

SOUTH AFRICA / JUDGMENT

Graham N.O and Others v Reyneke and Others (2024/050337) [2025]

ZAGPJHC 714 (13 March 2025)

[2025] ZAGPJHC 714

COURT

South Gauteng High Court, Johannesburg

BEFORE

WJ du Plessis

CASE / FILE NUMBER

2024/050337

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THE

HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

2024-050337

(1)

REPORTABLE: No

(2)

OF INTEREST TO OTHER JUDGES: No

(3)

REVISED: Yes

In

the matter between:

WILLIAM
OLIVER GRAHAM N.O.
First Applicant
ANNAMEY
GRAHAM N.O.
Second Applicant
HERMARNUS
ALBERTUS DU TOIT N.O.
Third Applicant
and
JACOBUS
CORNELIUS REYNEKE
First Respondent

GAMAN
50 (PTY) LTD
Second Respondent
ELEGANT
ELM TRADING (PTY) LTD
Third Respondent
RUDOLF
WOLDEMAR WINCKLER
Fourth Respondent
LIEZL
CRONJE
Fifth Respondent

JUDGMENT

DU PLESSIS J

Introduction

- [1] The applicants, acting as trustees of the Rodzina Carbonile Trust ("the Trust"), seek leave to file a further affidavit under Rule 6(5)(e) of the Uniform Rules of Court. This application arises in the context of a pending spoliation application, in which the Trust seeks the restoration of its alleged sole shareholding in the third respondent, Elegant Elm Trading (Pty) Ltd ("Elegant Elm").
- [2] After the founding, answering and replying affidavits were delivered, the Trust delivered a "further affidavit" without the court's permission. This prompted the first and third respondents to deliver a notice of an irregular step under Rule
30. The Trust did not remove the irregular step within the time provided for in the notice. The first and third respondents then launched an interlocutory application under Rule 30 to have the irregular step set aside. With the delivery of the Rule 30 application, the Trust withdrew its further affidavit. The Trust then launched this Rule 6(5)(e) application.
- [3] The respondents oppose the application on the basis that the Trust had ample opportunity to include the additional evidence in its founding affidavit. They submit that the proposed affidavit introduces new issues rather than merely responding to unexpected
- allegations raised in the answering affidavit.
- [4] The spoliation application concerns the removal of the Trust's name as the registered 100% shareholder of Elegant Elm. The Trust alleges that the respondents unlawfully altered the company's share register on 20 March 2024, replacing the previous share certificate issued on 6 July 2020. The respondents contend that this alteration merely corrected a fraudulent misrepresentation of ownership allegedly orchestrated by Ms Reynolds, the custodian of the original share register.

[5] The Trust refers to an answering affidavit filed by Mr Reyneke on behalf of the respondents in another matter instituted in terms of section 61(3) of the Companies Act,[1] in which he explained how he altered the company records of Elegant Elm because they, allegedly, did not reflect the true state of affairs. He did so without informing the Trust. The Trust asserts that this was an act of self-help since it happened without

forewarning the Trust and bypassed the court.

[6] The respondents allege fraudulent and criminal conduct on the part of Ms Reynolds (the custodian of the original share register of Elegant Elm until 8 March 2024), whom they claim colluded with the Trust to commit fraud and forgery. The respondents raised this issue to address the question of ownership. However, the Trust submits that ownership is irrelevant in a spoliation application.

[7] The respondents' allegations of fraud and forgery prompted the Trust to file another affidavit, stating that it would have adverse consequences in this and other litigation if they did not address these accusations. The Trust contends that leaving these allegations uncontested would prejudice them in multiple proceedings.

[8] The Trust asserts that its application is not aimed at "relieving the pinch of the shoe" but rather at addressing the allegations made in the answering affidavit, particularly considering other ongoing litigation in which the ownership of the shares is in dispute. The Trust states that they did not have the benefit of Ms Reynolds' affidavit at the time of filing the initial affidavits because she was unwilling to discuss the matter. Ms Reynolds finally agreed to depose an affidavit on 4 June 2024..

[9] The respondents submit that a Rule 6(5)(e) application is ordinarily brought by a respondent and typically succeeds only in exceptional circumstances, such as when something unexpected emerges from the replying affidavit. The respondents oppose the application on the basis that the Trust is attempting to introduce new evidence that it failed to include in its founding affidavit despite already filing a lengthy replying affidavit.

[10] The respondents further contend that the Trust's new evidence pertains to the issue of ownership, which the Trust itself has maintained is irrelevant to a spoliation application. The respondents submit that the Trust is, in effect, attempting to introduce a new round of affidavits, thereby amounting to a second application.

The law on Rule 6(5)(e)

[11] Rule 6(5)(e) provides that the court has discretion to permit the filing of additional affidavits beyond the usual three sets (founding, answering, and replying affidavits). This discretion, however, is exercised sparingly and only in exceptional circumstances

where the interests of justice demand it.

[12] Motion proceedings are intended to be final and efficient. The admission of additional affidavits must not be allowed to introduce an unnecessary fourth round of pleadings. As established in *Transvaal Racing Club v Jockey Club of SA*, [2] the applicant must show that the new evidence could not have been introduced earlier, that there is a full and satisfactory explanation

for the delay, that the evidence is material and relevant to the dispute and that allowing the affidavit will not unfairly prejudice

the opposing party. The overriding consideration remains fairness and justice, not only to the applicant but also to the respondents. A court must be satisfied that any prejudice caused by allowing additional affidavits cannot be cured through a cost order.

[13] In the present case, the spoliation application concerns the unlawful deprivation of possession of shares, not their ownership. It is, therefore, critical to ensure that the matter is adjudicated on the relevant facts and legal principles without deviation into collateral

issues.

[14] The Trust's founding affidavit pleads that it was unlawfully deprived of possession of its shares through self-help measures. The respondents, in turn, seek to justify their actions by submitting that the Trust's alleged ownership was fraudulent. However, as the Trust correctly points out, ownership is irrelevant in a spoliation application.

[15] Despite this, the supplementary affidavit focuses almost exclusively on refuting the respondents' allegations of fraud and proving ownership. This shifts the focus away from the core issue of spoliation. The respondents themselves confirm this in their answering affidavit when they state:

"The allegations [in Ms Reynolds' affidavit] are intended as expressed in the further affidavit and that of Mrs Reynolds to meet the incredible allegations of criminality and untruthfulness on the part of the Respondents in respect of their 'defence' of ownership."

[16] This acknowledgement demonstrates that the additional affidavit does not advance the central issue in dispute. Instead, it introduces

collateral and extraneous matters. The principle of trial by ambush cannot be permitted and applies equally to unnecessary expansions of the pleadings that do not serve to assist the court in resolving the actual dispute.[3]

[17] The legal question before the court is not whether the Trust is the lawful owner of the shares but rather whether it was unlawfully deprived of possession. The Constitutional Court in *Ngqukumba v Minister of Safety and Security* [4] reaffirmed that:

"The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor . . . The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law."

[18] The possession required in spoliation applications is factual possession, not ownership. In the context of shares, *Tigon Ltd v Bestyet Investment (Pty) Ltd*[5] establishes that possession entails being registered in the share register, exercising rights such as voting and receiving dividends,

and the ability to negotiate, pledge or otherwise deal in the shares.

[19] A spoliation claim is thus concerned solely with whether these incidents of possession were unlawfully interfered with or not. Courts have consistently held that even an unlawful possessor is entitled to protection under the mandament van spolie. The fact that the Trust may or may not have obtained its shareholding lawfully does not alter the fact that it was in possession of the shares prior to the alleged spoliation.

[20] The affidavit of Ms Reynolds' does not contribute to resolving the core legal issue. The allegations of fraud, criminality, and ownership disputes are irrelevant to the issue of spoliation. Accordingly, the supplementary affidavit does not meet the requirements for admission under Rule 6(5)(e).

[21] If the Trust takes issue with the respondents' allegations of fraud, the proper course is to apply to strike out any scandalous or irrelevant matters rather than filing a further affidavit that derails the focus of the litigation.

[22] The principle, that courts should decide cases on all relevant facts, does not entitle a party to expand the case beyond its original scope. Allowing an additional affidavit in this instance would invite procedural chaos, encouraging litigants to supplement their case beyond the structured three-tier affidavit system continuously. The legal representatives in this matter have already been notably expansive in their submissions, at times straying into unnecessary detail. While thorough argument is always welcome, the risk of overcomplicating proceedings with prolix pleadings must be carefully managed to ensure that the real issues remain in focus.

[23] The applicants have failed to demonstrate any exceptional circumstances justifying the admission of the further affidavit. The evidence sought to be introduced is not relevant to the issue of spoliation. Moreover, its admission would delay the finalisation of what is supposed to be quick and robust proceedings.

Order

[24] Accordingly, the following order is made:

1. The applicants' Rule 6(5)(e) application is dismissed.

2. The applicants are ordered, jointly and severally, the one to pay the other to be absolved, to pay the first and third respondents' costs, including the cost of two counsel, such costs to be taxed on a scale B.

WJ du Plessis

Judge of the High Court Gauteng Division, Pretoria

Date of hearing: 24 January 2025 Supplementary heads filed: 31 January 2025 and 7 February 2025

Date of judgment: 15 March 2025 For the applicants: N Konstantinides SC instructed by Van Hulsteyns Attorneys For the respondents: APJ Els SC and JL Myburgh instructed by Taljaard & De Oliveira

[1] Act 71 of 2008.

[2] 1958 (3) SA 599 (W) at 604A-G.

[3] Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA).

[4] 2014

(5) SA 112 (CC) para 10.

[5] 2001

(4) SA 634 (A) at 645.

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