

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 17766/2023

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|-----------------------------|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |
| <u>17 APRIL 2024</u> | <u>SM MARITZ AJ</u> |
| DATE | SIGNATURE |

In the matter between:

MINISTER OF WATER AND SANITATION

APPLICANT/DEFENDANT

and

LIMPHOTA HOUSING CC

RESPONDENT/PLAINTIFF

[REG NO: 2008/020875/23]

JUDGMENT

MARITZ AJ

Introduction

- [1] The Applicant, the Minister of Water and Sanitation, brought an application for condonation to uplift the bar which prevents it from delivering a plea. The Respondent, Liphota Housing CC, opposed this application. The Applicant is the Defendant in the summons and the Respondent is the Plaintiff in the summons. For ease of reference the Court will refer to the parties as in the summons.
- [2] The Plaintiff issued and served a summons against the Defendant on or about 21 February 2023 based on specific performance for payment by the Defendant in terms of a written agreement (CONTRACT DEV001WT) FOR EMERGENCY WORKS - PROCEDURE, UNDER EMERGENCY DELEGATION A SUITABLE CONTRACTOR TO GET GROBLERSDAL AREA OFFICE SCHEMES INTO A FUNCTIONAL CONDITION ("the agreement"), in respect of work performed for 9 projects at various locations being Buffelskloof Dam, De Hoop, Flag Bashielo, Injaka, Loskop, Mkhombo, Ohrigstad, Vlugskraal and Brugspruit concluded between the parties on 29 September 2021, totalling R 24 276 835.73.
- [3] Prior to conclusion of the agreement the Defendant invited interested parties to bid for DEV001WTE: EMERGENCY WORKS: PROCURE, UNDER EMERGENCY DELEGATION, A SUITABLE CONTRACTOR(S) TO GET GROBLERSDAL AREA OFFICE SCHEMES INTO A FUNCTIONAL CONDITION. On or about 21 April 2021 the Plaintiff submitted its bid, which bid was accepted on 31 May 2021 by the Defendant and the Plaintiff was appointed with a letter of appointment for emergency works under DEV001WTE. It is submitted that after the appointment of the Plaintiff and before the above agreement was concluded, the Plaintiff was instructed to immediately attend to emergency works as a matter of urgency, as demanded by the Defendant. The emergency works were performed between 1 June 2021 and 26 September 2021 prior to conclusion of the agreement.
- [4] The Plaintiff contends that it fulfilled all its obligations in terms of the letter of appointment and the agreement by rendering the services, performing the works as stipulated in the

agreement and by the Project Manager and furnishing the Defendant with all necessary documentation including *inter alia* invoices in the Defendant's prescribed format. However, the Defendant breached the agreement by failing to make payment despite demand. The Plaintiff seeks payment of R 20 230 696.45 together with an additional amount of R 4 061 139.28 being a 20% management fee. The Plaintiff submits that it suffered damages in the total amount of R 24 276 835.73, together with interest.

[5] The Defendant filed its notice of intention to defend on 13 April 2023 (12 court days out of time).

[6] The Defendant had until 15 May 2023 to file its plea but neglected and/or failed to file same. On 22 May 2023 the Plaintiff served a notice of bar on the Defendant per email, which was the agreed method of service. A copy of the notice of bar, together with the e-mail confirmation of service, is attached to the Plaintiff's answering affidavit as annexure "AA2".

[7] Despite a further period of FIVE (5) days from date of delivery of the notice of bar (22 May 2023) granted to the Defendant to file a plea, it has failed to deliver its plea. As a result of thereof the Defendant was *ipso facto* barred from delivering its plea.

[8] On 7 June 2023, the Defendant served its application for upliftment of the bar on the Plaintiff's Attorneys of Record.

[9] In terms of the Notice of Motion the Defendant seeks the following relief:

9.1 That the Defendant, having been *ipso facto* barred from delivering a plea, such bar be and is hereby uplifted; and

9.2 That the costs of this application be paid by the Plaintiff, alternatively be costs in the cause.

[10] The Plaintiff seeks the following relief:

10.1 That the application for upliftment of the bar be dismissed with costs, such costs to include the costs of two Counsel.

[11] The issues for determination, as set out in the affidavits, are two folded, being:

11.1 Whether the deponent to the Defendant's founding affidavit has any personal knowledge of the facts of the claim instituted by the Plaintiff and/or whether the entire application is based on hearsay evidence as contained in the founding affidavit. If the Court finds in favour of the Plaintiff, it will be the end of the upliftment application and there is no need to further deal with the merits thereof.

11.2 Whether the Defendant has shown good cause and made out a proper case for condonation for the upliftment of the bar.

[12] The Court will first deal with the issue pertaining to whether the deponent to the Defendant's founding affidavit has personal knowledge of the facts of the claim instituted by the Plaintiff and/or whether the entire application is based on hearsay evidence as contained in the founding affidavit. If needed, the Court will thereafter deal with the merits of the upliftment application.

Personal Knowledge of Deponent to Founding Affidavit

[13] Before dealing with the submissions made by the Plaintiff relating to whether the deponent to the founding affidavit, Mhloti Malandula, has personal knowledge of the facts of the matter, it is necessary to quote the averments made by the deponent in the founding affidavit in this regard, which are as follows:

- "1. *The facts contained herein are, unless the context indicates otherwise, within my personal knowledge and are to the best of my belief both true and correct.*
2. *I am a female Director Legal service (sic) employed as such by the Department of Water and Sanitation ("the department") with our offices situated at 185 Francis Baard Streets (sic), Pretoria.*
3. *Where I make submission of a legal nature, I do so on the advice of the legal representative of the applicant.*

4. *I depose to this affidavit on behalf of the applicant, in that as a Director Legal service (sic) of the applicant, I am responsible for this legal matter and therefore conversant with the facts thereof and have unlimited access to the documentation relating thereto.”*

[14] Based on the above averments made by the deponent to the founding affidavit as well as further averments made by the deponent in the founding affidavit, the Plaintiff questioned whether the deponent to the founding affidavit has personal knowledge of the facts of the matter or the ambit and nature of the Plaintiff's bid that was accepted by the Department of Water and Sanitation (“the Department”). In addition, the Plaintiff asserted that from the content of the founding affidavit, the deponent fails to appreciate the facts surrounding the Plaintiff's appointment as contractor to attend to emergency works when the Department desperately needed the Plaintiff to do the required emergency works. The Plaintiff further submitted that the Defendant fails to appreciate and deals with the undisputed fact that the parties only entered into the written agreement, after the Plaintiff being appointed to immediately attend to the emergency works as a matter of urgency, as demanded by the Defendant.

[15] In addition, the Plaintiff denied that the content of the founding affidavit falls within the personal knowledge of the deponent as she was not involved in any of the projects or events and there is no confirmatory affidavit by anyone in the Department who has first-hand knowledge of the emergency works done, or the projects involved or any of the events that led to the Plaintiff's claim. As a result thereof, the Plaintiff denied that the entire content of the founding affidavit is true and correct.

[16] The Plaintiff further submitted that the fact that the deponent to the founding affidavit is the Director of Legal Services of the Department, illustrates clearly that she was never involved in the appointment of the Plaintiff to perform the emergency works and what it entailed.

[17] Further, it was contested by the Plaintiff, that the deponent to the founding affidavit was never involved in the subsequent written agreement entered between the parties or with the emergency services rendered by the Plaintiff to the Defendant on any of the projects

claimed for in the particulars of claim. It was asserted that “*She simply knows nothing about the matter*”.

- [18] The Plaintiff denied that the deponent to the founding affidavit has any personal knowledge of any of the emergency services rendered or the work done, or the nature of the claims for the works and services rendered by the Plaintiff. It was asserted that the deponent to the founding affidavit relies on unsubstantiated hearsay allegations.
- [19] In addition, the Plaintiff submitted that the fact that the deponent to the founding affidavit averred that she is responsible for legal matters and “*therefore conversant with the facts thereof*”, is non-sensical and does not indicate that the deponent to the founding affidavit has any personal knowledge of the merits of the claim instituted by the Plaintiff against the Defendant, nor can she aver that the claim is indeed honestly and *bona fide* defensible by the Defendant, as she simply does not have any direct knowledge.
- [20] It was further submitted by the Plaintiff that the Defendant has failed to identify the so-called “*technical team members of the Department*” (para 11.1 of founding affidavit) who allegedly, very belatedly, all of a sudden visited the sites of the projects to verify the work done by the Plaintiff and further that there are no confirmatory affidavits annexed to the founding affidavit from anyone who allegedly visited the sites or allegedly verified the work done by the Plaintiff. It was submitted that these allegations are vague and sketchy and that it does not assist the Defendant in its application to uplift the bar. However, it is indicative of the Defendant’s delaying tactics.
- [21] The Plaintiff further submitted that the deponent to the founding affidavit does not have personal knowledge of the facts of the matter when she averred in the founding affidavit (para 11.2) that the work was not done in accordance with the work requirements as contained in the Service Level Agreement (“the SLA or the agreement”). It is asserted by the Plaintiff that the work was done in terms of the letter of appointment and the instructions received by the Project Manager, as set out in the particulars of claim, since the works were emergency works, to be performed prior to the parties entering into the SLA. As proof of the fact that the Plaintiff was required to start the emergency works prior to the signing of the SLA, the Plaintiff referred the Court to a copy of the minutes of a meeting held on 7 June 2021 between the respective parties (annexure “AA1” to answering affidavit).

- [22] The Plaintiff submitted that the allegations of the deponent in the founding affidavit, regarding why the Defendant was unaware of the notice of bar, are vague and unsubstantiated. For instance, mentioning the State Attorney's email server being down during the period the notice was sent lacks specifics, such as the exact timeframe of the server issue. These assertions, without substantiating facts, do not fall within the deponent's personal knowledge. Additionally, there is no confirmatory affidavit of an IT official confirming the server outage, its cause or duration. Moreover, the Defendant failed to provide the alleged transmission report to support the claim of non-delivery confirmation from the destination server.
- [23] The Plaintiff submitted that the deponent to the founding affidavit simply quantum leaps to the conclusion that there is no prejudice of a substantial nature to be suffered by the Plaintiff, without any factual support of such a conclusion or that the Plaintiff will not suffer any prejudice if the bar is uplifted. It was submitted by the Plaintiff that it has already incurred major financial expenses when it duly rendered the emergency services during the period May/June 2021 to September 2021. The Plaintiff further denied that the Defendant's proposed plea established any and/or *bona fide* prospects of success as these allegations are unsubstantiated.
- [24] It was further submitted by the Plaintiff that the deponent to the founding affidavit does not understand or have personal knowledge of the nature of this project.
- [25] The Plaintiff further submitted that the relief sought by the Defendant is based on hearsay evidence in its entirety, which is inadmissible, and the relief sought should not be granted.
- [26] In addition, the Plaintiff submitted that the Defendant's inadmissible hearsay evidence should not be allowed because the Defendant has failed to demonstrate why the Court should admit it as an exception under the hearsay evidence rule.
- [27] It was further submitted by the Plaintiff that the rationale behind the vague and sketchy allegations of the deponent in the founding affidavit is the fact that the deponent thereto does not really have any knowledge of the history of the matter and the correct sequence of events. It was further submitted by the Plaintiff that the deponent's allegation are

unsubstantiated hearsay allegations, which is not supported by any evidence. It was further submitted by the Plaintiff that there is no basis in fact or in law for the Defendant and/or the deponent to dispute that the emergency services were correctly, timeously, and duly rendered in terms of the letter of appointment and the invoices rendered in respect thereof. Further that it is evident from the founding affidavit that the Defendant and/or the deponent do not refer to a single instance in which the Defendant disputed the Plaintiff's invoices duly rendered, despite receiving them.

[28] In the Plaintiff's heads of argument it was submitted that the deponent to the founding affidavit is the Director Legal Services employed by the Department and that this job description demonstrates that the deponent does not have any personal knowledge of the facts of the claim instituted by the Plaintiff. There is no confirmatory affidavit by anybody who indeed has any knowledge or personal knowledge of the matter.

[29] The Defendant denied that she does not have personal knowledge of the facts of the matter and stated in her replying affidavit that she has full knowledge of the service level agreement, the specifications and the services rendered as she worked closely with the functionaries involved. Further, that they have continuous engagements with role players where some engagement occurs at the sites.

[30] It was submitted by the deponent in the replying affidavit that the Plaintiff barely denied the correctness of the affidavit with any factual basis to support such denial(s) and failed to appreciate the internal workings of the Department which is all inclusive of employees playing various roles.

[31] In the replying affidavit the deponent stated that the verification of the invoices rendered involved several officials of the Defendant and that she has been part of the team working on this matter ever since the dispute on the invoices started. She (deponent) stated that she worked with the relevant technical officials on a regular and continuous basis.

[32] It was submitted in the Defendant's supplementary heads of argument that the deponent, as a Director Legal Services, was responsible for the matter, was conversant with the facts and has unlimited access to documentation relating thereto. It was submitted that in an

institution such as the Defendant, such evidence should be regarded as adequate and satisfactory.

[33] In application proceedings, the affidavits take the place not only of the pleadings in action proceedings, but also of the essential evidence which would be led at trial. The deponent thus “testifies” in motion proceedings. From this it follows that generally relief may only be granted in motion proceedings if it is supported by admissible evidence in the affidavits. Whether the deponent’s evidence is admissible depends on whether he/she has personal knowledge of the facts. The hearsay evidence rule applies to all proceedings, including motion proceedings. According to section 3(4) of the Law of Evidence Amendment Act, 45 of 1988, hearsay evidence is “*evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.*”

[34] In *Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 423D-E* the Court held that the mere assertion by a deponent that he/she can swear positively to the facts is not regarded as being sufficient, unless these are good grounds for believing that the deponent fully appreciated the meaning of these words.

[35] In *President of the Republic of South Africa and Others v M&G Media Ltd 2011(2) SA 1 (SCA) at para 38* the Supreme Court of Appeal remarked as follows on the meaning of personal knowledge:

“A court is not bound to accept the ipse dixit of a witness that his or her evidence is admissible... Merely to allege that that information is within the ‘personal knowledge’ of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired, so as to establish that the information is admissible, and if it is hearsay, to enable its weight to be evaluated. In this case there is no indication that the facts to which Mr Chikane purports to attest came to his knowledge directly, and no other basis for its admission has been laid. Indeed, the statement of Mr Chikane that I have referred to is not evidence at all: it is no more than bald assertion.”

[36] If the deponent to a founding affidavit lacks personal knowledge of the material facts, the integrity and veracity of the “evidence” placed before the Court is compromised. In any trial, a Court should be vigilant to manage how witnesses testify, ensuring that the rules of

evidence are observed scrupulously. Similar vigilance should be displayed in motion proceedings – however, Courts must be mindful not to adopt an over-formalistic approach.

[37] In the present application the deponent of the founding affidavit claims personal knowledge of the Plaintiff's claim based primarily on her role as the Director Legal Services of the Defendant. She asserts responsibility for the matter, familiarity for the facts, and unrestricted access to related documentation. Additionally, she claims a thorough understanding of the service level agreement, and services provided, due to close collaboration with the involved personnel. However, she does not specify the extent to which she relied on these personnel or how they informed her understanding of the facts. There is no understanding of when and how she acquired this knowledge, nor which documents she accessed. No confirmatory affidavits from these personnel are provided, and their identities and relevance to the Plaintiff's claim remain undisclosed. The deponent mentioned engagements with unspecified "*role players*" and/or "*functionaries*" but fails to identify them or to provide supporting affidavits. Furthermore, she does not disclose the locations, timing or parties involved in these engagements.

[38] No explanation was given why confirmatory affidavits were not obtained from any of the functionaries and/or role players.

[39] In the replying affidavit, the deponent mentioned that verifying the invoices involved numerous officials from the Defendant, and she has been involved in this matter since the invoice dispute arose. She indicated collaborating regularly with pertinent technical officials. However, there is a lack of specifics regarding these Defendant officials, the composition of her work team, and the identity of the technical officials mentioned. The affidavit does not detail the nature of their discussions, the extent of their work relationship, or provide information for the Court to ascertain the details from the founding affidavit for the Court to ascertain whether the deponent has personal knowledge of the facts of the matter.

[40] The Court agrees with the Plaintiff's submission that the Defendant's claims regarding the "*technical team members of the Department*" (para 11.1 of founding affidavit) are unclear and lacking in detail. Allegations that these team members supposedly visited the project sites much later and unexpectedly to verify the Plaintiff's work are unsupported by any confirmatory affidavit from these team members.

- [41] The Court has considered the submissions made by the Plaintiff, as set out in paragraphs 14 to 28 above, and agrees with them concerning the deponent's lack of first-hand/personal knowledge when drafting and deposing to the founding affidavit. Simply holding a position within the Defendant's Legal Department does not establish that the facts presented were within her (the deponent's) personal knowledge. Additionally, reference to specific individuals (third parties) as source of the deponent's information were not substantiated by any supporting affidavits or documents to validate the origin of her knowledge. There is no evidence that the deponent was directly involved or engaged in the bid procedure, the appointment of the Plaintiff as a contractor, the scope, extent and timing of the emergency works, and the subsequent conclusion of the agreement. No supporting/confirmatory affidavits are attached to confirm and/or verify the source of the deponent's personal knowledge.
- [42] It is trite that where a deponent to the founding affidavit or any affidavit relies on the evidence of a third party, that evidence should be confirmed in a confirmatory affidavit. In this case there is no indication that the facts to which the deponent to the founding affidavit purports to attest came from her direct personal knowledge, and no other basis for her admissions have been laid. Thus, the statement (founding affidavit) of the deponent is not evidence at all, but no more than bald assertions.¹
- [43] The present application is not akin to that of a manager in the collections department of a credit provider, who deposes to affidavits in summary judgment applications as a matter of course. In such cases the deponent exercises overall control of the relevant accounts and all the necessary information can be found in the relevant files. All necessary documents are attached to the founding affidavit. No reliance is placed on unspecified 'extensive' consultation with another person to gain personal knowledge (See: *Sibani Group (Pty) Ltd v Doves Group (Pty) Ltd* [2022] JOL 55868 GJ).
- [44] The Court has duly considered the exceptions to the hearsay evidence rule, as provided for in section 3(1) of the Law of Evidence Amendment Act, 45 of 1988, and finds no justification for admitting such evidence. Additionally, the deponent of the founding affidavit has not provided reasons for the Court to consider admitting it under any exception to the hearsay evidence rule.

¹ *President of the Republic of South Africa and Others v M&G Media Ltd* 2011(2) SA 1 (SCA) at para 38

[45] Thus, the Court finds that the deponent to the Defendant's founding affidavit lacks personal knowledge of the material facts, rendering it hearsay evidence, which is not admissible. Consequently, there is no need to further consider the merits of the application for upliftment.

[46] The Plaintiff, as the successful party, is entitled to the costs.

Order

THEREFORE, the following order is granted:

1. The application for upliftment of the bar is dismissed.
2. The Defendant/Applicant is ordered to pay the Plaintiff's/Respondent's costs, such costs to include the costs of two Counsel.

SIGNED ON THIS 17th DAY OF APRIL 2024.

BY ORDER

[...]

SM MARITZ AJ

Appearances on behalf of the parties:

Counsel for Applicant/Defendant:

Adv DT Skosana SC & Adv MC Phathela

Instructing Attorneys for Applicant/Defendant:

The State Attorney : Pretoria

Counsel for Respondent/Plaintiff:

Adv DJ Joubert SC & Adv GVR Fouché

Instructing Attorneys for Respondent/Plaintiff:

Bekker Brink & Brink Attorneys c/o VDT
Attorneys Inc

Date of Hearing: 6 February 2024

Date of Judgment: 17 April 2024