavits themselves to set out the facts on which leave is sought. The Homeowners Association has acted in accordance with that practice. There may be instances though where the application for leave should be heard before the main application because good grounds exist to do that. It will depend on the facts and circumstances. But the choice of a party to follow the former course rather than the latter, or *vice versa*, will not constitute an irregularity."

## CONCLUSION

[12] The court has a wide discretion in terms of Rule 6(5)(e) to permit the filing of further affidavits. Rule 6(5)(e) does not specify the manner in which a party should approach the court for leave to file a further affidavit or at what time during proceedings leave should be sought.

[13] The facts of this application are clearly distinguishable from the facts in *Sewpersadh supra*. In *Sewpersadh* there was no application seeking leave from the court to file a supplementary affidavit, and no reasons were furnished by the tendering party why the supplementary should be allowed or why the new material were not included earlier. *In casu* the respondent did not merely "slip" the affidavit into the court file. In paragraph 17 of the supplementary founding affidavit the respondent clearly stipulated that leave will be sought from court for the admission of

the affidavit. The supplementary founding affidavit also set out the facts on which leave would be sought. This is accepted practise<sup>4</sup> and it was therefore not necessary for the respondent to have filed a separate affidavit dealing with the reasons why it seeks leave to file the additional affidavit. In the supplementary founding affidavit the respondent dealt with the facts necessitating the filing of a further affidavit, the reasons why the facts were not in the founding affidavit and the absence of any prejudice for the applicants. The respondent also notified the applicants in advance of their intention, served the supplementary affidavit on their attorneys of record and invited the applicants to file a supplementary answering affidavit. The only criticism that can be levied against the respondent is that it could have delivered a short form Notice of Motion stipulating the relief for the supplementary founding affidavit to be admitted. This is however purely technical and in *Trans-African Insurance Co Ltd v Maluleka*<sup>5</sup> Schreiner JA remarked as follows:

"... technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits".

[14] The mere filing of the supplementary founding affidavit does not constitute an irregular step. The affidavit will in any event not be considered admitted until leave is granted by the court dealing with the application. If good cause is shown why the supplementary affidavit should be permitted, and the court, in its discretion allows the affidavit, it will in effect retrospectively condone the filing of the affidavit. If

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<sup>4</sup> *Long Beach Home Owners Association v Great Kei Municipality, Amathole District, Eastern Cape and 9 Others supra* at [31]

<sup>5</sup> 1956 (2) SA 273 (A) at 278F - G

respondent had filed the affidavit without seeking the leave of the court, the affidavit at best, in the discretion of the court, could be regarded a *pro non scripto*.<sup>6</sup>

[15] In the circumstances of this case there is no need for a separate substantive application to be made on notice, separate from the main application. It is appropriate if the application for leave to file the supplementary founding affidavit and the main application are brought on the same papers at the same time. This accepted practice, which is widely adopted in this division, is both cost efficient and pragmatic.

[16] The respondent seeks a punitive cost order against the applicants. The application is purely technical and has put the respondent to unnecessary expense and the applicants must therefore bear the costs of this application. I am however unable to find that the applicants brought the application to delay the proceedings or to abuse the court process, or that their attitude and actions were vexatious or grossly unreasonable<sup>7</sup>. I have therefore decided, in the circumstances of this matter, and exercising my discretion, to refrain from making a punitive cost order.

## ORDER

1. The application in terms of Uniform Rule 30 to strike out the supplementary affidavit is dismissed.
2. The application for leave to file a supplementary founding affidavit will be heard together with the main application.

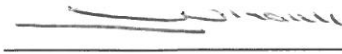
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<sup>6</sup> Sewpersadh ad par[13]

<sup>7</sup> Uitenhage Municipality v Uys 1974 (3) SA 800 (E)



3. The applicants to bear the costs of this application jointly and severally.



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**L WINDELL**

**JUDGE OF THE HIGH COURT**

Counsel for the Applicants

Adv RJ Groenewald

Instructed by:

Fareeaa Csikos INC

Counsel for the Respondent

Adv PV Ternent

Instructed by:

Tanya Brenner Attorneys

Date of Hearing:

28 May 2017

Date of Judgment:

11 August 2017