

SOUTH AFRICA / JUDGMENT

Independent Examinations Board v Umalusi and Others (83440/19) [2020] ZAGPPHC 362 (14 July 2020) [2020] ZAGPPHC 362

COURT

North Gauteng High Court, Pretoria

BEFORE

Basson

CASE / FILE NUMBER

83440/19

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED.

Case No: 83440/19

14/7/2020

In the matter between:

INDEPENDENT EXAMINATIONS BOARD

APPLICANT

and

UMALUSI

FIRST RESPONDENT

PROFESSOR JD VOLMINK NO

SECOND RESPONDENT

DOCTOR MS RAKOMETSI NO THIRD RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO FILE A FURTHER AFFIDAVIT

BASSON J

Introduction

- [1] This is an application for a review in terms of section 6 of the Promotion of Administrative Justice Act^[1] for the relief set out in the Notice of Motion. The applicant is the Independent Examinations Board (“the IEB”). The respondent is Umalusi, a statutory body that provides quality assurance services to the IEB and other private examination bodies. Umalusi is entitled by law to charge the IEB a fee for these services.
- [2] At issue in this application are three invoices furnished to the IEB for certain services rendered. Briefly, the IEB disputes the service fees charged in these three invoices and contends that these three invoices each charged the IEB about R1 million more than usual. The IEB challenges these three invoices on the basis that there appears to be no rational basis for the charges. Umalusi opposes this application and relies on a fee schedule from 2007 as the basis on which these invoices were calculated and accordingly identifies this 2007 fee schedule as a rational basis for the three invoices. The IEB denies that Umalusi used the 2007 fee schedule to generate the three invoices and persists in their argument that the 2007 schedule does not provide a rational basis for the three invoices.
- [3] This application was launched in November 2019. The record was filed in December 2019. By agreement between the parties, the Deputy Judge President of this court issued directives setting out the timelines to which parties must adhere in respect of the filing of papers.
- [4] The IEB filed its written submissions on 30 April 2020. Umalusi filed its written submissions on 3 June 2020. The matter was set down for Monday 8 June 2020.

Application to file a further affidavit

- [5] On 29 May 2020 the attorneys acting on behalf of Umalusi informed the court that they had received instructions from their client that it is necessary that a further affidavit be filed and that Umalusi would seek leave to reopen its case by filing such further affidavit. On 3 June 2020, the attorneys acting on behalf of the IEB in turn advised the court that it intends opposing any such application and reiterated that they were ready to proceed with the matter on 8 June 2020.
- [6] On 3 June 2020 — 2 court days before the hearing of this matter — Umalusi then filed a further affidavit. The further affidavit is deposed to by Dr. Rakometsi (the third respondent). He also deposed to the (initial) answering affidavit. He explains in his further affidavit that it is the purpose of this affidavit to provide an explanation as to why there appears to have been such a dramatic increase in the fees charged for quality assurance services (in particular fees for moderation of papers) with reference to the three disputed invoices. He confirms that it is indeed stated in the answering affidavit that the fees charged year-on-year were based on the 2007 policy. It is only whilst preparing the written submissions that counsel for Umalusi —after considering paragraphs 28 to 31 of the IEB’s written submissions

—sought

clarification from Umalusi on what appears to have been the reason for the increase in moderation fees.

Paragraphs 28 to 31

[7] If regard is had to what is stated in paragraphs 28 to 31 of the IEB's written submissions, it would appear that the IEB did a mathematical calculation of what the fees ought to have been if the 2007 fee schedule was in fact used as the basis for the calculations reflected in the three invoices. Based on these calculations (taking into account the 2007 fee schedule), the IEB makes the point that Umalusi could not have used the rate per question paper set out in the 2007 policy to calculate the service fees reflected in the three invoices. Further, taking into account the 2007 fee schedule and what ought to have been charged, Umalusi overcharged the IEB with more than 600% per paper and thus 600% more than what the 2007 fee schedule permits. The IEB consequently concludes that the 2007 fee schedule is not a rational basis on which the three invoices were calculated.

The explanation now tendered in the further affidavit

[8] In the further affidavit Umalusi now seeks to ex post facto rely on a 2015 policy decision to rationalise its decision ("the second rationalisation"). This volte-face constitutes a complete departure from the reliance on the 2007 policy decision advanced in these papers as the rationalisation for its decision under review ("the first rationalisation"). This new explanation, Umalusi admits, is done in an attempt to provide an ex post facto explanation for the dramatic increase in fees claimed:

"Whilst preparing heads of argument, counsel for Umalusi (after considering paragraphs 28 – 31 of the IEB's heads of argument) sought clarification on what appeared to be a dramatic and unexplained increase in moderation fees. There is, however, a perfectly plausible explanation for the increase. This was unfortunately not included in the answering affidavit due to a miscommunication between the representatives of Umalusi and its legal team."

[9] Umalusi also relies on the fact that a document, although originally attached to the answering affidavit marked "Annexure AA10", was not available at the time the affidavit was settled and that this document was attached only thereafter.

[10] It is not disputed that the further affidavit now sought to be introduced contradicts the answering affidavit in material respects: Not only is Umalusi seeking to introduce a completely new rationalisation (the 2015 policy) after the fact, it is seeking to introduce a rationalisation in conflict with its first rationalisation (the 2007 policy).

[11] The IEB takes issue with the further affidavit and submits that it is impermissible and that the principles of administrative action do not allow for the consideration of ex post facto explanations for administrative decisions.

[12] Umalusi has waited until the last possible moment to seek leave to file a further affidavit. This is relevant in light of the preceding history of this matter. The challenge to the calculations based on the 2007 policy certainly is not a new one. Umalusi has always been aware of the basis on which the invoices are disputed. Umalusi has also always been consistent in relying on the 2007 policy as justification for the disputed invoices. The first time Umalusi's decision in respect of the three invoices was questioned was as far back as 2017. Yet, it took Umalusi three years and until two court days before the hearing of this application to seek to introduce this new rationalisation and leave to file a further affidavit which not only disavows any reliance on the 2007 policy but to seek to rely on a later policy as justification for the

calculations. The IEB points out that not once has Umalusi relied on the explanation it now seeks to rely on: Umalusi never

relied on this explanation in any of the correspondence between the parties nor during meetings prior to the launch of these proceeding

nor in the record filed in this application.

[13] IEB submits that this court should deny leave to file the further affidavit particularly in light of the fact that this about turn effectively means that the entire basis of the dispute between the parties and captured in a full set of court papers is premised on an explanation that Umalusi now wishes to abandon. This, IEB submitted, means that the entire application has been wasted in light of the version Umalusi now wishes to introduce. This, according to IEB, constitutes an abuse of court process.

Legal Principles

[14] The normal rule is that only three sets of affidavits are allowed. In review proceedings it is four sets, the additional set being a supplementary founding affidavit on receipt of the record. The obvious reason for this rule is to allow for the parties to identify the parameters of the dispute between the parties and to inform the other party of the case that it has to meet.[2]

[15] A court does have a discretion to permit the filing of further affidavits, but will only do so in exceptional circumstances. Exceptional circumstances may, for example, exist when something unexpected or new has emerged from the applicant's replying affidavit. But, as stated in *James Brown & Hamer (Pty) Ltd (Previously Named Gilbert Hamer & Co Ltd) v Simmons*, NO,[3] where a party in motion proceedings tenders an affidavit that is both late and out of its ordinary sequence, such party is seeking, not a right, but an indulgence from the court.

[16] Where a party seeks to introduce fresh issues in the further affidavits a proper and satisfactory explanation must be tendered as to why it was not done earlier. The court must also be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs.[4] I will deal with these aspects in more detail herein below. Suffice to point out that no satisfactory explanation is

tendered and that the prejudice to the IEB cannot be remedied by an order as to costs.

[17] In this matter Umalusi filed its application for permission to file a further affidavit after both parties had already filed their

written submissions and even after both parties had filed their respective practice notes. In this respect, the circumstances

in this case are akin to an application during a trial to reopen a case already closed and more in particular at the stage where legal argument has commenced. *Herbstein & Van Winsen* deals with the approach to be followed in such an instance:

“Once a party has closed he is, generally, not entitled to call further evidence, save in rebuttal. The reason for this rule would appear to be that if fresh evidence were allowed, it might necessitate the calling of further evidence by the other side, thus occasioning an undue protraction of the case. A further reason given for the rule is that the temptation that would otherwise exist to commit perjury. The rule is, however, not an inflexible one, and it may be departed from in the discretion of the court.

That the court has the power, which it may exercise in its discretion, to allow a party who has closed its case to reopen it, is beyond doubt. The power may be exercised in favour of a plaintiff even after the defendant has closed, and, a fortiori, it may be exercised immediately after the plaintiff has closed.”

[18] Although a court therefore always retains a discretion to allow a further affidavit, such a discretion must be exercised with due reference to the particular circumstances of a case and more in particular with reference to the point in time in the litigation such an application is brought. Where argument has already begun, such as in this case where both parties have filed their written submissions and where it is the very submissions that alerted Umalusi to a potential problem, the court in *Du Plessis v Ackerman*[5] pointed out that —

“[a] special danger of abuse lies in the opportunity for the deliberate colouring or manufacture of testimony to suit some specific need which may be apparent only after opposing counsel’s argument has revealed where the emphasis of his claim is placed and what conclusions he founds on the evidence already presented.”

[19] From the above it would seem that the further a case progresses, the less likely a court would be to accede to an application for leave to reopen a case for the purpose of leading fresh evidence. Where argument has already begun, persuasive reasons must be placed before a court before granting the privilege to reopen a case.

- [20] In this instance, the matter has reached a stage where written submissions on behalf of both parties have already been filed. All that remained outstanding was for the matter to be argued before court based on the arguments as set out in the heads of argument. It is only when counsel took note of paragraphs 28 to 38 in the IEB's heads of argument that it was realised that it was unable to rely for the calculation of the 2007 policy. This is exactly the situation which the court in *Du Plessis*[6] warned against.
- [21] A court will also generally not accept additional affidavits where a party seeks to introduce a whole new issue which does not constitute a reply to new issues raised in the applicant's reply and which will entail the filing of further affidavits by the applicant.[7]
- [22] Notwithstanding the above, it remains in the discretion of the court taking into consideration the explanation tendered for the need to file a further affidavit. As already pointed out, exceptional circumstances must exist. In this particular matter the question invariably arises as to why it only came to light at this late stage that the justification tendered in the answering affidavit is not correct and that there actually exists another justification for the calculation particularly in light of the fact that the document marked "Annexure AA10" upon which Umalusi now relies has always been available

and in fact attached to the answering affidavit now sought to be disavowed. This question ties in with the approach followed by our courts that an applicant applying for the privilege to reopen its case must show that it has used proper diligence in endeavouring to procure the evidence at trial. This was explained by the Appellate Division in *Deintje v Gratus & Gratus*: [8]

"Now as the appellant asks for indulgence to allow him to lead fresh evidence, the onus is upon him to show that he has used proper diligence - reasonable diligence in not presenting evidence at the trial that with due diligence might have been available. Whether he has done so must be gathered from the facts set forth in the application. The appellant bases his application on the fact that he employed what seems to me may perhaps be considered exceptional diligence after the judgment. But there is no indication of what he and his advisers had done during the six months that elapsed between the accident and the trial. He says that his father is an old man 86 years of age, and that he himself was disabled for a long time. That the Court accepts, and does not impute any want of diligence to either of them. But he says nothing about what had been done by his solicitors in the matter. Looking at the facts it does not appear to me that the solicitors had done their duty."[9]

- [23] I am not persuaded that I should exercise my discretion in favour of Umalusi and allow the filing of a further affidavit. In

summary: I am not persuaded by the explanation tendered that there was a "miscommunication" between Umalusi and its legal team. The deponent to the answering affidavit and the further affidavit is the Chief Executive Officer of Umalusi. He confirms in the answering affidavit that the facts contained in his affidavit fall within his personal knowledge. With these facts at his disposal and which fall within his personal knowledge, the deponent vigorously attacks the averments made in the founding affidavit and persists with a detailed justification of the disputed invoices with reference to the 2007 policy. Moreover, this matter has a long history. During the entire

matter Umalusi persisted with a version that the calculations underlying the three disputed invoices were based on the 2007 policy. Even in the joint practice note under the heading “SUMMARY OF ISSUES AND CONTENTIONS” Umalusi persisted with this version.

[24] By means of illustration, one of many examples of Umalusi’s justification for the basis upon which the three disputed invoices

had been calculated can be found in paragraph 2.4 of the answering affidavit. There Umalusi clearly states that —

“This application concerns a decision by Umalusi’s Executive Committee during May 2007 to charge separately for certification and for quality assurance services and a subsequent decision by Umalusi to approve fees for quality assurance services for independent

assessment bodies, which approval took place on 22 November 2007 (“the 2007 policy”)... The IEB is a victim of its own success... On 25 October 2017, Umalusi rendered an invoice to the IEB, setting out precisely what had been charged for certification and what had been charged for quality assurance services and how such figures were made up:”

In response to this paragraph, the IEB replied as follows —

“Umalusi suggest that the October 2017 invoice is explained with reference to the 2007 policy decision. There is no causal link between the policy and the invoice.”

[25] From this response there could not have been any doubt in the mind of the deponent to the answering affidavit on behalf of Umalusi

that the IEB directly places in dispute the rationale advanced in Umalusi’s papers that the 2007 policy justifies the amount

arrived at in the disputed invoices. Why red flags did not go up at that stage, is difficult to understand. It is also

concerning that an organisation which exercises public power did not bother at that stage to revisit the calculations in light of this clear statement contained in the replying affidavit. Moreover, Umalusi now seeks to rely on documentation that has been in its possession throughout the litigation.

[26] Umalusi therefore has throughout these proceedings firmly pinned their colours to the mast and only when IEB made their calculations in their written submissions, Umalusi realised that the explanation for the amounts claimed in the invoices fell flat— a mere 2 court days before the hearing of the matter. The fact that the discrepancy was only discovered after reading the IEB’s written submissions does not amount to exceptional circumstances justifying seeking to file a further affidavit. See *Bafokeng Rasimone Platinum Mine (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*: [10]

“[4] When the matter was argued it became apparent that the issues that the applicant wished to raise in the additional affidavit

had come to light after counsel had perused the application. All the material on which the additional affidavit was based was already

before the applicant's attorneys by the time the supplementary affidavit was filed. Review applications by their nature give

the applicant party ample time to consider the merits of its case before filing a supplementary affidavit. No reasons were advanced why the matters raised in the additional affidavit could not have been raised in the supplementary affidavit. The fact that an applicant subjects the record to more careful scrutiny after pleadings have closed and discovers further points it could have raised previously but did not, does not amount to exceptional circumstances justifying the reopening of the pleadings. The applicant argued that there would be no prejudice to the third respondent, because the court would obviously grant him an opportunity to respond if the additional affidavit was admitted. On this principle, an applicant could keep adding to its case ad nauseam and a respondent party would have to keep incurring further costs for each additional perusal of the record required to consider the new points raised as and when the applicant deigned to reconsider its case. Insofar as the admission of additional affidavits is a matter of fairness to both parties, there is nothing fair about allowing a party to add to its case in the absence of a very satisfactory explanation for the earlier omission.

[5] Pleadings are intended, amongst other things, to identify the nature and parameters of a dispute. Care must be taken at the time of drafting to ensure that the full ambit of a party's case is canvassed. In the case of a review application an applicant has the added advantage that a weak founding affidavit can be completely replaced or augmented by a supplementary affidavit. It is at that point of the applicant's preparation of the application that it must focus its mind on the merits of its case. It should not regard the supplementary affidavit as merely a preliminary exploration of issues to be more fully developed when heads of argument are prepared. Still less should it consider the supplementary affidavit as anything less than its final statement of its grounds of review. There may be exceptional circumstances where issues come to light that a party exercising reasonable diligence in the preparation of its case could not have been aware of, or where there is some other justifiable reason why a material issue is omitted. In this case no such reason has been provided to excuse omissions from the applicant's founding papers. I see no justification for the third respondent to be burdened months later with having to consider answering further matters that should have been raised at the time the supplementary affidavit was filed.”

[27] I further find it difficult to accept that the deponent to the answering affidavit was not aware of the 2015 policy at the time of

deposing to the answering affidavit particularly in light of what is now stated in the further affidavit. Briefly: The deponent now states that submissions were in fact made to Umalusi's Executive Council concerning "Review of Tariffs and Fees for 2015". Following various meetings, a decision was made to revise the tariffs applicable at that time. The deponent states that he received an internal submission dated 5 June 2015 for approval to implement the approved tariffs contained in the document submitted to him and that he - on 17 June 2015 - approved the recommendation to implement the revised tariffs effective from 1 June

2015. Why these facts were not communicated to Umalusi's lawyers at the time particularly in light of the deponent's active involvement in the approval of the 2015 policy is unfortunately not properly explained on the papers beyond an attempt to explain it as a "miscommunication".

[28] It is also important to take into account the fact that what is at stake in this application is a review of public power. This is a significant factor to be taken into account in circumstances where the state entity seeks to introduce a completely new justification for the calculation. Hoexter[11] explains why this introduction of new reasons ex post facto should be frowned upon especially in circumstances where the exercise of public power is under review:

"As to the possibility of the administrator's relying on new or additional reasons in a review application, the Supreme Court of Appeal recently confronted the problem in National Lotteries Board v South African Education and Environment Project [[2012] 1 All SA 451 (SCA)]. Here the administrator had originally given two reasons for rejecting the application and sought, on review, to rely on a new reason introduced for the first time in its answering papers. Cachalia JA noted for a unanimous court that in English law a decision that is invalid for want of adequate reasons cannot be validated by different decisions given later, as these may merely be part of an ex post facto rationalisation of a bad decision. Without deciding whether the position is the same in our law, he found that in this instance the administrator's failure to exercise its discretion properly or at all could not be remedied 'by giving different reasons after the fact'."

[29] In conclusion:[12]

(i) A completely new and contradictory case is being made out in the further affidavit effectively rendering the entire application before court a waste of time and resources; (ii) At the time that the application was made, the litigation was already in an advanced stage where the only outstanding issue was the presentation of oral argument; (iii) No exceptional circumstances have been raised

permitting the filing of a further affidavit. Certainly, no reasonable explanation is tendered as to why this "miscommunication"

was not discovered at an earlier stage; (iv) The new rationalization falls outside of the record that was filed in terms of Rule 53 of the Uniform Rules; and (v) Considering the balance of prejudice to both parties, I am of the view that the prejudice to the IEB far outweighs the prejudice that Umalusi will suffer if the affidavit is not permitted. The entire application has to a large extent been rendered obsolete: This is not the kind of prejudice that can be cured by a costs order,

especially where the wasted costs will have to come from the public purse; (vi) Lastly, despite having indicated to the IEB in correspondence that a substantive application for the postponement of the matter will be argued on 8 June 2020, no such application has been filed.

[30] In the event the following order is made:

The respondents' application for permission to file a further affidavit is dismissed with costs such costs to include the costs of two counsel where so employed.

A.C. BASSON

JUDGE OF THE

GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Applicant: Greg Fourie SC

Adv Irene de Vos

Instructed by:

Brian Bleazart Attorneys

Counsel for the Respondents: AG South SC

Instructed by:

Macrobert Inc

[1] Act 3 of 2000.

[2]Herbstein & Van Winsen Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (5th Ed) vol 1 at 434 citing Ogilvie Thompson JA in James Brown & Hamer (Pty) Ltd (previously named Gilbert & Hamer Co Ltd) v Simmons 1963 (4) SA 656 (A) at 660 D-F: "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."

[3] 1963

(4) SA 656 (A) at 660E-G: "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 (see e.g. authorities collated in *Zarug v Parvathie*, 1962

(3) SA 872 (N)). 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.”

[4] *Herbstein & Van Winsen supra* note 2 at 434 – 435: “Although the court may give leave to file further affidavits dealing with new matter in the

applicant’s replying affidavits, it will not do so where the affidavits sought to be filed do not constitute a reply but raise wholly fresh issues, entailing the filing of further affidavits by the applicant. If a party to an application files and serves certain affidavits and files additional affidavits before the other party has replied to them because there was not enough time to complete all of the affidavits before a fixed time or because new matter has been discovered or for any other good reason, a court will not reject the additional affidavits solely upon the basis of any alleged rule of practice against the filing of more than one set of affidavits. If there is an explanation that negatives mala fides or culpable remissness as the cause of the facts or information not being put before the court at an earlier stage, the court should incline towards allowing the affidavits to be filed. But there must be a proper and satisfactory explanation as to why it was not done earlier and, what is more important, the court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs.”

[5] 1932 EDL 139 at 143.

[6] *Herbstein & Van Winsen supra* note 2 at 434

[7] *Ibid.*

[8] 1929 AD 1.

[9] *Ibid* at 6-7.

[10] (2015) 36 ILJ 3045 (LC).

[11] *Administrative Law in South Africa* 2nd Ed (Juta) at 483.

[12] See in general: *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000

(4) SA 598 (C) at 616I-617J.

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