CASE NO.: (P) A 104/2005

SUMMARY

MAUNO HAINDONGO t/a Onawa Wholesalers

versus

AFRICAN EXPERIENCE (PTY) LTD t/a Fred Mac Energy Resources

SILUNGWE, J.

2005.07.26

PRACTICE – Applications and motions – Affidavits – Number of sets to be observed – However, Court may, in its discretion, allow filing of further affidavits - Affidavits tendered out of sequence and time – What party needs to show for such affidavits to be admitted – Party's failure to give satisfactory explanation which negatives culpable remissness as to why information/evidence could not be put before Court at an earlier stage – Application to admit affidavits filed out of sequence and time dismissed.

CASE NO.: (P) A 104/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MAUNO HAINDONGO
Applicant
T/a ONAWA WHOLESALERS

and

AFRICAN EXPERIENCE (PTY) LTD
Respondent
T/a FRED MAC ENERGY RESOURCES

CORAM: Silungwe, J.

Heard on: 2005.06.07

Delivered on: 2005.07.26

RULING

SILUNGWE, J.: On July 26, 2004, a summary judgment in the sum of N$1,903 249.53 was given in favour of the respondent in respect of monies lent and advanced to the applicant. It is common cause that the respondent paid the sum of Z$15,172,324.60 to the National Railways of Zimbabwe for cement storage charges at the request, and on behalf, of the applicant. Dissatisfied with the turn of events, the applicant lodged an appeal to the

Supreme Court (which is still pending); and subsequently applied to this Court for rescission of the summary judgment. In the application for rescission of the said judgment in these proceedings, both the applicant and the respondent have each raised points *in limine*.

Mr Frank, SC, assisted by Mr Corbett, is representing the applicant and Mr Hinda is representing the respondent.

Starting with the applicant, his first point *in limine* is that the respondent's answering affidavit filed on April 1, 2005, ought to be struck from the record on the ground that it was not duly attested and authenticated by a Notary Public as required by Rule 63(2)(e) of the Rules of the Court. Mr Frank submits, however, that as the applicant has dealt with the point in his replying affidavit, there can be no prejudice to him; hence, this point *in limine* will no longer be pursued. It follows that the now duly authenticated answering affidavit will be, and is hereby, admitted.

The second point is that the respondent's supplementary affidavit filed on April 13, 2005, should be struck out as it was filed out of sequence and time, it constitutes a fourth set of documents, and was not duly attested or authenticated. That being so, argues Mr Frank, the supplementary affidavit does not form part of the respondent's answering affidavit. In any case, Mr Frank continues, the disputed affidavit (to which is annexed a copy of the Herald Business, a Zimbabwean newspaper, relating to an impugned rate of

exchange) would not take the dispute between the parties any further as it has to do with imported goods which are not relevant here since the goods in question were exported from Zimbabwe to Namibia.

The sole issue that falls to be decided at this stage is whether or not the Court should admit, as part of the record, a fourth set of affidavits tendered by the respondent. It is settled law that in deciding such an issue, the Court has a discretion which is exercisable judicially.

In *James Brown & Hammer (Pty) Ltd v Simmons, N.O.* 1963 (4) 656 the Appellate Division made the following comments 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 observed: 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."

And, in an earlier case of *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599, Williamson, J., had this to say at 604A-E:

> It was contended in argument that I really have no discretion on the question of the admission of these further affidavits because authority had decided that a further set of affidavits can only be admitted, firstly, if they are necessary to answer new matter raised in the applicant's affidavits, or secondly, if the information or evidence was not available to the respondent when the first set of affidavits was filed. No new matter was raised in the answering affidavits of the applicant nor was it sought to answer only alleged new matter. Secondly, it was contended, the information or evidence was at all times available to the respondent in its records. The fact that it was not present to the minds or known to the officials presently dealing with the matter, did not constitute a compliance with the second or alternative requirement to be satisfied before fresh affidavits could be filed. In my view the authorities do not restrict the discretion of the Court in the manner suggested. I think that if there is an explanation which negatives *mala fides* or culpable remissness as the cause of the facts or information being put before the Court at an earlier stage, the Court should incline towards allowing the affidavits to be filed. As in the analogus cases of the late amendment of pleadings or the leading of further evidence in a trial, the Court tends to that course which will allow a party to put his full case before the Court. But there must be a proper and satisfactory explanation as to why it was not done earlier, and, what is also important, the Court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs. In the present instance there is a completely satisfactory explanation as to why the affidavits containing new facts were not filed earlier; there is no suspicion of *mala fides* and I find no culpable remissness. No prejudice to the applicant which cannot be remedied by wasted costs being awarded it, has been suggested."

See: *Cohen, N. O v Nel and Another* 1975 (3) SA 963, where Franklin, J. aptly made the following observations at 966B:

> "On any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit is always an important factor."

Generally, see also: *Karpakis v Mutual & Federal Insurance Co. Ltd* 1991 (3) SA 489 at 503F-504E.

The observations expressed in the cases above are salutary.

From the foregoing cases, the following principles are perceptible:

1. the benchmark rule is that three sets of affidavits are allowed, namely: founding/supporting affidavits, answering affidavits, and replying affidavits;

2. however, the Court may, in its discretion, allow the filing of further affidavits , for instance, in application or motion proceedings;

3. leave to file further affidavits, out of sequence, may be allowed, for example, where there was something unexpected in the applicant's replying affidavits or where a new matter was raised, or where the information/evidence was not available to the respondent (or could not be made available) when the founding affidavits were filed and before the answering affidavits could be filed;

4. the applicant must give a satisfactory explanation which negatives *mala fides* or culpable remissness as to why the information/evidence could not be put before the Court at an earlier stage; and

5. the Court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs.

In *casu,* it is not in dispute that the respondent's supplementary affidavit was not only out of its proper sequence but it was also late. It is neither alleged nor shown by the respondent that the information sought to be admitted is required to answer a new matter raised in the applicant's replying affidavits. In addition, it is not alleged or shown that such information could not be made available by the time the answering affidavits were filed. It is common cause that the respondent has provided an explanation. The question that needs to be answered is whether the respondent has given a satisfactory explanation that negatives *mala fides* or culpable remissness as to why what is sought to be done now was not, or could not have been, done at an appropriate earlier stage.

The relevant part of the respondent's explanation (in his supplementary affidavit) is in these terms:

> "3. I deposed to the answering affidavit in this matter on 1st April, 2005. At that stage my attorneys and I were in a hurry to file the papers for hearing before the Supreme Court on 5th April, 2005.

The matter in the Supreme Court was postponed to the 24th June, 2005.---"

And in his supporting affidavit, deposed on June 3, 2005, Mr Patrick Kauta, the respondent's attorney of record, averred, *inter alia,* as follows:

"4. The Applicant was put under pressure to answer this voluminous application quickly in order for the matter to be heard on the 5th day of April 2005. The Applicant took up the challenge and duly answered.

5. …

6. Nevertheless, due to the hastiness in which I prepared the Answering Affidavit of the Applicant, I could not get a copy of THE HERALD which is a Zimbabwean newspaper indicating the correct and legal exchange rate. I received annexure "A" to the Supplementary Affidavit on the 13th day of April 2005 at 11h00. As a result, I telephonically consulted with Applicant and thereafter drafted the Supplementary Affidavit. The next day, the 14th day of April 2005, the Supplementary Affidavit was filed.

7. In the circumstances of this case, the Supplementary Affidavit is of vital importance. It disposes and negates the Respondent's defence, which emanate from Mr Stritter and Nedbank.

8. There was no remissness on my part and as soon as I got hold of the newspaper copy, which supported the Applicant's contention, it was filed within 30 hours."

From the affidavits of the respondent and of his attorney, it is apparent that the question of *mala fides* does not arise. But it is necessary to consider whether the explanation put forward negatives culpable remissness. Evidently, the significance of the respondent's supplementary affidavit pertains to Annexure "A": The Herald Business newspaper of Zimbabwe which was apparently published on Thursday, October 2, 2003."

No explanation has been advanced as to why a copy of The Herald Business newspaper could not have been obtained any time after the date of its publication up to April 1, 2005, when the answering affidavit was filed. It is common cause that the respondent served his summons on the applicant in February 2004; that the applicant filed his notice of intention to defend on March 2, 2004; that on march 19, the respondent filed an application for summary judgment which was heard on April 19; that a reserved judgment was delivered on July 26; that on August 24, the applicant noted an appeal to the Supreme Court; that the set down for the appeal was April 5, 2005; and that on March 22, 2005, the applicant filed an application for rescission clearly showing in his founding papers that the heart of the dispute was the applicable rate of foreign exchange. In my view, this is a clear illustration of culpable remissness on the part of the respondent and his attorney. It may well be that a possible reason for the respondent's failure to obtain a copy of The Herald Business newspaper at an earlier stage and to thus append it to his answering affidavit, is because of the fact that, from the outset, his case had hitherto been founded on an alleged contractual relationship between

the parties regarding the applicable rate of foreign exchange. This allegation was expressly disputed by the applicant. In my view, the explanation tendered by the respondent is, in the circumstances of this case, of no account as it is no more than a lame excuse and, consequently, I have no hesitation in finding it unsatisfactory. In the light of this conclusion, it is unnecessary to consider any of the other issues raised in respect of this point.

This brings me to Mr Hinda's points *in limine*. The first one concerns an alleged absence of an index and of the pagination of the record. This point, however, now stands abandoned as both indexing and pagination were, in reality, duly done.

The respondent's second point is that paragraphs 28 and 29 of the applicant's affidavit be struck out on the basis that they allegedly constitute inadmissible hearsay. This point has not been ventilated in oral argument and it is thus reasonable to assume that the point is, by implication, abandoned.

The respondent's third and final point calls for the striking of confirmatory replying affidavits by Jan Albert Strydom, Heiko Wilfred Stritter, Axel Manfred Stritter, Emma Haiduua, Michael Pienaar and Godfrey Diergaardt and Ndamona David, as the said affidavits allegedly contain new matter, constitute an attempt to supplement an incomplete founding affidavit and make out the applicant's case in reply.

It is here apposite to examine what gives rise to the point at issue so as to assess whether the challenged confirmatory replying affidavits contain a new matter, are an attempt to supplement an incomplete founding affidavit, and make out the applicant's case in reply. The pertinent paragraph in the applicant's founding affidavit is paragraph 30 and it reads:

> "Whilst I was initially advised that I should pursue this matter on the basis of an appeal which was lodged by my legal representative of record with the Supreme Court of Namibia on 24 August 2004 and that I should not proceed to obtain rescission of judgment, I have subsequently been advised that it would be appropriate to bring this application. This is the reason why I did not apply for rescission of judgment at an earlier stage and I submit that, in all the circumstances, this application has been brought within a reasonable time."

In reply to that, the respondent averred as follows in paragraph 24 of his answering affidavit:

> "I deny that the negligence or inefficiency of counsel is a ground for rescission of judgment and also that the application was brought within a reasonable time. This application is brought within 330 days later and the applicant failed to make out a case for *(sic)* rescission."

An examination of the record shows that, apart from Messrs Heiko Wilfred Stritter and Jan Albert Nicholaas Strydom, the rest of the applicant's confirmatory replying affidavits simply confirm the correctness of all the references made to the deponents in his replying affidavit and to the steps that the deponents have taken in the matter, and the manner in which the matter has been handled by them. On the other hand, the affidavits by Messrs. H. W. Stritter and J. A. N Strydom principally strive to explain why the rescission application was not brought earlier. These are the affidavits that Mr Hinda is urging the Court to strike out for the reasons already stated.

Mr Frank, however, submits that all the confirmatory replying affidavits relate to an issue, raised by the respondent, of an alleged unreasonable delay in launching the application for rescission of the summary judgment. He maintains that the issue is raised in paragraph 30 of the applicant's founding affidavit which is merely a narrative of events and has nothing to do with the applicant's cause of action or the bolstering of his case. He thus implores the Court to dismiss this point *in limine.*

Having read the papers and heard both learned counsel on the matter, my conclusion is that Mr Frank's argument finds favour with me for I am inclined to the view that the point at issue is covered in paragraph 30 of the applicant's founding affidavit, that as such, the challenged affidavits do not contain a new matter, do not constitute an attempt to supplement an alleged incomplete founding affidavit and neither do they make out the applicant's

case in reply. However, even if the confirmatory replying affidavits were to be construed as containing a new matter (which I do not), the deponents thereof were entitled to respond, as they did, to matters raised in the respondent's answering affidavit. See, for instance, the decision of Lichtenberg, J in *Karpakis v Mutual & Federal Insurance Co Ltd, supra*, wherein he said at 504C-D:

> "In so far as the facts set out in (g) above can be said to be new matter – although they, strictly speaking, relate to plaintiff's financial position which is relevant to 'good cause' – and can be said to be new matter to her replying affidavit, the replying affidavit is, after all, in response to a defence raised by respondent in its opposing affidavit, namely that applicant has not shown good cause at all."

It follows that the respondent's third point *in limine* can not succeed.

In the result, I make the following order:

1. the applicant's second point *in limine* is upheld and consequently, the respondent's supplementary affidavit filed on April 13, 2005 is struck out;

2. the respondent's third point *in limine* is dismissed;

3. the respondent is condemned in costs.

SILUNGWE, J.

ON BEHALF OF THE APPLICANT: **Adv. T. J. Frank, SC**

Assisted by Adv. A. Corbett

Instructed By: **Engling, Stritter & Partners**

ON BEHALF OF THE RESPONDENT: **Adv. G. S. Hinda**

Instructed By: **Kauta, Basson & Kamuhanga Inc.**