

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 029983/2023

- (1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No
(3) REVISED: Yes / No

Date: 04 June 2024

WJ du Plessis

In the matter between:

GARNNETT-ADAMS PROPERTIES (PTY) LTD APPLICANT

and

THOMAS FANAHAH KENNY RESPONDENT

JUDGMENT

DU PLESSIS AJ

[1] In this application the Applicant seeks a final sequestration order of the Respondent's estate, which the Respondent opposes. A provisional sequestration order was granted on 23 May 2023. On 27 November 2023, the Respondent was granted leave to file his answering affidavit to oppose the final sequestration order, to which the Applicant replied.

[2] Thus, the court was initially tasked with determining whether the Provisional Order should be made final. Whether such sequestration would be to the advantage of the Respondent's creditors is at the core of the application. It is

unnecessary to go into the details of the merits of the sequestration application, as on the hearing date, I was asked first to determine whether to grant the Respondent leave to file a supplementary affidavit.

- [3] The Applicant's claim originates from an order by Maier-Frawley J on 11 October 2022 for a judgment which remains unsatisfied. The Applicant tried to prosecute the application but could not do so on the movable property of the Respondent, as evident from the Sheriff's a *nulla bona* return. The Applicant now wants to execute against the Respondent's residential property.
- [4] The Respondent argues that the sequestration would not be to the advantage of the creditors because the house in which he lives has a mortgage bond registered over it, and should his house be sold at public auction, the only creditor that will benefit is the bondholder. The Applicants contend that the value of the property is more than the outstanding amount and that, for that reason, there will be at least some benefit to the creditor. The Respondent disputes this. This places the issue of the property's value and the outstanding bond amount at the centre of the dispute.
- [5] There is also a dispute regarding the amount of about R16 000 that the Respondent receives as a monthly "income" and the source of that money. The Respondent, therefore, hopes that the appointment of a trustee would help investigate the source of this income.
- [6] To help clarify the bond issues, the Respondent filed a notice to file a supplementary affidavit, referred to as a "supplementary answering affidavit", on 30 April 2024. The Applicant then filed a notice of intention to oppose the filing of a supplementary affidavit filed on 9 May 2024, along with what it terms an answering affidavit to the Respondent's supplementary answering affidavit to set out their reasons for opposing it. The Respondent then replied to this on 14 May 2024.
- [7] The Respondent's supplementary affidavit sets out the precise amounts owing on 31 January 2024, along with other liabilities of the Respondent. The Respondent also addresses the issue of the "income" raised in the Applicant's

replying affidavit. The affidavit states that it is important for the court to have this information to have the complete picture, allowing time for the Applicant to reply if they so wish.

- [8] The Applicant's main reasons for opposing the filing of the supplementary affidavit are that it was done 12 court days before the hearing, that the provisional order was granted on 23 May 2023 and that the return date has been extended several times, and that the evidence the Respondent seeks to introduce was always in his possession. The Applicant denies that it raised new issues in their replying affidavit and that it only pointed out shortcomings in the Respondent's answering affidavit. The Applicant alleges that the supplementary affidavit is an attempt to relieve the pinch of the show because of the shortcomings in the Respondent's answering affidavits. The Respondent denies most of this.
- [9] On 20 May 2024, the day before the hearing, the Applicant themselves applied for leave to file their own supplementary (answering) affidavit, presumably to introduce evidence to rebut what the Respondent raised in *their* supplementary affidavit. After addressing the court on this matter, and after the Respondent stated that should this supplementary affidavit be allowed, the matter is not ripe for hearing. The Applicant then promptly withdrew the notice to file a supplementary affidavit.
- [10] While the parties could seemingly not agree on many things, they agreed that the first issue that must be decided was whether the court would give leave to the Respondent to file a supplementary answering affidavit.
- [11] I asked both parties to address me on the way forward, should I permit the filing of the supplementary affidavit. The Applicant requested that if the supplementary affidavit be permitted, they would like to be granted the opportunity to reply to it – therefore, the return date should be extended. The Respondent contends that notwithstanding the withdrawal of the Affidavit, the fact that the content of the Applicant's supplementary affidavit was discussed requires them to respond appropriately. That, of course, is not necessary. A

court can only decide applications on the papers placed before it. Therefore, any evidence a party wishes to place before the court must be considered and contained in the papers. These are the only facts that the court can consider when coming to a decision.

- [12] I now turn to whether the supplementary affidavit should be permitted.
- [13] Rule 6(5)(e) provides that “[w]ithin 10 days of the service upon the respondent of the affidavit and documents referred to in subparagraph (ii) of paragraph (d) of subrule (5) the applicant may deliver a replying affidavit. *The court may in its discretion permit the filing of further affidavits.*” (own emphasis)
- [14] In motion proceedings, there are normally three sets of affidavits.¹ It is within the court’s discretion whether to permit the filing of further affidavits. In exercising this discretion, the court must keep in mind that a matter should be adjudicated on with all the facts relevant to the issue in dispute.²
- [15] Still, whether a further affidavit may be filed remains in the court’s discretion, and a party seeking to do so must obtain leave from the court.³ If the affidavits are filed without leave from the court, then the affidavits can be ignored.⁴ It is generally required that the number of sets and the proper sequence of affidavits should be followed, although some flexibility is allowed.
- [16] In making the decision, the question of fairness to both sides should be considered. The parties must explain why the facts or information had not been put before the court at an earlier stage, and there should be no prejudice caused by the filing of the additional affidavits which cannot be remedied by an

¹ *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at 153G–H. See in general Erasmus *Superior Court Practice Volume 2: Uniform Rules and Appendices* D1 Rule 6 -31.

² *South Peninsula Municipality v Evans* 2001 (1) SA 271 (C) at 283A–H.

³ *Hano Trading CC v JR 209 Investments (Pty) Ltd* 2013 (1) SA 161 (SCA) at 165A–C,

⁴ *Standard Bank of SA Ltd v Sewpersadh* 2005 (4) SA 148 (C) at 153H–154J.

appropriate cost order. There are various factors that the court will consider when deciding, namely:⁵

- i. The reason the evidence was not produced timeously;
- ii. The degree of materiality of the evidence;
- iii. The possibility that it may have been filed to “relieve the pinch of the shoe”;
- iv. The balance of prejudice to the applicant if the application is refused in relation to the prejudice to the respondent if it is granted;
- v. The stage of the litigation;
- vi. The possibility of an appropriate order cost to address the late filing;
- vii. The general need for finality in judicial proceedings;
- viii. The appropriateness of visiting the attorney's fault upon the head of his client.

[17] These factors should be considered together, bearing in mind the need for the court to benefit from all the facts before it makes a decision, together with the need to bring finality to a case.

[18] As stated, the crux of the matter turns on whether there is reason to believe that it will be to the advantage of the creditors of the respondent if he is sequestrated. Material to answer that question is the issue of the residential property and the outstanding amount on the bond registered over the property. The issues raised in the supplementary affidavit speak to this and seek to address some of the issues raised in the Applicant’s replying affidavit. Without the benefit of all the information on this issue, the court cannot determine the issue of “benefit to the creditors”.

[19] It might be that some of the facts were available to the Respondent at the time of compiling the answering affidavit and that the shoe is pinching, but the fact that the court needs to adjudicate on this matter with all the facts at its disposal

⁵ Erasmus *Superior Court Practice Volume 2: Uniform Rules and Appendices* D1 Rule 6 -31.

tips the balance in favour of allowing the supplementary affidavit. This is even more so since issues of insolvency have an impact on a person's status.

[20] The Respondent also did not file the supplementary affidavit on the eve of the hearing – there was time for the Applicant to answer and engage with the issues raised had it wish.

[21] In weighing up the prejudice of allowing the supplementary affidavit on the Applicants versus the prejudice on the Respondent to make a proper case to show why such sequestration should not be granted, the balance again tips in favour of the Respondent. As stated, the Respondent sets out facts to show that the sequestration might not benefit creditors and should thus not be granted. The Applicant can deal with these arguments, hoping to convince the court otherwise. Opposing the filing of a supplementary affidavit that deals with the contents in the opposition, and thereafter filing a supplementary affidavit on the eve of the hearing only to withdraw it at the hearing, does not aid the court in understanding the whole factual matrix, enabling it to grant an order to bring finality to the matter.

[22] In this instance, the Respondent's supplementary affidavit does not significantly prejudice the Applicants and will assist the court in reaching a decision. It should thus be allowed.

Costs

[23] Both parties addressed me regarding costs. Before the Applicant withdrew their supplementary affidavit, the Respondent requested a punitive cost order because the late filing made the matter not ripe for hearing. The Applicant argued that they cannot request a cost order for the application to file the supplementary affidavit as the Respondent is insolvent.

[24] After withdrawing *their* application to file a supplementary affidavit, the Applicant argued that the matter is now unopposed and, therefore, no cost order should be granted against them. Instead, costs should follow the result and be

costs in the main application (the insolvent estate). The Respondent replied that since the matter is now withdrawn, the Applicant should pay the wasted cost.

[25] Both parties approached this hearing somewhat haphazardly. Still, I see no reason why costs should not follow the result.

Order

[26] I, therefore, make the following order:

1. The Respondent is granted leave to file a supplementary affidavit.
2. The rule nisi granted on 27 February 2024 by Siwendu J is extended to 4 November 2024.
3. The Applicant is to pay the costs.



WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines and emailing it to the parties/their legal representatives.

Counsel for the applicant:	Mr SN Davis
Instructed by:	Boshoff Smuts Inc
Counsel for the respondent:	Ms B Bhabha
Instructed by:	Stan Fanarof & Associates
Date of the hearing:	21 May 2024
Date of judgment:	04 June 2024