

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: JS1034/2001

In the matter between:

Applicant

and

First Respondent

ENSEMBLE TRADING 341 (PTY) LIMITED

Second Respondent

—

JUDGMENT

—

FRANCIS J

Introduction

1. The respondents are applying for condonation of the late filing of its response to the applicant's statement of claim. The applicant is opposing the application and raised an objection that Schalk Eybers ("Eybers") who deposed to an affidavit for the respondents did not have the necessary *locus standi* to bring the application.

Background facts

2. The applicant was employed by the first respondent with effect from 14 October 1997 until his services were terminated by the first respondent for operational reasons on 7 June 2001. During or about June 2001 the second respondent took over the first respondent's business as a going concern.

1. 3. On 21 June 2001, the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) for conciliation. After conciliation failed, the applicant referred his dispute to this Court for adjudication on 6 September 2001. A copy of the statement of claim was served on the respondents per telefax. The respondents were required to file its response on or before 19 September 2001.
4. On 14 September 2001 Eybers, on behalf of the respondents, transmitted a facsimile to the applicant’s attorneys of record stating that it would be opposing the matter and would be filing its papers early in the following week as its counsel was not available at the time. A copy of the letter was also transmitted to the Registrar of this Court.
5. On 10 October 2001 the applicant’s attorney applied to this Court for the matter to be set down for default judgment. On or about 12 October 2001 the applicant’s attorneys were contacted by the respondents attorneys requesting a round-table meeting. The round table meeting took place on 17 October 2001. The parties were unable to resolve the dispute. There were no discussions about whether the pleadings were going to be suspended.
6. On 7 October 2001 the Registrar of this Court notified both parties that the matter had been set down for default judgment on 31 October 2001 which prompted the

respondents to launch this condonation application. The respondents filed its application for condonation on 26 October 1997 at 15h07 which was served 26 court days out of time.

1. 7. The respondents contended that they were under the *bona fide* impression that the period for filing its response would be suspended pending the round table meeting, and was surprised to learn that the applicant had filed a notice of set down for hearing for default judgment the same day of the round table meeting.
8. The applicant raised an objection that the respondents' application for condonation was deposed to by Eybers who does not allege that he is duly authorised to bring the application on behalf of the respondents, nor does he set out facts in his affidavit to support any inference that he is entitled and/or authorised to do so. He did not show that he has *locus standi* to bring this application and the application should be dismissed.

Does the Respondents have locus standi?

9. It is common cause that the respondents are artificial or juristic persons. It is trite that a party may object if there is nothing before a Court to show that a juristic person duly authorised the institution of notice of motion proceedings. A juristic person can only function through its agents and can only take decisions by the passing of resolutions in the manner provided by its constitution. It is trite that where a close corporation or a company commences proceedings by way of notice

of motion, it must appear that the person who makes the application on behalf of the juristic person is duly authorised to do so by the said juristic person. In such a case some evidence should be placed before a Court to show that the juristic person has duly resolved to institute the proceedings and that the proceedings are instituted at its instance.

1. 10. It was held in *Mall (Cape)(Pty) Ltd v Merino Ko-operasie Bpk* 1957(2) SA347 CPD at 352 paragraph A:

“The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be determined on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf.

Where, as is in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the Court, then I consider that a minimum of evidence will be required from the applicant.”

11. Eybers deposed to an affidavit and stated the following at paragraphs 1 to 4 of his supporting affidavit:

“1. *I am an adult male businessman employed by Ensemble Trading 341 (Pty) Limited of Shop 14, Linksfield Road, Linksfield.*

2. The facts herein contained are, unless otherwise stated, within my personal

knowledge and are both true and correct.

3. Since the facts contained herein are within my knowledge as opposed to being within the knowledge of anyone in the employ of the Second Respondent, it is I who deposes to this Affidavit on behalf of the First and Second Respondents.
1. 4. I was the sole member of the First Respondent, Aerial Excellence CC, a Close Corporation which has since been sold to the Second Respondent Ensemble Trading 341 (Pty) Limited t/a Aerial Excellence. I am currently an employee of the Second Respondent.
12. In response to the applicant's objection, Eybers filed a supplementary affidavit and deposed to the following at paragraph 3 and 4:
"3. *It is averred by the applicant that I do not display the requisite authority required to depose to the Supporting Affidavit attached to the Application for Condonation. This is an erroneous assumption as the facts contained herein are within my exclusive knowledge, as opposed to being within the knowledge of anyone else in the employ of the second respondent. I am consequently competent and authorised to depose to this Affidavit on behalf of the First and Second Respondents.*
4. I was the sole member of the First Respondent I am currently an employee of the Second Respondent."
13. It is trite that a party cannot establish its authority in a replying affidavit.

Appropriate allegations to establish the *locus standi* of an applicant should be made in the founding affidavits and not in the replying affidavits. Thus, if it is indeed so that the challenged passages in the replying affidavits are not legitimate responses to the objection and have been included solely to remedy an omission in the founding affidavits, they are liable to be struck out.

1. 14. It will be noted from the respondents supplementary affidavit that Eybers avers that he is an employee of the second respondent and thus “competent and authorised to depose to the affidavit” in support of the first application for condonation. The deponent in *Mall (Cape)(Pty) Ltd v Merino Ko-operasie Bpk supra* was the secretary of the applicant Society who had stated that “I am duly authorised to make this affidavit.” That Court found that even though it was not stated that it was the applicant Society which had conferred the authority upon the deponent. The word “duly” showed that the authority conferred on the deponent had been properly conferred, i.e., that all the necessary formalities prescribed by the applicant’s Society constitution had been complied with. That Court found that what the deponent was saying is that he is duly authorised to speak on behalf of the applicant Society. In other words, it is really the applicant’s affidavit and not the deponent’s. That Court found that there was no reason to think that the applicant did not pass a proper resolution authorising the institution of proceedings against the respondent and that the proceedings are those of the applicant. The Court found that the respondent had put no evidence whatsoever to suggest that was not the case, and in the circumstances was held that the

applicant had put sufficient evidence before that Court.

15. The same cannot be said about the respondents in this case. The second respondent took over the first respondent's business as a going concern. Eybers stated that he is an employee of the second respondent which is now a company. He did not state in his founding affidavit that he was "duly authorised" by the respondents to bring the application. In his supplementary affidavit he did not state that he was "duly" authorised by the respondents to do so. Eybers has placed no evidence in his affidavit to show that he has the necessary authority to bring these proceedings. He did not display the requisite authority to depose to his affidavit on behalf of either of the respondents. As an employee of the second respondent he cannot be authorised to depose to the affidavit on behalf of the second respondent without being authorised specifically in terms of a resolution of the board of the Second Respondent. Mr Roodt, who appeared for the respondents, conceded that there was nothing that indicated that Eybers had the authority to bring the application. He submitted that Eybers was an employee of the respondents who was tasked with dealing with those types of procedures. Eybers was the only person who was authorised by the respondents to bring the application. He admitted however that there was no formal declaration or that there was nothing in the papers before me that shows that Eybers had been given the necessary authority to bring the application for condonation.

16. Eybers has not shown that he has the necessary *locus standi* to bring this application

on behalf of either the first or second respondent. The application for condonation stands to be dismissed on this ground alone.

17. I see no reason why in law and equity costs should not follow the result.

18. In the circumstances I make the following order:

(a) The application for condonation is dismissed with costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

THE APPLICANT: M WESLEY INSTRUCTED BY BOWMAN GILFILLAN INC

THE RESPONDENT: ROODT INSTRUCTED BY FRIEDLAND HART INC

DATE OF JUDGMENT: 8 MARCH 2002