IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – MTHATHA) CASE No: 1899/12

In the matter between:

NAKISA SERVICE STATION

and

BS TITUS HOLDINGS (PTY) LTD

JUDGMENT

BROOKS AJ

INTRODUCTION

[1] The applicant is a close corporation which has launched an urgent application against a company. It seeks leave to proceed in terms of Rule 6 (12) of the Uniform Rules of Court, a spoliation order in respect of all the property situate at 5 Richardson Road, Dutywa, ("the premises"),a final interdict against the respondent and any persons acting on its behalf or under its authority associated with free and undisturbed use of the premises; and a costs order on the scale as between attorney and client.

[2] The application is opposed. A full set of affidavits has been filed.

BASIS OF OPPOSITION

[3] One of the bases of the opposition to the application is that the applicant has failed to make out a case in its founding affidavit, and that the application should be dismissed in the result

[4] In similar vein, the opposition criticises the absence of any allegation on the founding affidavit demonstrating that the applicant resolved to bring the present proceedings. In reply the applicant annexes an appropriate resolution to the replying affidavit.

THE FOUNDING AFFIDAVIT

[5] In the founding affidavit the applicant alleges the spoliation by a group of persons led by the director of the respondent, one Philiso Titus. The founding affidavit contains allegations relating to the involvement of this person as communicated to the deponent by one Sotondoshe. The latter files a brief confirmatory affidavit, which contains no independent allegations of substance.

In answer the respondent, through its director, denies any involvement with the spoliation. Its director states under oath, that she was nowhere near the premises on the day in question being at work all day in Ngcobo. In reply the applicant confesses that it transpires that the individual identified as the director of the respondent leading the group in fact is that person's grandmother, one Zingisa Titus. The replying affidavit further annexes three confirmatory affidavits.

5.1 The first by one Mpingelele Nteleza confirms an allegation in the replying affidavit to the effect that Zingisa Titus is well known to her and was seen by her leading the group who welded the entrance to the premises shut.

5.2 The second is in identical terms by one Mpateli Maki who confirms the same observation.

5.3 The third is by one Patrick Sitonana Mapoyi who is alleged in the replying affidavit to have provided the welding services at the request of Zingisa Titus. Importantly this is recorded in the replying affidavit as being something that Mapoyi told the deponent. A copy of a relevant invoice is attached.

[6] It is the applicant's argument that the error in identification is irrelevant. The deponent relies on the assertion in the replying affidavit that the circumstantial evidence points to an involvement on the part of the respondent to the exclusion of any other reasonable probability. Nothing connects Zingisa Titus to the respondent but conjecture. This is based upon a family connection and perhaps a history that the late husband of Zingisa Titus was a former director of the respondent. It is trite that an applicant must make out a case in the founding affidavit. **National Council of Societies for the Prevention of Cruelty to Animals v Openshaw 2008 5 SA 339 (SCA) at 349 A to B**. The case in the founding affidavit is the case which the respondent is called upon to meet. The applicant must stand or fall by its petition and the facts alleged therein. **Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 635 H**. There is good and obvious reason for this. In an application for final relief such as the present, particularly involving an interdict, the Court will consider the entitlement to such relief upon a consideration of the facts alleged in the founding affidavit which are admitted by the respondent in the answering affidavit and the facts alleged by the respondent therein **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634**.

National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at 290 D to E.

[7] Mr Levine who appears on behalf of the applicant, contends that this matter falls into the open category of exceptional cases, where the rule regarding the need to make out a case in the founding affidavits can be relaxed. This obviously is within the discretion of the Court. He argues that the urgency in the matter, and the nature of the error, and the explanation offered therefor in the replying affidavits, are factors of assistance to the applicant in seeking such indulgence. Reliance is placed on **Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd 1984 (3) SA 202 (T),** a full bench decision, in which on appeal the fate of an application to strike out a replying affidavit in sequestration proceedings was reconsidered. In that matter new material raised in the answering affidavit prompted the new material to be introduced by the applicant in reply. The respondent in the matter sought leave to file a further affidavit. The application for leave to introduce a further affidavit was apparently overlooked in the court a quo and the application to strike out the new material in the replying affidavit was granted. The appeal Court held that the decision ought to have been different with leave being given to file the

further affidavits from the respondent, consequent upon the application seeking such leave and the concomitant dismissal of the application to strike out.

[8] Plainly the circumstances in this matter are different. Whilst the Court may be more lenient where new material is introduced into the replying affidavit as a consequence of allegations made on behalf of a respondent in an answering affidavit, at the end of the day the enquiry remains whether or not the applicant knew of the facts at the time when the founding affidavit was prepared and simply didn't include them, or ought reasonably to have ascertained them before launching proceeding. **Driefontein Consolidated GM Limited v Schlochauer 1902 TS 33 at 38**. I am of the view that in this matter the applicant has failed to make out a case in its founding papers. The manner in which it is essentially based on hearsay allegations is not assisted by a confirmatory affidavit, which itself contains no allegations of substance. The crucial information potentially linking the mischief complained of to the respondent is demonstrated in the answering affidavit to be incorrect. The respondent met the case it was called upon to meet without the benefit of the full period of time normally afforded a respondent by the provisions of Rule

6 of the Uniform Rules of Court. It did so in a satisfactory manner. I am of the view that there is substance in the argument advanced by Mr Zilwa who appeared on behalf of the respondent to the effect that one would have expected the applicant to make certain of the facts which were communicated to it by the deponent who deposed to the confirmatory affidavit in the founding papers, before embarking upon the issue of the urgent application with important consequences

ABSENCE OF RESOLUTION

[9] It is incumbent upon an applicant which is a legal persona such as a company or close corporation to place evidence before the Court that the applicant has resolved to institute proceedings, and that the proceedings are instituted at its instance. For obvious reasons this should be set out in the founding affidavit. **Mall Cape (Pty) Limited v Merino Ko□perasie Beperk 1957 (2) SA 347(C) at 351 H**. The complete absence of any reference to this in the founding affidavit is different from a situation where a Court may permit presentation of the evidence of such a resolution as an annexure to the replying affidavit clarifying a challenge raised in the answering affidavit. Where the basic allegation as to its

existence has been made in the founding affidavit but the respondent challenges the veracity of it is a circumstance different from the one before me. **Moosa and Cassim NNO v Community Development Board 1993 SA 175 (A) at 180 H to 181 C**.

FINAL RELIEF

[10] The factual allegations in the founding affidavit, which are admitted in the answering affidavits, as read with the allegations in the answering affidavits do not entitle the applicants to final relief, either for a spoliation order or a final interdict against the respondent. A Court will not permit an applicant to make out a case in reply, where no case at all was made out in the original application. **Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd 1980 (1) SA 313 (D) at 316 A**. I am unable to accede to the invitation extended by Mr Levine to draw reasonable and necessary inferences from the skeleton of the founding affidavit to the benefit of the applicant. I am of the view that an equal number of reasonable inferences are available to be drawn in favour of the argument advanced by Mr Zilwa on behalf of the respondent, indicating that Zingisa Titus may well have been on a

frolic of her own unconnected with any direction or control emanating from the respondent. Obviously the existence of reasonable and possible inferences which are adverse to those sought by the applicant must cancel out the equation.

COSTS

[11] What remains is the issue of costs. The applicant sought costs on a scale as between attorney and client. In seeking the dismissal of the application the respondent seeks a similar costs order. The Court has a wide discretion to make an appropriate costs order including an attorney and client costs order, which is punitive in nature. The exercise of this discretion depends upon the facts and circumstances of the matter. **Rail Commuter Action Group v Transnet Ltd t/a Metro Rail No 1 2003 (5) SA 518 (C) at 589 F to G**. I am not persuaded that such an order would be appropriate in the circumstances of this matter. Whilst I find myself unable to find in favour of the applicant on the basis of the fundamental error in the papers, I do not consider that the decisions made in the conduct of the matter thereafter amount to anything more than perhaps errors of judgment, which would not attract the censure of this

Court.

ORDER

[12] In the result the following order will issue:

1. The application is dismissed.
2. The applicant is directed to pay the costs of the application on the scale as between party and party.

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R.W.N. BROOKS

JUDGE OF THE HIGH COURT (ACTING)

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(EASTERN CAPE DIVISION - MTHATHA) CASE No : 1899/13

In the matter between:

NAKISA SERVICE STATION

and

B S TITUS HOLDINGS (PTY) LTD

PRESIDING JUDGE	:	BROOKS AJ
ON BEHALF OF THE APPLICANT	:	ADV LEVINE
ON BEHALF OF THE DEFENDANT	:	ADV ZILWA
INTERPRETER	:	NOT STATED
STENOGRAPHER	:	MS J NOMKUSANE

CONTRACTOR : IKAMVA VERITAS TRANSCRIPTION SERVICES CONSORTIUM

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