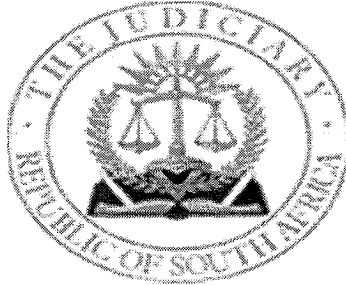


REPUBLIC OF SOUTH AFRICA



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

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

CASE NO: 7457/2017

22/02/19

Date

ML Twala

ML TWALA

In the matter between:

MFUNDISO NDLEBE

APPLICANT

AND

BUDGET INSURANCE LIMITED

RESPONDENT

JUDGMENT

TWALA J

- [1] Before this Court, there are two interlocutory applications brought in terms of rule 30 of the Rules of Court wherein the applicant seeks an order declaring the filing of an affidavit and subsequent filing of an application to file a supplementary affidavit by the respondent as an irregular step and should be set aside.
- [2] I do not intend to deal with these applications separately since the issue is the supplementary answering and/or the substitution of the answering affidavit. They are both intended to yield the same results.
- [3] It is common cause that the applicant instituted motion proceedings against the respondent and the respondent opposed the action and filed its answering affidavit. It is further not in dispute that the deponent to the answering affidavit of the respondent did not testify as to his or her gender neither did the commissioner of oaths to the affidavit.
- [4] It is submitted by counsel for the applicant that the filing of a fourth affidavit in motion proceedings can only be allowed with the leave of the Court. The respondent, it is contended, first filed an affidavit without obtaining leave from the Court and therefore that step is irregular. Further, as the argument goes, the respondent brought an application to substitute the defective answering affidavit without bringing an application for condonation for the late filing of the application and thus again the respondent took an irregular

step in an attempt to correct the defective answering affidavit. The applicant is prejudiced by the conduct of the respondent in relation to costs.

- [5] Counsel for the respondent submitted that the applicant replied fully to the answering affidavit although it alleges it to be defective. Leave to file the supplementary affidavit was sought in the supplementary affidavit itself. It has been accepted by the Courts that the application to file a supplementary affidavit is simultaneously brought at the hearing of the main application. The supplementary affidavit cannot be said to be an irregular step for it requests the leave of the Court to file same. It is not a pre-requisite, so the argument goes, that the respondent should have brought a substantive application and same to be heard separately before the main application.
- [6] It is further contended by counsel for the respondent that there were minor technical errors on the answering affidavit which did not go to the merits of the matter. The respondent filed the supplementary affidavit to correct the error in a more cost effective manner and the respondent objected to that.
- [7] It is trite that there are normally three sets of affidavits in motion proceedings. However, the Court has a wide discretion to allow the filing of further affidavits. It is upon the litigant who seeks to file a further affidavit to provide an explanation to the satisfaction of the Court that it was not malicious in its endeavour to file the further affidavit and that the other party will not be prejudiced thereby.

- [8] In *Meropa Communications (Pty) Ltd & Another v Verb Media (Pty) Ltd* [GLDH] Case No: 29646/2016 (Unreported) the Court stated the following:

“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 the 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.”

- [9] In *Khunou & Others v Fihrer & Son* 1982 (3) SA (WLD) the Court stated the following:

“The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner.”

- [10] In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) which was quoted with approval in the case of *Life Healthcare Group (Pty) Ltd v*

Mdladla & Another (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY 2014) the court stated the following:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand 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.”

[11] I find myself in agreement with counsel for the respondent that there is no need for a separate substantive application to be made on notice, separate from the main application. The supplementary affidavit to the answering affidavit in fact sought the leave of Court for its filing and there was nothing wrong for it to be heard simultaneously with the main application. I am of the view therefore that the filing of the supplementary affidavit cannot be said to have been an irregular step.

[12] It is my respectful view that it was unnecessary for the respondent to bring an application to substitute the answering affidavit which is said to be defective when the supplementary affidavit had been filed, (*ex abundante cautela*). For the applicant to succeed in invoking the provisions of rule 30, it must establish to the satisfaction of the Court that it is prejudice by the step taken by the other party to the extent that it cannot be compensated by the award of costs. In this case, the applicant has failed to establish any prejudice except that it will incur unnecessary costs.

[13] The *audi alteram partem* rule is a fundamental principle of our law which is enshrined under the bill of rights in the constitution. Courts are enjoined not to shut the door in the face of a litigant for flimsy reason or for minor technical defences raised by the other party. The applicant sought to strikeout the answering affidavit of the respondent for the deponent did not testify about its gender. However, the applicant replied to the whole answering affidavit dealing with the merits of the case. The inescapable conclusion is that the applicant is intent on preventing the ventilation of all the issues in this case. It is my respectful view therefore that, the engagement of the parties in numerous interlocutory applications is causing inordinate delays in the hearing of the main issues in the matter. It is undesirable that the finality of a matter should be unnecessarily delayed by side issues.

[14] It is my firm view that the interest of justice would not be served by discarding the supplementary affidavit and/or the substitution of the answering affidavit as sought by the applicant in both applications.

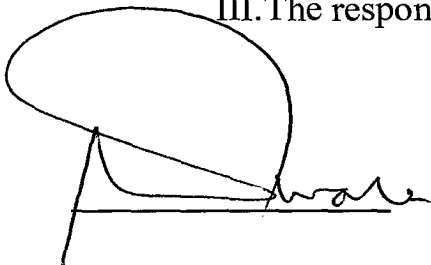
[15] I am in agreement with the respondent that the applicant abused the process of the court. The applicant unnecessarily availed himself of the provisions of rule 30 even when the respondent brought an application to file the further affidavit or to substitute the answering affidavit. This caused the interlocutory application to heard long before the main application when it is acceptable practice that they are heard together. It is in my view apparent that the applicant's conduct is dilatory and intent on not dealing with main issues between the parties. I have no doubt in my mind that the Court is entitled to protect itself and other litigants against the abuse of the court

processes. The Court should not hesitate to mulct the errant litigant with punitive costs under such circumstances.

[16] As indicated above that the respondent's application for the substitution of the answering affidavit is superfluous since a supplementary affidavit had been filed, I am not persuaded to grant costs against the applicant in this regard.

[17] In the circumstances, I make the following order:

- I. Both the applicant's applications dated the 21st July 2017 and 23rd August 2017 are dismissed;
- II. The applicant is to pay the costs of both applications on the scale as between attorney and client;
- III. The respondent's application dated 18th July 2017 is granted;

A handwritten signature in black ink, appearing to read 'Twala M L', written over a horizontal line.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 4th February 2019

Date of Judgment: 22nd February 2019

For the Applicant: Adv. S I Vobi

Instructed by: Ndlebe Msuthu Attorneys

TEL: 011 434 0510

For the Respondents: Adv. L Hollander

Instructed by: Fluxmans Attorneys

Tel: 011 328 1700