

SOUTH AFRICA / JUDGMENT

African Unity Life Ltd v Boikanyo's Funeral Home (M12/2018) [2022] ZANWHC 9 (25 March 2022)

[2022] ZANWHC 9

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

M12/2018

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Source record**IN THE NORTH WEST HIGH
COURT, MAFIKENG****CASE NO: M12/2018****Reportable: YES / NO****Circulate to Judges: YES
/ NO****Circulate to Magistrates:** YES / NO
Circulate to Regional
Magistrates: YES / NO**In the matter between:** AFRICAN
UNITY LIFE LTD
Applicant
and
BOIKANYO'S
FUNERAL HOME
Respondent
DATE
OF HEARING
:
10 MARCH 2022
DATE
OF JUDGMENT
:
25 MARCH 2022
FOR
THE APPLICANT
:

ADV. CARVALHEIRA
FOR
THE RESPONDENT
:
ADV. STROEBEL

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 10h00 on 25 MARCH 2022.

ORDER

Consequently, the following order is made:

- (i) The application filed with the Registrar of this Court on 04th August 2021 is dismissed.
- (ii) The applicant is ordered to pay the costs of this application dated 04th August 2021 on an attorney and client scale.

HENDRICKS DJP

- [1] On 31st January 2019 the respondent raised certain point in limine which were argued before my brother Gura J. In a judgment delivered on 30th May 2019 the following order was granted:

"[56] It is therefore my considered view that, the points in limine should be argued first when the case resumes. Consequently, the following order is made:

- 1. The three points in limine raised by the respondent are to be argued first before the hearing of the merits of the case.
- 2. Costs shall be costs in the cause.
- 3. The applicant is directed to request the Registrar to allocate a date (one day) for hearing of this application.
- 4. In the application for a trial date, the applicant shall point out to the Registrar that the Judge who is seized with the matter is myself."

- [2] The judgment by Gura J comprises of no less than twenty-seven (27) pages, with different headings. Under the heading "Points in limine" the following is stated in paragraphs

[47] and [48]:

"[47] The respondent raised the following three points in limine:

- (1) No prima face case has been made out in the founding papers;

(2) The plaintiff has no locus standi in matter, and

(3) There are material disputes of facts.

[48] Just before the points in limine could be argued, Advocate Carvalheira raised an objection against the respondent's points in limine being argued and submitted that the respondent should be disallowed by the Court to make any submissions relating to the points in limine. The view held by Advocate Carvalheira was therefore that the parties should go straight to the merits and address the Court thereon. The reason why this unusual procedure was suggested by the applicant's counsel was that the respondent had raised the points in limine for the first time in the heads of argument. In its answering and supplementary affidavits, the said points in limine were not raised. The concern raised on behalf of the applicant was that if submissions were allowed to be made by the parties on the points in limine then there was a great potential that the applicant would suffer prejudice. The respondent, on the other hand, submitted that it was legally entitled to raise these preliminary points regardless of whether the respondent had not alluded to them in its affidavits opposing the application. The Court was referred to a number of authorities in this regard."

and also

[53] Admittedly there are cases in which to raise a point in limine for the first time in the heads of argument or just at the outset of the hearings in Court may amount to trial by ambush. In most of these instances there is a potential that the applicant may be prejudiced. Throughout her argument, counsel for the applicant seemed to dispel any suggestion that in certain cases it may not be trial by ambush when the points in limine are raised for the first time in the heads of argument. I am unable to share the same view. In this regard, I agree with counsel for the respondent that especially where questions of law are addressed in the heads of argument, in the form of points in limine, to prevent the respondent to argue these aspects just before submissions on the merits are made, would lead to unfair results or an unfair trial. I have carefully considered the submissions by both counsel in relation to the current issue and I have considered the authorities but I do not think that the applicant, in casu may suffer

prejudice if the Court directs that the points in limine be dealt with before going into the merits. Only three points in limine have been raised. These are:

(1) No prima facie case has been made out in the founding affidavit;

(2) The applicant has no locus standi; and

(3) There are material disputes of facts.

[54] In regard to the issue of locus standi, the respondent avers that the applicant failed to annex to its founding papers, the alleged written contract between the cedent and the respondent. That written contract is the alleged Master Policy Agreement. In dealing with the last point in limine, Harms JA said we concentrate on the founding affidavit only. Finally, the issue of

“no prima facie case made out in the founding affidavit”, here the respondent’s case is that the applicant has failed to annex a copy of the Master Policy Agreement in terms of Rule 18(6) which makes it obligatory for that requirement.”

- [3] On the 04 August 2021 the applicant lodged an application enrolled for 26th August 2021 praying:

“That Annexure “D” as referred to in annexure “FA06” of the founding affidavit, be included in the founding affidavit as sub-annexure to the relevant founding affidavit annexure “FA06”. This Notice of Motion is accompanied by a Founding Affidavit deposed to by Jan Brand Wessel Robertson, a practicing attorney. The purpose is to seek leave to add the missing annexure “D” to the incomplete Annexure “FA06”.

This application is opposed and was ultimately argued on 10th March 2022 when judgment was reserved.

- [4] The contention is that this application is the same issue that was previously argued and upon which a pronouncement was made. It is also res judicata and the applicant is estopped from raising it again. This sparked much debate. This is not an application in terms of Rule 6(5)(e) of the Uniform Rules of Court to seek permission from Court to allow a further (fourth) set of affidavits. This was categorically stated by counsel acting on behalf of the applicant, Adv. Carvalheira. Neither can the defence of res judicata been successfully raised as there is no final pronouncement or judgment made. The order of Gura J, so it was contended, is only procedural in nature. It is not final in effect and also does not dispose of a substantial part of the case/matter or relief sought. It is submitted that this is simply an application to have a document that was erroneously omitted, admitted as part of the founding affidavit. It is not to introduce any new evidence that may change the course of events and amount to introducing a new cause of action to the prejudice of the respondent. I do not agree.
- [5] First and foremost, a point in limine was raised about the fact that no prima facie case has been made out in the founding papers and coincidental thereto, that plaintiff lacks to the necessary locus standi and the omission of this annexure goes to the heart of the point in limine raised. Gura J had already dealt with the issue in his judgment set out in paragraphs [1] and [2], supra. That order of Gura J is not varied or rescinded and even though an argument is advanced that it is not a final order/judgment, it stands until set aside by a competent court. The appealability of the order is an entirely different debate. Even if it is merely directives in the form of a ruling, it must be adhered to. The filing of a further set of affidavits is also not allowed without the express consent of the Court. To grant the relief as prayed for by the applicant will amount to nothing more than to circumvent the order of Gura J, as so aptly stated in his judgment quoted above.
- [6] I am in full agreement with the submissions made by Adv. Stroebel on behalf of the respondent. This is not an application in terms of Rule 6 (5)

(e) for leave to file a further set of affidavits encompasses the said document. This issue was previously (January 2021) raised and was pronounced upon (May 2021). Although it may not be strictly speaking *res judicata* as the merits of the application are still to be decided, the incorrect procedure is followed in an attempt to place this document before court. The argument advanced that this is an interlocutory application does not help the applicants' case. The order of Gura J is very specific in nature. The points in limine raised by the respondent are to be argued first before the hearing of the merits of the case. So emphatic was Gura J in his order that he instructed the Registrar to allocate a date (one day only) and that he is the Judge who is seized with the matter.

[7] I am of the view that in light of the point in limine raised, this application should fail. I cannot circumvent the order (whether it be rulings/directives) granted by my brother Gura J, by granting the relief as prayed for in this Notice of Motion dated 04th August 2021. The judgment and order of Gura J of May 2019 still stands insofar as it is not varied and/or rescinded. This order is amplified by the order of Gura J dated 21st July 2021 in which he ordered!

"That

(i) The matter be and is hereby removed from the roll;

(ii) The Applicant to approach the Registrar for a trial date;

(iii) Supplementary Affidavits filed after the judgment of this Court (30 May 2021) by Applicant and Respondent are disallowed and will be disregarded in this matter;

(iv) The applicant dealing with the three (3) points in limine not later than 31st day of August 2021."

[8] It is quite apparent that Gura J's order of 21st July 2021 stated categorically that the points in limine be dealt with by no later than 31st August 2021. It does not need rocket science to realise that in an effort to avoid compliance with the Court order of 21st July 2021 and seeing that further sets of affidavits will not be allowed by this Court (as per Gura J's order), this application was lodged on 09th August 2021, with the intention to circumvent compliance with that court order. This amounts to nothing less than a flagrant disregard of the said court order and a belated attempt to manipulate the system and an abuse of the court processes. This Court will show its disapproval and disquiet of this conduct displayed by the applicant by ordering it to pay the costs of this application of 04th August 2021 on a punitive scale.

Order

[10] Consequently, the following order is made:

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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