

SOUTH AFRICA / JUDGMENT

Hacker v Hartmann and Others (1415/2017) [2018] ZAECPEHC 15 (19 April 2018) [2018] ZAECPEHC 15

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

E Revelas

CASE / FILE NUMBER

1415/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – PORT

ELIZABETH

Case

No.: 1415/2017

In

the matter between:

INGE
JOANNE HACKER
Applicant
and
MARK
KEISER HARTMANN
First
Respondent
BEX
HOTEL (PTY) LTD
Second
Respondent
JOHN
MICHAEL (PTY) LTD
Third
Respondent
MARIE-JOSE
GABREILLE HARTMANN N.O.
Fourth

Respondent
ROLAND
HANS HEIRISS N.O.
Fifth
Respondent
MARK
KEISER HARTMANN N.O.
Sixth
Respondent
WENDY
FIONA HAY N.O.
Seventh
Respondent
INGE
JOANNE HACKER N.O.
Eight
Respondent
MARK
KEISER HARTMANN N.O.
Ninth
Respondent
THE
COMPANIES AND INTELLECTUAL
PROPERTIES
COMMISSION
Tenth
Respondent

JUDGMENT

REVELAS J:

- [1] The applicant seeks certain interlocutory relief in terms of Rule 30(1) of the Uniform Rules of Court (“the Rules”) to the effect that the respondents’ supplementary answering affidavit and its attachments (all consisting of 588 pages) filed on 18 September 2017, without obtaining leave of the court to do so, be struck out on the grounds that such filing is an irregular step.
- [2] The application in question arose in the course of an application wherein the applicant sought orders declaring the first respondent, her brother, a delinquent director in terms of the section 162 of the Companies Act, 71 of 2008 (the Act); directing the first respondent to be removed as a director of the second and third respondents (respectively a hotel and a company); authorizing

the applicant to bring proceedings on behalf of and in the name of the second respondent for repayment of the financial assistance

provided to the first respondent in contravention of section 45 of the Act; ordering the respondents to pay costs of the

application on an attorney and client scale. The application was launched on 24 April 2017.

[3] The first respondent's answering affidavit was due on 14 June

2014. Various extensions were sought by the first respondent

and it was agreed that he could file his answering affidavit by 28 June 2018.

[4] On 21 July 2017 the first and remaining respondents filed a counter-application instead of an answering affidavit setting out the

basis of their opposition to the relief sought by the applicant in terms of sections 162 and 45 of the Act. The relief sought in the counter-application was abandoned shortly before the present application was launched because it was not competent. It did not comply with any principles in law and did not amount to a proper answering affidavit as prescribed by the Uniform Court Rules. It was not the kind of document a prudent attorney would file in response to an application such as the main application. The counter-application was filed out of time and made little sense. The matter was consequently set down on the unopposed roll on 25 July 2017 and was postponed sine die. By this time the first respondent had engaged new attorneys who also appeared for the remaining respondents. These respondents did not individually or collectively file a notice to confirm this.

[5] Thereafter there was a chain of correspondence between the attorneys of the opposing parties. The respondents indicated that they intended to file a supplementary affidavit, opposing the application. The respondents indicated that they would not seek any indulgence from the applicant but would rather apply to court for condonation to file this affidavit. This did not happen at the relevant time.

[6] Upon receiving no response from the respondents the applicant, on 31 August 2017 filed her replying affidavit to the affidavit of the respondents on 5 September 2017. The matter was set down to be heard on 26 October 2017.

[7] The supplementary affidavit was filed on 18 September. The affidavit itself consists of 206 pages, in addition to the 206 pages already filed as the respondents "Provisional Abridged Answering Affidavit". Attached to the supplementary

affidavit were three supplementary affidavits deposed to by the fifth respondent, the first respondent's accountant.

[8] Rule 6 (5) (e) of the Uniform Rules of Court clearly requires that the filing of further affidavits is only permitted with the indulgence of the court, and the court will only exercise its discretion if good reasons to do so were furnished by the party seeking to introduce a further affidavit. This was not done. In the supplementary affidavit the respondents applied for condonation, but

not formally.

[9] The applicant then launched the present application. The respondents' response to the application in terms of Rule 30

was not to file an answering affidavit, but to yet again launch another counter application seeking dismissal of the Rule 30 application. The respondents filed a counter-application seeking leave to file the supplementary answering affidavit.

[10] The applicant levelled several justified and objections against the introduction of yet another set of affidavits. Firstly, seeking the dismissal of Rule 30 application and leave to file the supplementary affidavit in a counter application, is inappropriate.

Why the respondents choose to litigate in this way is not understood. They adopted the same approach in the main application. The respondents attorneys should in my view, take some or all blame for the manner of litigation since this is a procedural question. Also, the grandiose and style in which the respondents' affidavits are drafted could also largely be attributed to the respondents' legal representatives. The respondents also failed to file heads of argument. I was handed a copy when counsel were on their feet to argue.

[11] Secondly, the applicant correctly makes the point that it is not open to the respondents to rely on what is contained in the affidavit itself to obtain the leave of court in order to file the affidavit. On this approach the applicant was required to traverse the whole affidavit and reply thereto notwithstanding that the court has not yet permitted its introduction. The applicant would also have prepare for the striking out of certain portions of the supplementary affidavit, which the applicant has applied for and prepared for the hearing of the actual application in terms of Rule 30.

[12] Thirdly, since the respondents filed a counter-application and not an answering affidavit, the application brought in terms of Rule 30 is technically unopposed, albeit that the largest part of the affidavit consists of motivating why the supplementary affidavit should be admitted.

[13] The applicant, through her counsel, Mr Ford, has carefully and thoroughly demonstrated with reference to correspondence that there was no agreement between the parties regarding the filing of a supplementary affidavit, as alleged by the respondents. The applicant did not agree thereto.

[14] The prolixity of the papers before me is astounding. The applicant is entirely correct in describing the supplementary affidavit as a prolix, confusing document which does not comply with the requirements of an affidavit. Much criticism can be levelled at most of the respondents' several affidavits. The record is over a thousand pages long, mostly because of the respondents'

extravagant use of paper. They indulge in extensive argument and incorporate irrelevant matter, which some might regard as

iniurious or plain gossip. The first respondent even issued summons against the applicant seeking the same relief as in his first counter-application. Peter AJ in *Venmop v Cleverlad Projects*[1] decried prolix papers thus:

“[14] The inclusion of unnecessarily prolix and repetitive material in court papers is not a peculiarly domestic problem. In the context of an appeal against a conviction for tax evasion and whether or not a defence was waived by being buried in a single unreasoned paragraph, the United States Court of Appeals for the Seventh Circuit remarked that ‘Judges are not like pigs, hunting for truffles buried in briefs’ (US v Dunkel

[1991] USCA7 185; 927 F 2d 955 (7th Cir 1991)). In a recent case, using similes more appropriate to more northerly climes, in the Canadian Federal Court of Appeals in *McKesson Canada Corporation v Canada* 2014 FCA 290, Stratas JA remarked:

[23] The difference between what the appellants propose in page length and what I am willing to grant is nine pages. Some might wonder, “What’s the bid deal about nine pages?”

[24] Unnecessarily lengthy, diffuse submissions are like an unpacked, fluffy snowball. Throw it, and the target hardly feels it. On the other hand, short, highly focused submissions are like a snowball packed tightly into a iceball. Throw it, and the target really feels it. Shorter written submissions are better advocacy and, thus, are much more helpful to the Court.

[25] Structures that lead to repetition, over-elaboration of arguments block quotations, and rhetorical flourishes make submissions diffuse. Simple but strategic structures, arguments presented only once and compactly, tight writing that arranges clinical details in a persuasive way, and short snippets from authorities only where necessary make submissions highly focused. The former dissipates the force of the argument, the latter concentrates it.”

[15] In *Minister of Environmental Affairs and Tourism and Others v Pambili Fisheries (Pty) Ltd; Minister of Environmental Affairs v Bato Star Fishing (Pty) Ltd*[2] Schultz JA similarly criticized prolix replying affidavits as bringing out “irritation, not persuasion”.

[16] I have mentioned that the supplementary affidavit and its annexures are 588 pages long. Given all the shortcomings of the respondents’ supplementary and other affidavits, and the seriously flawed manner in which the respondents have chose to litigate, I was sorely tempted to strike out the entire supplementary affidavit, including its annexures, and the three supplementary affidavits deposed to by the fifth respondent.

[17] However, I had to consider that not the entire supplementary affidavit consisted of irrelevant matter. If I were to strike out the entire affidavit, the first respondent may be unfairly deprived of placing his case before court. The applicant has made serious allegations of unlawful conduct against the first respondent and he stands to lose a lot if his case is not properly before court. It may very well be that he has no case at all, in which case it would not matter if his supplementary affidavit is struck out, but that would involve consideration of the merits of the main application which is premature at this stage.

[18] In my view, and for the same considerations, it would also be premature to consider an application to strike out certain portions of the supplementary affidavit. That application ought to be heard, and as a general rule, such applications are usually heard by the court entertaining the main application.

[19] In the circumstances I decline to grant the relief sought by the applicant.

Costs

[20] Even though the applicants were not the successful party, the application was not futile in the sense that the respondents have been made aware that this manner of litigation is unacceptable. In my view, it is only fair that the respondents pay the costs of this application. The almost uncontrolled filing of prolix inflated affidavits in this matter, has no doubt greatly inconvenienced the applicant and certainly the court who was expected to trundle through over a thousand pages. I believe a punitive costs order would be appropriate in the circumstances.

[21] I have considered whether or not the respondents' attorneys should pay a substantial portion of the applicant's costs de bonis propriis since it is very obvious that they are partly responsible for the prolixity and manner of the litigation pursued by the respondents.

Unfortunately I heard no argument on that aspect, but the court considering the main application might well hear such argument in due course.

Order

[22] The following order will issue:

1. The application brought in terms of Uniform Court Rule 30 is dismissed.
2. The respondents are liable to pay the costs of the application, on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved.
3. The applicant is granted leave to file her replying affidavit, if any, to the respondents' supplementary affidavit, within 21 days hereof.

E REVELAS

Judge of the High Court

Appearances:

For the Applicant: Adv Ford SC and Adv Richards, instructed by Kaplan Blumberg Attorneys, Port Elizabeth

For the 1st, 2nd, 3rd, 4th, 5th, 6th and 9th Respondents: Adv Smuts SC and Adv Nel, instructed by Lexicon Attorneys, Port Elizabeth

Date heard: 29 March 2018

Date delivered: 19 April 2018

[1] 2016 (1) SA 78 at 87 H-J

[2] 2003 (6) SA 407 (SCA), para [39]

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