IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, BHISHO

CASE NO: 104/2022

In the matter between:

ELEGANT LINE TRADING 257 CC

(Registration No. 2005/037911/23) Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR TRANSPORT – EASTERN CAPE Respondent

JUDGMENT

Rugunanan J

[1] This is a decidedly brief judgment that illustrates the enduring purpose of affidavits in motion proceedings.

[2] In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom[1]. It is trite that an applicant must make out its case in the founding affidavit which must contain sufficient facts in itself upon which a court may find in the applicant's favour.

[3] Quoting where relevant, in *Director of Hospital Services v Mistry*[2] the court put the position as follows:

> 'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is … and as been said in many other cases: "… an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".'

[4] Since it is clear that the applicant stands or falls by its petition and the facts alleged therein, 'it is not permissible to make out new grounds for the application in the replying affidavit'[3].

[5] The rule against allowing new matter or new grounds in reply was held in *Bayat and Others v Hansa and Another*[4] to be capable of being departed from only in exceptional circumstances. The principle nonetheless remains that a case must be made out in the founding papers. Its rationale promotes legal certainty. This is evident from the contemporary approach adopted by the Constitutional Court in *South*

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[1] *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D.
[2] 1979 (1) SA 626 (A) at 635H-636B.
[3] *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260A-D
[4] 1955 (3) SA 547 (N) at 553D; see also *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another* 1980 (1) SA 313 (D&CLD) at 315E-H and 316A.

African Transport and Allied Workers Union and another v Garvas and others[5] where it held as follows:

> 'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'

[6] It occurs frequently in practice that parties may attach documentary annexures to their affidavits.

[7] Where this occurs it is not open to a party to request the court to have regard thereto. What is incumbent is the identification of portions thereof on which reliance is placed as an indication of the case which is sought to be made out on the strength of the document concerned.

[8] The document serves as proof of the source of the information.

[9] Regard being had to the function of affidavits, it cannot be expected of a party nor of a court to trawl through a series of annexures reduced to a mass of print and to speculate on the relevance of their contents[6] or to establish if there is material that adds substance to loose averments in an affidavit.

[10] The relief claimed against the respondent arises from a scholar transport service level agreement ('the agreement') concluded with the Eastern Cape Department of Transport ('the department') in respect of the award to the applicant of a bid for the provision of transport services in the

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[5] 2013 (1) SA 83 (CC) para 114.

[6] Van Loggerenberg, *Erasmus Superior Court Practice*, 2nd ed Vol 2 [Service 5, 2027] at D1-58D – D1-59; *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-G.

Chris Hani West District, Queenstown (now Komani), for the period 11 January 2017 to 10 December 2019.

[11] It is common cause:

(i) that the applicant was appointed to provide transport for children schooling at Mapasakraal Farm School ('Mapasakraal') from pickup points at Cheviot, Thornlands, Prospect, and Peace Farm (I pause to state that the pickup points are identified by the respondent – no mention thereof by the applicant in the founding affidavit); and

(ii) that in January 2018, the Department of Education closed Mapasakraal and enrolled the attending learners at Nonesi Primary School in Queenstown.

[12] The applicant essentially seeks orders:

(i) for payment of an amount of R1 217 752.24 for the extra distance travelled from the 'extended pickup points' post closure of Mapasakraal and the relocation of learners to attend in Queenstown; and

(ii) that it be paid the amount of R614 498.21 representing short-payments for the period July 2019 to December 2019.

[13] The applicant is a registered close corporation. The deponent to its founding affidavit is its sole member.

[14] The entire evidentiary basis on which the application is brought resides in the founding affidavit. It is alleged by the deponent that the applicant has complied with its obligations under the agreement.

[15] Of relevance to the applicant's specific claims are the following averments:

> '11. During the month of January 2018, [Mapasakraal] was closed and its learners were moved to Nonesi Primary School. The effect of this change was a phenomenal increase on the kilometres travelled from the pickup points to the school. A letter of confirmation by the District Director of [the] Eastern Cape Department of Education is attached as KM4.
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> 12. Despite the increased travelling distance, the Respondent did not adjust the contracted kilometres in respect of the scheduled trips. As a result of this non-adjustment of contracted kilometres, the applicant was under paid in the amount of R1 217 752.24.
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> 13. During the month of July 2019 up to December 2019 the Applicant was short paid, as a result thereof the applicant is short paid by an amount of R614 498.21 which is due and payable by the Respondent.
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> 14. I have on numerous occasions approached relevant officials of [the department] in want of having this inaccurate payment of Applicant's claims rectified. However, my pleas and cajoling have yielded to nought. I am therefore left with no option but to approach this court for relief …'

[16] Leaving aside for a moment the respondent's answer to these averments, it is not apparent from the content of these extracts *per se* how the applicant has computed the respective amounts, nor from the complement of annexures mentioned and attached to the founding affidavit – which in any event are by themselves deficient for want of inclusion of the additional documentation specifically mentioned in the

annexures. The assertion of a ‘phenomenal increase’ in kilometres travelled is not borne by a meaningful formula or explanation from which a readily quantifiable arithmetical deduction may be made to arrive at the respective amounts claimed, much less does the asserted compliance with obligations under the agreement clarify the quantification conundrum. With these limitations in the founding affidavit, nothing further needs to be said other than to reiterate the legal prescripts set out at the commencement of this judgment.

[17] In answer, the respondent denies that the amount of R1 217 752.24 is owed to the applicant for the reason that the applicant has failed to include supporting documentation in its founding papers clearly indicating how that amount is calculated. In respect of the claim for R614 498.21 the respondent disputes that the applicant rendered transportation services for the period August 2019 to December 2019 and further disputes that the applicant submitted invoices for that period. In the instance of either claim, there is accordingly weighty justification in the respondent’s contention that the applicant’s appointment did not contain a contract amount as the applicant was to be paid according to kilometres travelled. This underscores the necessity for the applicant to have arithmetically factored the distance component in whatever formula it applied to arrive at the amounts claimed (an exercise which it has not undertaken).

[18] Significantly, it is stated in answer that the Department of Transport was only advised by the Department of Education about the closure of Mapasakraal on or about 20 June 2018, and in this regard the applicant breached its contractual obligation to communicate and seek approval

from the transport department for any changes of pickup points, routes, schools and number of learners involved.

[19] The respondent however contends, on the basis of trip data information reflected in spreadsheets (annexures 'MCM3' and 'MCM4') that the applicant 'may be owed some kilometres to the amount of R74 366.92'. The spreadsheets comprise of numerical data in a mass of fine print. Taken together they contain no less than 130 horizontal rows and 28 vertical columns. The information was collated by an official who deposed to a confirmatory affidavit from which it appears that the amount was arrived at on the basis of the applicant's 'non-submission of invoices', albeit that the portions in the spreadsheets that support the amount which it is contended may be owed, have not been identified, nor has the applicable period.

[20] In reply, the applicant has attached annexures 'KM9', 'KM10', and 'KM11', with the qualification by the deponent that they are 'self-explanatory'. These are respectively a legal opinion for the state attorney (acting on behalf of the department), and a series of two addenda thereto. This is new matter. The documentation recommends payment to the applicant of the amounts of R1 406 568.67 and R614 498.21.

[21] Quite apart from new matter in reply, it constitutes hearsay evidence without providing confirmatory affidavits from their source. The obvious needs to be stated. Neither this court nor the respondent can be expected to speculate on the possible relevance of the material prepared for the state attorney – the contents of which, far from constituting factual findings, is untested opinion evidence.[7] The respondent, of course, does not enjoy the right to answer, though I am of the view that

[7] Cf. *Minister of Land Affairs & Agriculture v D & F Wevell Trust supra* at 200D

to do so would be wasteful in circumstances where it is unnecessary for purposes of determining whether the relief sought is competent.[8]

[22] As for the respondent's assertion of a breach of the service level agreement and denial that the applicant rendered transportation services for the period August 2019 to December 2019, together with the further denial that the applicant submitted invoices for that period, this is contradicted in reply by the applicant attaching proof of receipt of the invoices for the specified period (the annexures are marked 'Doc F'). The proof consists of a series of notes in typescript acknowledging receipt of invoices. The notes do not mention whether what was received were invoices specifically for transportation services rendered. Although each note bears the departmental stamp, the designation of the signatory thereto is unknown.

[23] In my view the annexures serve no purpose other than an acknowledgment of a nondescript nature – they do not establish proof as to how the claim for the period in question has been calculated.

[24] To the extent that disputes of fact might exist regarding contractual performance and submission of invoices, the test enunciated in *Plascon Evans-Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[9] must therefore be applied and final relief can only be granted if those facts averred by the applicant which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

[25] In the present matter they clearly do not.

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[8] Cf. *Gelyke Kanse and Others v Chairman of the Senate of the Stellenbosch University and Others* [2017] ZAWCHC 119 para 169.
[9] 1984 (3) SA 623 (AD at 634E-635C.

[26] From what has been dealt with in this judgment, it is clear that the applicant's founding affidavit is wholly unsustainable. The scathing and ignominious tone of the replying affidavit is gratuitous and may appropriately be attributed to the founding affidavit which may deservedly be censured as an inadequately conceptualised effort.

[27] A concerning aspect of the matter is that both parties have attached material without endeavouring to identify what exactly is relevant in support of their respective cases. It is not the task of this court to go behind their affidavits and undertake a forensic analysis. Courts are a public resource under severe pressure.[10] It does not bode well for litigants to introduce matter that unnecessarily labours the issues for determination. This sentiment influences my discretion on costs.

[28] In the circumstances the following order issues:

1. The application is dismissed.

2. Each party shall pay their own costs.

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M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

[10] *Savvas Socratous v Grindstone Investments 134 (Pty) Ltd* [2011] ZASCA 8 para 16.

APPEARANCES:

For the Applicant:	B. Metu Instructed by G. N. Jojwana Attorneys Inc. c/o Khaya Dywanisi Attorneys Inc. Qonce Tel: 043-6436 109 or 084 2197 049 Email: khaya@kkdattorneys.co.za babalo.metu@gmail.com (Ref: K Dywanisi)
For the Respondent:	L. X. Mpiti Instructed by The Office of the State Attorney East London (Ref: 164/22-P15 Mrs. Gabula) Tel: 082 948 1856 / 083 466 4673 Email: AGabula@justice.gov.za nolithagabula63@gmail.com mpitilx@gmail.com
Date heard:	15 September 2022.
Date delivered:	14 December 2022.

This judgment was handed down electronically with the consent of and by circulation to the abovementioned legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 14 December 2022.