

SOUTH AFRICA / JUDGMENT

JDG Trading (Pty) Ltd v Black Sash Trust and Others (A3086/2019) [2023] ZAGPJHC 1004 (8 September 2023) [2023] ZAGPJHC 1004

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nyathi

CASE / FILE NUMBER

A3086/2019

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IN THE HIGH COURT
OF SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE
NO. A3086/2019
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
NOT REVISED
08.09.23

In the matter between:

J
D G TRADING (PTY) LTD
Applicant
And
BLACK
SASH TRUST
1st
Respondent
NATIONAL
CREDIT REGULATOR
2nd
Respondent
NATIONAL
CONSUMER TRIBUNAL
3rd
Respondent

In

Re: THE
NATIONAL CREDIT REGULATOR
Appellant
And
JDG
TRADING (PTY) LTD
1st
Respondent
THE
NATIONAL CONSUMER TRIBUNAL
2nd
Respondent
THE
BLACK SASH TRUST
3rd
Respondent

JUDGMENT

NYATHI J

A.

INTRODUCTION

- [1] This is an interlocutory application in terms of Rule 30 of the Uniform Rules to disallow and strike out a further replying affidavit filed by the BST, an amicus in the main application.

B. BACKGROUND CTO THE ISSUES

- [2] The application arises in the context of an appeal which the National Credit Regulator (“NCR”) is prosecuting against the applicant (“JDG”) in terms of section 148 of the National Credit Act, 34 of 2005 (“the NCA”) which provides an automatic right of appeal to this court.
- [3] Briefly, the NCR referred a complaint against JDG to the tribunal in 2015. The matter was finally heard and determined in favour of JDG on 8 July 2019.
- [4] The complaint revolves around the fact that JDG offers a packaged insurance product which responds to the consumer’s needs, as circumstances dictate. The insurance product is sold as a "package" or a "bundle" to a wide spectrum of consumers, which allows for cross-subsidization and therefore makes the bundle of insurance products more affordable. In fact, the bundle of insurance is more affordable for consumers than securing any of the individual elements of the insurance package would be. The NCR considers this to be "unreasonable".

- [5] Following the appeal and the exchange of heads of argument between the NCR and JDG, the First Respondent ("BST") sought to intervene as an amicus and also sought to adduce further evidence before the Court of appeal. JDG did not oppose BST's application to intervene as amicus, but it opposed the application to adduce additional evidence.
- [6] That opposed application culminated in the judgment and order of Her Ladyship Madam Justice Mia ("Mia J") dated 20 April
2021. The judgment and order handed down by Mia J permitted the BST to adduce certain evidence on appeal.
- [7] When BST was invited to adduce the evidence contemplated in the order of Mia J, it confirmed that it had already done so, and that the evidence it wished to adduce is the expert evidence contained in the report of Professor Harris, which was attached to its original papers in the application for leave to adduce additional evidence on appeal.
- [8] The applicant asserts that although Professor Harris's evidence was throughout billed as expert evidence, it contains various factual assertions and assumptions which did not form part of the evidence before the Tribunal, were therefore not considered by the Tribunal and which JDG had no opportunity to address. The unfairness and inappropriateness of introducing that evidence on appeal is manifest.
- [9] Moreover, certain of Professor Harris's "factual" assertions are unfounded and plainly incorrect and therefore required

a response from JDG, which was now faced with the incorrect factual averments for the first time. On that basis, JDG proceeded to respond to the report delivered by Professor Harris. It did so by the delivery of the affidavit of Mr Charl van Der Walt in which he, on behalf of JDG, responded to certain factual allegations (and assumptions) contained in Prof Harris's report. Attached to Mr Van Der Walt's affidavit is the affidavit (and report) of Mr Alexander Roux (the head of the Actuarial Control Function, Abacus Life Limited) who dealt with the actuarial assumptions and arguments raised in Prof Harris's report.

C. THE ISSUES IN DISPUTE

- [10] The delivery of the purported "Replying Affidavit" is the subject of the notice in terms of Uniform Rule 30(2)(b) ("the Notice") and ultimately the present application.
- [11] The BST alleges that its entitlement to deliver the Replying Affidavit arises "by operation of law". In addition, the BST contends that the Court which should make the determination of the admissibility of the Replying Affidavit is the appeal Court itself.
- [12] The Applicant contends that the delivery of the Replying Affidavit constitutes an irregular step, and that the BST is not permitted to deliver such additional evidence either in terms of Mia J's order, or by "operation of law".

- [13] In the circumstances, the Applicant seeks to have the "Replying Affidavit" struck from the appeal record so that the appeal can be finalized in an orderly manner.

D. APPLICABLE LEGAL PRINCIPLES

- [14] The starting point should be Rule 16A in terms of which the amici curiae get appointed as well as applicable case law.

- [15] In *Hoffmann v South African Airways*[1] the Constitutional Court framed the role and status of an amicus curiae as follows:

“An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation but believes that the Court’s decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position.”[2]

- [16] The applicant has already been admitted as an amicus by the order of Mia J.

- [17] The respondent alleges that the applicant is bringing new evidence on appeal and that this is an irregular step as contemplated in Rule 30 in the context of the applicant insisting on the delivery of a “Replying Affidavit”.

E. BACKGROUND AND CHRONOLOGY

- [18] This application arises in the context of an appeal which the National Credit Regulator ("the NCR") wishes to prosecute against JDG in terms of section 148 of the National Credit Act, 34 of 2005 ("the NCA").

- [19] Section 148 allows the NCR to prosecute an appeal against the decisions of the Tribunal as of right and without first seeking leave to do so[3].

- [20] This is of some relevance, since neither the Tribunal nor any Court has determined that there are any prospects of success of overturning the Tribunal's determination. JDG is of the view that there are no prospects of success on appeal and is prejudiced by the protracted appeal process, which is occasioned in the main by the efforts of the amicus to participate in the appeal on the basis of entirely new evidence and on grounds never advanced by the NCR.

- [21] The respondent having crossed the first and the main hurdle of gaining admission as an amicus should be permitted to make its submissions as envisaged in Rule 16A.

[22] This opened the gate for the applicant to make its submissions by way of affidavit before the appeal court. It goes without saying that it is that court that is clothed with the capacity to determine whether the applicant has made all the necessary allegations upon which it relies in its founding affidavit, or if it should exercise its discretion to allow new matter in a replying affidavit.

[23] It is trite that a party must make out its case in motion proceedings in its founding affidavit and that it will not generally be allowed to supplement such case by adducing supporting facts in its replying affidavit. In *Mostert and Others v FirstRand Bank t/a RMB Private Bank and Another*[4] the Supreme Court of Appeal reiterated that,

“...This, however, is not an absolute rule. A court may in the exercise of its discretion in exceptional circumstances allow new matter in a replying affidavit...”

[24] The SCA referred to its earlier decision in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others*[5] where the respondent in the appeal raised new matter in its replying affidavit in the proceedings in the court a quo. The SCA, in referring to the exceptional circumstances which may arise where a court in its discretion may allow new matter in reply,

distinguished (in paras 25 – 27 of its judgment) between circumstances where new facts are brought to light in reply for the first time but were known to the applicant at the time of deposing to the founding affidavit, and a situation where facts which are alleged in the answering affidavit reveal the existence or possible existence of a further ground for the relief which the applicant seeks.[6]

[25] With this application to strike out the entire replying affidavit, it appears to me that the applicant is proscribing the submission of relevant evidence which arose from its answer to Professor Harris’s report. Applicant thus seeks to constrain the amicus from rendering its submissions fully, especially having regard to Professor Harris’s report.

[26] As the pending appeal is in terms of section 148 of the NCA 34 of 2005 (as amended), the appeal court is best placed to consider the propriety of the replying affidavit before it or otherwise. This application seems out of place in the context of the pending appeal.

[27] The respondent has expended scarce resources in the public interest and ought not to be rendered out of pocket as a result of defending this application.

[28] In the result, I make the following order:

The application is dismissed with costs.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Johannesburg

Date of hearing: 04 May 2023

Date of Judgment: 08 September 2023

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 08 September 2023.

[1] Hoffman v South African Airways 2001

(1) SA 1 (CC) at 27H–28B; In re Certain Amicus Curiae Applications: Minister of Health v Treatment Action Campaign 2002

(5) SA 713 (CC) at 715E–G; Amardien v Registrar of Deeds 2019

(3) SA 341 (CC) at 361A–B.

[2] Erasmus – Superior Courts RS 17, 2021, D1-166.

[3] 'Section 148 provides as follows: "Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may - (a) apply to the High Court to review the decision of the Tribunal in that matter; or (b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138 or section 69 (2) (b) or 73 of the Consumer Protection Act, 2008, as the case may be."

- [3] 'Section 148 provides as follows: "Subject to the rules of the High Court, a participant in a hearing before a full panel of the Tribunal may - (a) apply to the High Court to review the decision of the Tribunal in that matter; or
- (b) appeal to the High Court against the decision of the Tribunal in that matter, other than a decision in terms of section 138 or section 69 (2) (b) or 73 of the Consumer Protection Act, 2008, as the case may be."
- [4] Mostert and Others v FirstRand t/a RMB Private Bank and Another 2018
- (4) SA 443 (SCA)
- [5] Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others 2013 (2) SA 204 (SCA)
- [6] Also referred to in Trustees, Bymyam Trust v Butcher Shop & Grill CC 2022
- (2) SA 99 (WC). See also Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976
- (2) SA 701 (D) at 704 – 705; Shephard v Tuckers Land and Development Corporation (Pty) Ltd (1) 1978
- (1) SA 173 (W) at 177G.

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Prepared on 10 October 2026 · Esheria