



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

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| (1) | REPORTABLE: <b>NO</b>                  |
| (2) | OF INTEREST TO OTHER JUDGES: <b>NO</b> |
| (3) | REVISED:                               |

Date: **28<sup>th</sup> August 2020** Signature: \_\_\_\_\_

**CASE NO:** 9543/2019

**DATE:** 28<sup>th</sup> AUGUST 2020

In the matter between:

**ENGEN PETROLEUM LIMITED**

Applicant

and

**BLUE WAVES HOLDINGS (PTY) LIMITED**

First Respondent

**PALMRIDGE MOTORS (PTY) LIMITED**

Second Respondent

**Coram:** Adams J

**Heard:** 27 August 2020

**Delivered:** 28 August 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 13h00 on 28 August 2020.

**Summary:** Civil procedure – opposed applications – answering affidavit by second respondent in support of applicant's case – no prohibition against same

– filing of additional affidavits in the discretion of the court – considerations of fairness, equity and the interest of justice –

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### **ORDER**

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- (1) The second respondent's answering affidavit dated the 26<sup>th</sup> of September 2019 is received and admitted into evidence.
- (2) The first respondent, if it deems it necessary, is granted leave to reply to the second respondent's aforementioned answering affidavit by filing a supplementary answering affidavit within fifteen court days from date of this order.
- (3) The applicant shall thereafter and within fifteen court days from date of the filing of the first respondent's supplementary answering affidavit file its replying affidavit in response to the first and second respondents' answering affidavits and the first respondent's supplementary answering affidavit (if any).
- (4) In the event of the first respondent failing to file a supplementary answering affidavit as envisaged in par (2) above, then the applicant shall file its replying affidavit as envisaged in par (3) above on or before the date on which such answering affidavit would have fallen due had the first respondent filed its supplementary answering affidavit.
- (5) The costs of this interlocutory application shall be in the course of the main application.

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## JUDGMENT

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### Adams J:

[1]. This is an opposed interlocutory application by the applicant in the main application for an order giving directions in the main application, in which the parties are at loggerheads as to the further conduct of the main application and the proceedings to be followed. The main application appears to have lost its way in that the parties are at odds with regard to the way in which the processes in the application are to be progressed in order to bring the motion to finality. There is also a dispute between the applicant and the first respondent as to the nature of the second respondent's answering affidavit and whether or not same should, as contended by the first respondent, be treated and regarded as *pro non scripto*.

[2]. In this application, the applicant seeks an order declaring that the second respondent's answering affidavit be accepted into evidence and that the parties file subsequent responsive affidavits to deal with the issues raised in that affidavit. The first respondent opposes the interlocutory application mainly on the basis of a rather rigid and inflexible interpretation of the applicable rules and on the basis of other technical defences.

[3]. In sum, the first respondent opposes this application on the basis that the second respondent's answering affidavit, which was delivered after the delivery by the first respondent of its answering affidavit, supports the applicant's case in the main application. This, so the first respondent contends, prejudices it and is not procedural – the second respondent should have been joined as an applicant in the main application and should not have been cited as a second respondent. Let me say at the outset that I have difficulty in understanding the first respondent's reasoning and to follow the logic of its argument, especially if regard is had to the fact that the applicant does not claim any relief against the second respondent, but cited the latter because it may possibly have an interest in the outcome of the application. All the same, I can think of no reason or legal

principle which prohibits a respondent from joining issue with an applicant in an application. There is just no legal basis for the first respondent's objection to the second respondent's answering affidavit.

[4]. In the main application, the applicant, who is the registered owner of immovable property on which the first respondent conducts the business of a filling station and other ancillary businesses, seeks an order evicting the first respondent from the said property. The applicant bought and acquired the property from the second respondent and took transfer on the 31<sup>st</sup> of August 2017. The applicant alleges that the first respondent is in unlawful occupation of the premises. The first respondent denies this and avers that it occupies the property in terms of and pursuant to a valid lease agreement which is still in force and remains extant for the foreseeable future. This is the crux of the main application and it is on this aspect of the matter that the applicant is supported by the second respondent in its answering affidavit. The first respondent vehemently objects to the second respondent's answering affidavit and does so in emotive language. So, for example, the first respondent in its answering affidavit avers that the applicant '... instead of combining with the second respondent as applicants (first and second applicants), decided to attempt to disguise a wolf in sheep's clothes, and inserted the second respondent as such'.

[5]. I have my reservations about the appropriateness of the use of such emotional language in court papers, but I express no view in that regard. What is clear to me is that the first respondent's objection to the filing by the second respondent of its answering affidavit on this ground is devoid of any factual or legal basis.

[6]. The main application was issued by the applicant on the 14<sup>th</sup> of March 2019 and was served on the first and second respondents on the 15<sup>th</sup> of March 2019. The first respondent delivered notice of intention to oppose on the 25<sup>th</sup> of March 2019. On the 30<sup>th</sup> of May 2019 the applicant delivered a supplementary founding affidavit to correct a mistake in its original founding papers, which resulted in a few minor skirmishes between the applicant and the first

respondent. On the 20<sup>th</sup> of August 2019, some six months after the application had been served on it, the first respondent filed its answering affidavit and on the 26<sup>th</sup> of September 2019 the second respondent delivered its answering affidavit in which the averments made by the first respondent in its answering affidavit are dealt with in addition to addressing issues raised by the applicant in its founding affidavit. It is this latter answering affidavit which is of concern to the first respondent, but, as already indicated, in my view, there is no legal basis for such objection to the said affidavit and its contents.

[7]. As can be seen, the answering affidavits by both respondents were delivered out of time and there was non-compliance with the time limits imposed by the Uniform Rules of this Court. None of the parties do however seriously take issue with this aspect of the matter. There appears to be no prejudice to any of the parties as a result of such non-compliance and, in the context of the matter, condonation of the late filing of the affidavits by parties can and should be granted.

[8]. The second respondent is fully entitled to file an answering affidavit and, in my view, the first respondent has no right to take issue with the case put forward by the second respondent in its answering affidavit. The main purpose of an answering affidavit is to deal with the allegations contained in the applicant's founding affidavit, and if that entails agreeing and / or supporting the applicant's case, then so be it. There is no legal bar to such. The second respondent is a respondent in the applicant's application and there is no *lis* between the first and second respondents. Moreover, it is trite that applications should be adjudicated upon all the facts relevant to the issues in dispute and if the averments in the second respondent's answering affidavit assist in that regard, then this underlying objective is achieved.

[9]. I am therefore of the view that the applicant's request that it be declared that the second respondent's answering be admitted as evidence should be granted.

[10]. During the hearing of the interlocutory application, Mr Broodryk, who appeared on behalf of the first respondent, also contended that the court should

not allow the filing of further affidavits outside of the three sets normally allowed in motion court proceedings. This submission also links in with the first respondent's main objection to the second respondent's answering affidavit, which, so the first respondent contends, is in fact a replying affidavit on behalf of the applicant. For the reasons alluded to *supra*, I am of the view that there is no merit in that contention.

[11]. There are normally three sets of affidavits in motion proceedings. The court will exercise its discretion in permitting the filing of further affidavits. In exercising its discretion the court should have regard to the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute. It is for the court to exercise the discretion and the parties should obtain the leave of the court to file such further affidavits. That is what the applicant aims to accomplish in this interlocutory application.

[12]. I am of the view that *in casu* special circumstances exist which warrant granting the parties leave to file further affidavits if they deem it necessary. In that regard, I am of the view that the first respondent should be allowed an opportunity to deal with the averments contained in the second respondent's answering affidavit. I do not however believe that the second respondent should be allowed another bite at the proverbial cherry. No case has been made out for such an order. In any event, the second respondent has given no indication that it requires the leave of this court to file further affidavits. If it did, it would no doubt have approached the court for such relief.

[13]. I am satisfied that the applicant has made out a case for some of the relief sought.

### **Cost**

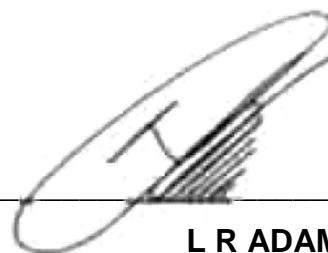
[14]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[15]. In this matter and having regard to the facts, it can be said that in a way the applicant, who is *dominus litis* requests an indulgence from the court. On the flipside, it can be said that the first respondent in opposing the application acted unreasonably. In the circumstances, I am therefore of the opinion that the costs of this interlocutory application should be in the course.

### **Order**

In the result, I make the following order:

- (1) The second respondent's answering affidavit dated the 26<sup>th</sup> of September 2019 is received and admitted into evidence.
- (2) The first respondent, if it deems it necessary, is granted leave to reply to the second respondent's aforementioned answering affidavit by filing a supplementary answering affidavit within fifteen court days from date of this order.
- (3) The applicant shall thereafter and within fifteen court days from date of the filing of the first respondent's supplementary answering affidavit file its replying affidavit in response to the first and second respondents' answering affidavits and the first respondent's supplementary answering affidavit (if any).
- (4) In the event of the first respondent failing to file a supplementary answering affidavit as envisaged in par (2) above, then the applicant shall file its replying affidavit as envisaged par (3) above on or before the date on which such answering affidavit would have fallen due had the first respondent filed its supplementary answering affidavit.
- (5) The costs of this interlocutory application shall be in the course of the main application.

**L R ADAMS***Judge of the High Court**Gauteng Local Division, Johannesburg*

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HEARD ON:	27 <sup>th</sup> August 2020
JUDGMENT DATE:	28 <sup>th</sup> August 2020
FOR THE APPLICANT:	Adv S Aucamp
INSTRUCTED BY:	Govender Patel Dladla Attorneys, Johannesburg
FOR THE FIRST RESPONDENT:	Attorney J Broodryk
INSTRUCTED BY:	J Broodryk Attorneys, Pretoria
FOR THE SECOND RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance