

SOUTH AFRICA / JUDGMENT

N M Scrap (Pty) Ltd v Transnet Ltd (45269/12) [2013] ZAGPJHC 86 (27 March 2013) [2013] ZAGPJHC 86

COURT

South Gauteng High Court, Johannesburg

BEFORE

E Molahlehi

CASE / FILE NUMBER

45269/12

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SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 45269/12

In the matter between:

N M SCRAP (PTY) LTD Applicant And TRANSNET LTD Respondent

Date of hearing: 13 March 2013

Date of judgment: 27 March 2013

Summary: Interlocutory application. Application to file additional affidavit after closure of pleadings and after judgement on the merits was reserved.

J U D G M E N T

MOLAHLEHI, AJ:

[1] This matter came before this Court on 30 January 2013 and after argument judgment was reserved. Thereafter, the respondent filed the present interlocutory application in terms of which it seeks leave to file a further affidavit in support of its defence to the main application of the applicant.

[2] The parties are in this matter referred as cited in the main application. The applicant opposed the application.

Background facts

- [3] The dispute in the main application arises from four separate written agreements concluded between the parties and relate to the purchase of scrap metal by the applicant from the respondent. In terms of each of the agreements the respondent was to remove the scrap metal from the various sites of the respondent and in turn to sell it to scrap merchandisers. The applicant contends that it has complied with the terms and conditions of each and everyone of the agreements by effecting payments as follows:
- a. 3 May 2012 an amount of R13 568,606.00.
 - b. 5 July 2012 an amount of R13 09,709.90.
 - c. 6 September 2012 an amount of R2, 800,172.77.
 - d. 1 November 2012 an amount of R132 927.50 the total amount being R33 600,000.00.
- [4] Following the conclusion of the four separate contracts a dispute arose between the parties regarding the amount and nature of the goods removed by the applicant in particular as concerning the removal at the site where the provisions of the first contract applied. In this respect the respondent accused the applicant of having removed items which did not fall within the definition of scrap metal. The matter was reported to the police who intervened and apparently impounded some of the applicant's containers including equipment.
- [5] It was as a consequence of the above that the respondent cancelled all the four contracts which cancellation the respondent accepted.
- [6] The applicant accepted the cancellation as repudiation of each of the contracts by the respondent. It was for this reason that the

applicant claimed restitution of the purchase price of all the contracts except for the first. In these proceedings and at

this stage the applicant does not claim restitution of the purchase price of the first contract. It is apparent that at the time of the cancellation of the contracts the applicant had already processed and sold a significant amount of the scrap from the site where the provisions of the first contract were applicable.

- [7] The respondent contends in the answering affidavit that it is entitled to withhold the payments of the purchase price pending the outcome of the investigation into the extent to which the applicant's employees have removed items which are not included in the contracts. In this regard the respondent alleges that the applicant's employees in removing scrap metal which they were entitled to in terms of the contract also removed other goods belonging to it which they were not supposed to remove.
- [8] As indicated earlier at this stage the applicant is not challenging the retention of the purchase price in as far as the first contract is concerned. The applicant contends that in as far as the second, third and fourth contracts are concerned it is entitled to restitution

because it had not yet commenced with the removal of the scrap metal at the time the respondent cancelled the contracts.

[9] In the interlocutory application the respondent as stated earlier seeks leave to file an additional affidavit to deal specifically with the issue of whether there was removal of scrap metal or any other goods not covered by the agreements at the other sites that would include the second, third and fourth contracts. The respondent says it failed in its answering affidavit to deal with the issue of whether the applicant had started removing scrap metal and other goods in the sites where the three other contracts apply because the investigation in that regard was incomplete and was thus unable to quantify its damages in relation to those goods which the applicant removed when it was not entitled to do so. In other words the evidence which the respondent wishes to introduce through the additional affidavit has to do with the allegation concerning the extent to which the applicant had at the time of the cancellation of the agreements, processed the removal of the goods under each of the contracts and what the value of the goods are.

Legal principles

[10] The general rule in motion proceedings is that three sets of affidavits are allowed and no further affidavits will be allowed once pleadings are closed.[1] The exception is however that additional affidavit/s may be allowed where special circumstances so dictates or where it is in the interest of justice to do so. In considering whether additional affidavits should be allowed after the closure of the pleadings the Court exercises a judicial discretion which it does by balancing the application for allowing additional affidavits with prejudice that the other party may suffer if the filing of additional affidavit is allowed.[2] The purpose of motion proceedings being expeditious dispute resolution has to also be taken into account when considering an application for leave to file additional affidavit.[3] However, speed, inflexible and strict rule application cannot be allowed to undermine the interest of justice and deprived the

applicant the opportunity to fully ventilate the issues between parties.[4] In this respect it was held in *James Brown & Hamer (Pty) Ltd v Simmons N.O*,

[5] that:

“It is in the interest 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 the 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.”

- [11] It is also important that consideration should be given to addressing any prejudice that arises as a result of the filing of an additional affidavit. In a case where a costs order can address the prejudice to be suffered if permission for filing additional affidavit is granted the Court should be slow in refusing permission for additional affidavit. It needs, however to be emphasised that permission to file additional affidavit should not be granted where the explanation for the request to file additional affidavit is unreasonable.
- [12] The approach to be adopted when dealing with the issue of additional affidavit after closure of pleadings received attention in

Standard Bank of South Africa v Sewpersadh and Another,[6] where the Court held that:

"[10] The Court will exercise its discretion to admit further affidavits only if there are special circumstances which warrant it or if the Court considers such a course advisable. In *Bangtoo Bros and Others v National Transport Commission and Others* 1973 (4) SA 667, it was held among other things that a litigant who seeks to serve an additional affidavit is under a duty to provide an explanation that negatives mala fides or culpable remissness as the cause of the facts and/or information not being put before the Court at an earlier stage. There must furthermore be a proper and satisfactory explanation as to why the information contained in the affidavit was not put up 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."

- [13] The applicant's counsel argued in opposing this application that the step taken by the respondent of seeking to file further

affidavits after the matter had been argued and judgment reserved was extraordinary and unusual and should for that reason be dismissed. It was further argued that allowing the respondent to file a further affidavit would be unfair on the applicant in the context where the matter has already been argued and judgment was reserved.

- [14] The other point made on behalf of the applicant is that the application to file a further affidavit should be dismissed because the respondent has failed to provide the details about the investigation regarding the removal of goods in relation to the three other contracts.
- [15] There can be no doubt that the step taken by the respondent is unusual, as a request, such as this ordinarily, ought to have been made after the closure of the pleadings. There can also be no doubt that the applicant is prejudiced by this approach. However, the fact that the application is made after the closure of the pleadings and after judgement was reserved is not determinative of whether permission to file additional affidavit should be granted or not. The request made after the merits of the matter had been argued and judgment reserved, does indeed require of the applicant to place a compelling explanation as to why the application is made so late.
- [16] In the circumstances of this case and in applying the relevant test, it is my view that the correct and the advisable approach to adopt is that of allowing the filing of the additional affidavit in the interest of justice and ensuring full ventilation of the issues. In this regard I

am satisfied that the explanation proffered by the respondent as to why the need for filing a further affidavit is reasonable and acceptable. The explanation is reasonable when regard is had to the broad context of this matter and more particularly when regard is had to the approach adopted by the plaintiff with regard to the first contact. The applicant has not challenged the respondent with regard to its retention of the purchase price in as far as the first contract is concerned. It would appear on face value that the applicant is prepared to wait until the alleged damages suffered as a result of the alleged additional goods removed by its employees are determined. In relation to the three other contracts the respondent states that it was still conducting an investigation to determine if at all its property which is not subject of the purchase of the scrap metal has been removed from the sites where the three contracts applies. It was pointed out during the hearing of this hearing that the affidavit in question has been served on the applicant. It was not yet filed in Court.

- [17] In light of the above I am persuaded that the explanation proffered by the respondent as to the need for additional affidavit is neither mala fides nor due to culpable remissness on the part of the respondent.
- [18] The prejudice suffered by the applicant arising from the delay in bringing the application by the respondent can be addressed in my view through the awarding of costs. The briefing of two counsels by the plaintiff in this matter is not unreasonable in my view.
- [16] In the premises the following order is made:
1. The respondent is granted leave to file an additional affidavit to its answering affidavit.
 2. The respondent shall file its additional affidavit within 5 days of date of this order.
 3. Applicant shall, if it so wish, file a replying affidavit to the additional affidavit within 5 days from the date of the filing of the additional affidavit.
 4. The matter is postponed to a date to be arranged with the Registrar.
 5. The respondent is to pay the wasted costs of arguing the main application including two counsels.

` E MOLAHLEHI

ACTING JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

Appearances:

FOR THE APPLICANT: Adv T V R Du Plessis SC with RJ De Beer instructed by TG Bosch Attorneys.

FOR THE RESPONDENT: Adv Sony SC instructed by Raborifi Inc Attorneys.

- [1] See *Africa Oil (Pty) Ltd v Ramadan Investments* 2004 (1) SA 35 NPD the Court held at 38 I – J, that special circumstances that may warrant the permission for additional

affidavits is where for instance something unexpected happened or something new emerges from the applicant's replying affidavit.

[2] See *Distell Limited v Commissioner for the South African Revenue Service* (16910/2009) [2011] ZAGPPHC 83 (2 June 2011).

[3] See *Stein Brothers Ltd v Dawood and Another* 1980 (3) SA 275 at page 282.

[4] In *Simmons NO v Gillbert Hamer and Co Ltd* 1963 (1) SA (NPD) 897 at 906, the Court held: "I believe that it is desirable not to be bound inflexibly to rules of procedure unless compelled to this by the clear language of the law, and that the present day tendency is away from formalism in procedure and in the direction of assuring that justice is done by allowing, whenever necessary, amendments to pleadings and the admission of further evidence, whether oral or on affidavit, subject to the absence of prejudice to the other party not remediable by an appropriate order as to costs.

[5] 1963

(4) SA 656 (AD).

[6] 2005

(4) SA 148 (CPD) at paragraph [10].

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