

SOUTH AFRICA / JUDGMENT

HR Focus CC v Commissioner for the South African Revenue Service (1121/2020) [2023] ZAECKMKHC 111 (17 October 2023) [2023] ZAECKMKHC 111

COURT

Eastern Cape High Court, Makhanda

BEFORE

Laing

CASE / FILE NUMBER

1121/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, MAKHANDA)

CASE

NO. 1121/2020

In

the matter between:

HR

FOCUS CC

Applicant

and

THE

COMMISSIONER FOR THE

SOUTH

AFRICAN REVENUE SERVICE

Respondent

JUDGMENT

LAING J

[1] This is an application for the payment of certain tax refunds, together with interest and costs. By reason of the way proceedings have been conducted, however, the issues before court pertain to the subject of two interlocutory applications brought by the respective parties.

The main application

[2] In its founding affidavit to the main application, the applicant describes itself as a close corporation that provides, inter alia, certain payroll administration services to its various clients. These include the calculation, submission, and receipt, of Employment Tax Incentive ('ETI') assessments and refunds.

[3] Previously, the applicant sent ETI assessments to the respondent on behalf of its clients, claiming payment of refunds. By reason of the respondent's delay in making payment, together with the negative impact of the president's declaration of a national state of disaster in response to the COVID-19 pandemic, the applicant found itself under increasing financial pressure, prompting it to institute urgent motion proceedings on 9 June 2020.

[4] The parties are currently involved in a separate dispute before the Tax Appeal Court concerning the applicant's liability for Skills Development Levy ('SDL') and Value Added Tax ('VAT') payments. The respondent subsequently approved a request for the suspension of payment of the disputed liability.[1]

[5] Consequently, the applicant claims payment of ETI refunds in the amount of R 12,975,071. It also claims payment of interest thereon at the prescribed legal rate, as stipulated under sections 187 to 189 of the Tax Administration Act 28 of 2011 ('TAA').

[6] It is common cause that the respondent paid the ETI refunds to the applicant on 11 June 2020, shortly after service of the main application. The respondent has tendered payment of the applicant's

costs until the above date. It has, however, denied liability for the payment of interest, contending that neither the TAA nor the Employment Tax Incentive Act 26 of 2013 ('ETI Act') provides for the accrual and payment of interest, as claimed by the applicant.

[7] In reply, the applicant persists in its claim for the payment of interest in terms of the TAA.

Further developments

[8] The applicant later applied for leave to amend its notice of motion. The court made an order to that effect on 3 August 2021. In terms of its amended notice, the applicant claims payment of interest in terms of the TAA, alternatively at the prevailing legal rate.

- [9] The court subsequently made a further order on 29 November 2022, granting leave to both parties to deliver supplementary papers.

Respondent's supplementary answering affidavit

- [10] In its supplementary answering affidavit, served on 6 December 2022, the respondent explains that the applicant's alternative claim is one for the payment of mora interest. It argues that the applicant is required to persuade the court that the South African Revenue Service ("SARS") owed certain debts to the applicant, and that it was in mora regarding such debts. The respondent asserts that this is simply not the case; the applicant is not entitled to the payment of mora interest. This is because the Prescribed Rate of Interest Act 55 of 1975 ('PRIA') does not apply.

- [11] The respondent goes on to discuss the meaning of 'employer' and 'employee' within the context of the ETI Act and the Fourth Schedule to the Income Tax Act 58 of 1962 ('ITA'),

before referring to the dispute in the Tax Appeal Court. A key issue in that regard is whether the applicant is liable for the payment of SDL on the remuneration of employees. The respondent attaches a copy of the applicant's statement of its grounds of appeal to its supplementary answering affidavit and points out that there are several assertions therein that have a direct bearing on the main application. Importantly, the applicant asserts in terms thereof that the respondent's contention that it had 4,500 employees was incorrect because such employees were employed by its various clients. It merely acted as an agent or as a payroll administrator and had a staff of only 15 employees. It was not the principal employer of the 4,500 employees mentioned by the respondent.

- [12] Consequently, argues the respondent, the applicant did not qualify as an employer under either the ETI Act or the Fourth Schedule to the ITA. This was based on its own assertions. It was not entitled to payment of its claim in the main application.

Applicant's supplementary founding affidavit and replying affidavit to the respondent's supplementary answering affidavit

- [13] The applicant served its supplementary affidavit, as described above, on 23 May 2023. It avers that it did so not only to reply to the allegations made in the respondent's supplementary answering affidavit but also to supplement its founding affidavit 'insofar as it is suggested that the applicant is introducing new matter that

is not in reply'.

- [14] It is the applicant's firm contention that it acts as an agent for its various clients. The founding affidavit makes this clear. By reason of the respondent's having paid the ETI refunds, the only remaining issues between the parties are the payment of interest and costs. The applicant then goes on to detail the basis upon which the respondent sought to supplement its answering affidavit, saying that the essence of the respondent's argument is that the applicant does not, in the main application, sue as an agent or as a representative of

any third parties but does so in its own right. This allegedly contradicts the applicant's position in the Tax Appeal Court. The applicant avers that, for the sake of pragmatism and avoiding unnecessary costs, it did not oppose the respondent's application for leave to supplement. Notwithstanding, says the applicant, the respondent's supplementary answering affidavit relies on different grounds and deals with matters not arising from the amended notice of motion.

[15] The applicant explains that the facts necessary to determine its claim for mora interest have already been alleged in its founding affidavit, read with the accompanying statements of account. It also explains why prescription does not arise. Regarding the matter before the Tax Appeal Court, the applicant asserts that it had previously mentioned this; the respondent was, in any event, involved in both matters.

[16] If the respondent is successful in the Tax Appeal Court, argues the applicant, then it will have demonstrated that the applicant is entitled to the ETI refunds. The applicant contends, however, that it has consistently described itself, in both sets of proceedings, as an agent that administers the payrolls of its various clients. Upon

receipt of the ETI refunds, the applicant credits its clients accordingly. It says that it has usually based its relationship with

clients on verbal agreements but has, more recently, resorted to written agreements for the sake of clarity. It attaches an example to its supplementary affidavit to demonstrate that it refers to the applicant as a 'designated agent', whose responsibilities

include the collection of the ETI refunds. In submitting assessments or returns on behalf of its clients, the applicant refers to itself as the employer, but this is done purely for convenience. It contends that a tacit cession must be deemed to have been concluded with its clients, to the effect that they ceded their claims for the ETI refunds to the applicant so that it could recover such amounts on their behalf, and the applicant was obliged to credit such amounts to its clients or to set off the amounts against outstanding service fees and other charges.

[17] Regarding the question of locus standi, the applicant argues that it has the necessary standing to claim the ETI refunds. This is because the respondent has admitted same by paying the ETI refunds previously claimed, and because there are several exceptions that apply to the principle that an agent cannot sue on behalf of its principal.

[18] The applicant maintains that if the respondent's position is that the ETI refunds ought never to have been paid, by reason of the applicant's lack of locus standi, then the respondent should have exercised the audit powers available under the TAA to issue additional assessments that reversed the ETI refunds claimed by the applicant. The respondent could not circumvent the process by expecting the court to come to its aid.

[19] It is, asserts the applicant, the respondent who has been contradictory. To that extent, the applicant points out that the respondent has argued in the Tax Appeal Court that the applicant is an employer. This attracts VAT obligations. The respondent uses the same argument in relation to the applicant's alleged SDL liability. If the Tax Appeal Court finds in favour of the respondent, then there would be no basis for the respondent's opposition in the present matter. The applicant would be entitled to payment of the ETI refunds, together with interest and costs. If, notwithstanding, the respondent was unsuccessful in the Tax Appeal Court, then the applicant would still not be prevented from claiming the ETI refund because it had done so as an agent and on behalf of its various clients. Its approach in both sets of proceedings has been consistent in this regard.

[20] The applicant submits that the finding of the Tax Appeal Court would assist in the determination of whether it was entitled to the relief sought under the main application. It would be sensible to postpone

it, pending the finalization of the appeal.

[21] The reasons for the delay in the delivery of the applicant's supplementary affidavit are provided. It seeks condonation, as well as leave to deliver the supplementary affidavit insofar as it may be construed as a supplementary founding affidavit. The applicant reiterates that the main issue to be decided is whether the applicant can claim interest in its capacity as agent for its various clients.

The interlocutory applications

[22] The applicant's delivery of its supplementary affidavit prompted the swift delivery of a pair of interlocutory applications. These form the focus of the present matter and are described below.

Respondent's application to strike out

[23] The respondent served an application to strike out on 18 July 2023. It argues that the applicant delivered its supplementary affidavit without complying with the order of 29 November 2022 and without obtaining further leave from the court. The respondent contends that the applicant has not identified which portions of its founding affidavit it seeks to supplement and has never afforded the respondent an opportunity to consider and oppose the grounds upon which it sought to do so. The principle of *audi alteram partem* has been flouted. The respondent also asserts that the applicant has failed to set out the factual basis upon which to materially alter or supplement the founding affidavit, pointing out, too, that the deponent to the supplementary affidavit is not the same person.

[24] If the supplementary affidavit is not struck out or set aside, then the respondent applies for the striking out of specific paragraphs. The grounds are set out in the application. These include the applicant's alleged introduction of new matter and matter that is scandalous, argumentative, irrelevant, or hearsay.

Applicant's application for, inter alia, condonation

[25] The applicant served, on 21 July 2023, an application for condonation of the late delivery of what it termed its replying affidavit. It also sought the following relief:

'(to the extent necessary, the applicant not conceding that all such allegations constitute new matter) [that the] applicant is granted

leave to supplement the applicant's founding affidavit in respect of any new matter that is held not to be in reply to the

supplementary answering affidavit of the respondent...'

[26] The relevant paragraphs or portions thereof, constituting possible new matter, are then listed thereunder.

[27] The applicant sought, too, the postponement of the hearing of the main application, pending the finalization of the matter in the Tax Appeal Court. In addition, it sought leave for both parties to supplement their papers pursuant to the finalization of such appeal.

Issues

to be decided

[28] At the hearing of the matter there was, understandably, some uncertainty about what was precisely before the court for determination. This was only clarified during argument.

[29] Counsel for the respondent indicated that his client sought the relief set out in terms of the first part of its application to strike out, viz. that the applicant's supplementary affidavit be struck out or set aside, alternatively that it be treated as pro non scripto. The second part of the application would be argued only when dealing with the merits of the main application.

[30] Counsel for the applicant confirmed that his client sought the relief limited to the first and second prayers of its application. This pertained to condonation for the applicant's late delivery of its replying affidavit and leave for the applicant to supplement its founding affidavit. The applicant did not pursue the postponement of the hearing of the main application; it also declined to pursue the granting of leave to both parties to supplement their papers,

consequent to the eventual finalization of the appeal.

[31] The determination of one application will prove decisive of the other. It needs to be said that counsel for the respondent urged the court to deal with the main application simultaneously with the interlocutory applications, rather than deal with the matter on a piecemeal basis. The reason for the court not to have done so appears from the judgment.

[32] A brief discussion of the applicable principles follows.

Legal framework

[33] The Uniform Rules of Court ('URC') provide, in terms of rule 6(5)(e), that a court may, in its discretion, permit the filing of further affidavits. It is trite that such discretion should be exercised to ensure that a matter be adjudicated upon all the facts that are relevant to the issues in dispute.[2] DE van Loggerenberg remarks that:

'...a party cannot take it upon himself to simply file further affidavits without first having obtained the leave of the court to do so. It has been held that where further affidavits are filed without the leave of the court, the court can regard such affidavits as *pro non scripto*. While the general rules regarding the number of sets and proper sequence of affidavits should ordinarily be observed, some flexibility must necessarily also be permitted. It is only in exceptional circumstances that a fourth set of affidavits will be received. Special circumstances may exist where something unexpected or new emerged from the applicant's replying affidavit.'[3]

[34] Whether a further set of affidavits should be admitted comes down to a question of fairness to both parties.[4] It must not result in prejudice.

[35] Furthermore, under rule 6(15), a court may strike out from an affidavit any matter which is scandalous, vexatious, or irrelevant. It has been held that the rule is wide enough to allow a court to strike out inadmissible evidence, e.g., hearsay, as well as argument, and new matter. [5]

[36] Still within the context of the URC, a party may, in terms of rule 28(1), amend a pleading or document other than a sworn statement. To attempt to amend an affidavit would be to attempt to change written evidence previously given under oath. It is not permitted unless the party who originally gave such evidence presents further evidence under oath, by way of affidavit where required.[6]

[37] The above principles comprise a very basic framework within which to decide the issues identified by the parties.

Application of principles

[38] The applicant argues that the respondent obtained the leave of the court to deliver a supplementary answering affidavit not so much to deal with the applicant's amended notice of motion as to deal with the issues that arose in the Tax Appeal Court. The main issue, says the applicant, is its assertion that it is not an employer of the 4,500 employees mentioned by the respondent. The purpose of the applicant's supplementary affidavit was essentially two-fold:

(a) to reply to the averments made by the respondent in its supplementary answering affidavit; and (b) to supplement its founding affidavit 'insofar as it is suggested that the applicant is introducing new matter that is not in reply'.

[39] Pertinently, counsel for the applicant contended in argument that the supplementary affidavit served additional purposes. These included the need for the applicant to address the question of its locus standi, considering the respondent's having raised the issue about whether the applicant is an employer for purposes of claiming payment of the ETI refunds. It also served to highlight the respondent's alleged contradictory stance in relation thereto,

as apparent from the Tax Appeal Court proceedings on the one hand and the main application before this court on the other. It served,

moreover, to motivate for the stay of the main application pending the finalization of the appeal, and to provide a basis upon which to seek condonation for late delivery.

[40] The immediate difficulty facing the applicant, however, is that, pursuant to the amendment of its notice of motion, it was granted leave merely to deliver a supplementary replying affidavit. This was to deal with the respondent's supplementary answering affidavit. It was not granted leave to deliver a multi-purpose affidavit of the nature presently before the court.

[41] Counsel for the respondent aptly restated the fundamental principle that a party is required to plead its case fully in its founding papers.[7] He or she is required to set out, in his or her founding affidavit, all the factual allegations relied upon in relation to the relief sought.[8] The applicant, however, has delivered an affidavit that purports to be both a supplementary replying affidavit and a supplementary founding affidavit. It would be impossible, argued counsel, to unravel which portions pertain to either one or the other. This would amount to piecemeal guesswork that would cause uncertainty, offend established practice, undermine the principle of audi alteram partem, infringe the URC, and disregard the case law. In short, argued counsel, it would amount to an abuse of process. The court is inclined to agree.

[42] In *Hano Trading CC v JR 209 Investments (Pty) Ltd and another*,^[9] the Supreme Court of Appeal, per Erasmus AJA, held as follows:

‘...rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so.

...This court stated in *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons* NO[10] that:

“It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided Provincial Courts in exercising a discretion to admit or reject a late tendered affidavit... It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry.”

...It was then later stated by Dlodlo J in *Standard Bank of SA Ltd v Sewpersadh and another*[11]:

“The applicant is simply not allowed in law to take it upon himself and [to] file an additional affidavit and put same on record without even serving the other party with the said affidavit...”

Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as *pro non scripto*.”

...To permit the filing of further affidavits severely prejudices the party who has to meet a case based on those submissions.’

[43] It is clear from the above that the court enjoys a wide discretion regarding whether to accept further affidavits. Whereas the applicant obtained leave to deliver a supplementary replying affidavit, the present supplementary affidavit can, nevertheless, hardly be described as such.

[44] Counsel for the applicant emphasised that the context of the present dispute is all-important. The genesis of its supplementary affidavit was the respondent’s supplementary answering affidavit, which

introduced an entirely new angle to the matter. The respondent alleged that the applicant was not entitled to payment of the ETI

refunds, notwithstanding the fact that it had already received payment thereof, because of the assertion, made in its statement of appeal in the Tax Appeal Court, that it was not a principal employer. This meant, argued the respondent, that it did not qualify as an employer under either the ETI Act or the Fourth Schedule to the ITA. The applicant had painted itself into a corner. This, of course, called for a proper explanation, says the applicant, which inevitably entailed the introduction of new matter. It was essential, too, from the applicant's perspective, to highlight the contradictory stance that the respondent had created for itself by adopting such an approach. The respondent had, contended counsel for the applicant, opened Pandora's box.

[45] There is authority for the proposition that a party in the position of the applicant may introduce further corroborating facts to respond to the contents of the answering affidavit. [12] This is so even where certain of the averments could have been made in the founding affidavit.[13] Counsel for the applicant correctly pointed out that the dividing line between what was new matter in a replying affidavit and what was merely a reply to the answering affidavit was not easy to draw. In *Smith v Kwanonqubela Town Council*, [14] Harms JA held that:

'The rule against new matter in reply is not absolute... and should be applied with a fair measure of common sense. For instance, in the present case, the point provided no material or substantial advantage to Smith- at least, counsel could not point to any- and it simply at great cost postponed the day of reckoning...'[15]

[46] Mindful of the above, the applicant argued that common sense dictates that the information contained in its supplementary affidavit should be permitted. The respondent should be afforded an opportunity to

deliver a further affidavit where necessary.

[47] Whereas the respondent's supplementary answering affidavit clearly called for a robust response from the applicant, the primary shortcoming in the applicant's supplementary affidavit is that it is not simply a reply. It purports to supplement the founding affidavit and to attempt to achieve a great deal more besides. A common-sense approach may well allow such a multi-purpose affidavit in some circumstances, but not all. The basic principle remains that a party must set out its case in its founding papers. Further affidavits are permissible, at the discretion of the court, but only in exceptional circumstances.[16]

[48] Counsel for the respondent strongly contended that it would be impossible to determine which portions of the supplementary affidavit purport to supplement the founding affidavit and which portions purport to constitute a supplementary reply. In the words of counsel, what the founding affidavit would then comprise 'is as clear as mud'. The other difficulties mentioned by the respondent are that the deponent to the supplementary affidavit is not the same as the deponent to the founding affidavit.[17] In addition, the applicant had converted from a close corporation to a private company. These factors created further obstacles to the acceptance of the supplementary affidavit.

- [49] The court agrees with the respondent. Importantly, however, there is a further factor that militates against the acceptance of the supplementary affidavit, but which seems to have been obscured to some extent during argument. Counsel for the applicant previously contended that the principles of *lis alibi pendens* apply since there is pending litigation in two courts, involving the same parties, and the same issues.[18] The applicant, in the end, did not pursue the postponement of the hearing of the main application and this court is not required to decide the issue of *lis alibi pendens*. Nevertheless, the fact remains that the outcome of the proceedings in the Tax Appeal Court, where, at the time of writing, judgment is still awaited, are likely to have a considerable impact on the proceedings in the main application. Insofar as the Tax Appeal Court decides whether the applicant was a principal employer, the finding will undoubtedly trigger the need for the parties to file further affidavits in the main application, subject, of course, to the discretion of this court. To permit the delivery of the applicant's supplementary affidavit at this stage would be premature, at best. It would, at worst, make the 'muddy morass of papers', as counsel for the respondent termed it, all the muddier.
- [50] The above reasoning underlies the refusal of the court to deal with the main application simultaneously. Whereas piecemeal litigation ought to be avoided, this cannot be escaped in the present matter when the proceedings in the Tax Appeal Court are still pending.

Relief and order

- [51] Ultimately, the court is not persuaded that it should exercise its discretion in favour of the applicant. The prejudice that would be caused to the respondent in permitting the filing of the supplementary affidavit is plain enough to see. The court is also of the view that the ambit of rule 6(15) is sufficiently broad to allow the striking out or setting aside of the supplementary affidavit. There is sufficient case law, as cited by counsel for the respondent, [19] for this to be done in its entirety.
- [52] Regarding costs, there is no reason why the general rule should not follow to the effect that the successful party is entitled to its costs. There is also no reason why the respondent's request for

the costs of two counsel should be denied, given the complexity of the matter. A party and party scale would be appropriate.

- [53] In the circumstances, the following order is made:

- (a) the respondent's application to strike out, dated 17 July 2023, is granted, and the applicant's supplementary founding affidavit and replying affidavit to the respondent's supplementary answering affidavit is struck out in its entirety;
- (b) the applicant's interlocutory application, dated 21 July 2023, is dismissed; and

- (c) the applicant is directed to pay the costs of both applications on a party and party scale, including the costs of two counsel.

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCES For the applicant: Adv AC Botha SC Adv KD Williams Instructed by: Wheeldon Rushmere & Cole Inc Matthew Fosi Chambers 119 High Street Makhanda Tel: 046 622 7005 (Ref: Ms Amm) As instructed by: Pieterse Seller Erasmus TRM 174B Cape Road Mill Park Gqeberha (Ref: Mr Pieterse) For the respondent: Adv MG Swanepoel SC Adv T Zietsman Instructed by: Whitesides 53 African Street Makhanda Tel: 046 622 7117 (Ref: Mr Barrow) As instructed by: Office of the State Attorney, Gqeberha (Ref: Mr Swartz) Date of hearing: 17 August 2023 Date of delivery of

judgment:

17 October 2023

- [1] The approval was given in terms of section 164 of the Tax Administration Act 28 of 2011.
- [2] Dickinson v South African General Electric Co (Pty) Ltd 1973
- (2) SA 620 (A), at 628F.
- [3] DE van Loggerenberg, Erasmus: Superior Court Practice (Jutastat e-publications, RS 18, 2022), at D1-68.
- [4] Milne NO v Fabric House (Pty) Ltd 1957
- (3) SA 63 (N), at 65A; Broode NO v Maposa 2018 (3) SA 129 (WCC), at 137G; and Amedee v Fidele (unreported, GJ case no 20/9529, 20 December 2021), at paragraph [79].
- [5] Premier Produce Co v Mavros 1931 WLD 91; SA Railways and Harbours v Hermanus Municipality 1931 CPD 184; and Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T).
- [6] Brummund v Brummund's Estate 1993
- (2) SA 494 (NmHC), at 498E.
- [7] National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008
- (5) 339 (SCA), at 349A-B; Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others 2008 (2) SA 184 (SCA), at 200C-E.
- [8] See Transnet v Rubenstein 2006 (1) SA 591 (SCA), at paragraph [28]; Openshaw, n7 supra, at paragraphs [29] to [30]; Van der Merwe and another v Taylor NO and others 2008 (1) SA 1 (CC), at paragraph [122]. See, too, the provisions of rule 6(1) of the URC.

[9] 2013

(1) SA 161 (SCA), at paragraphs [11] to [14].

[10] 1963

(4) SA 656 (A), at 660D-H.

[11] 2005

(4) SA 148 (C), at paragraphs [12] to [13].

[12] eBotswana (Pty) Ltd v Sentech (Pty) Ltd 2013

(6) SA 327 (GSJ), at paragraph [28].

[13] Ibid.

[14] 1999

(4) SA 947 (SCA).

[15] At paragraph [15].

[16] See *Bangtoo Bros and others v National Transport Commission and others* 1973

(4) SA 667 (N), at 680B; see, too, *Sewpersadh*, n 11 *supra*, at paragraph [10], where Dlodlo J referred to ‘special circumstances’.

[17] A Mr Bruce Butler deposed to the founding affidavit, describing himself as the sole member of the applicant. A Mr David Butler

deposed to the supplementary affidavit; explaining that he was the son of the late Mr Bruce Butler, who had passed away during the litigation.

[18] The three requirements for successful reliance on a plea of *lis pendens* are that the litigation is between the same parties, that the cause of action is the same, and that the same relief is sought in both. See *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA), at paragraph [12].

[19] See *Van Zyl and others v Government of the Republic of South Africa and others* 2008 (3) SA 294 (SCA), at paragraphs [45] to [46]. See, too, *Sewpersadh*, n 11 *supra*, at paragraph [13]; and *Wingaardt and others v Grobler and another* 2010 (6) SA 148 (ECG), at paragraphs [17] to [22].

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