REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCAA 08/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.

DATE..... SIGNATURE:.....

In the matter between:

Q4 FUEL (PTY) LTD	**APPELLANT**
And	
ELLISRAS BRANDSTOF EN OLIEVERSPRSEIDERS (PTY) LTD	**FIRST RESPONDENT**
ANTON VERSTER	**SECOND RESPONDENT**
MARIUS LUBBE	**THIRD RESPONDENT**
FRANS PRETORIUS FABER	**FOURTH RESPONDENT**
MARENTIA 471 CC	**FIFTH RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The appellant had launched an application against the respondents seeking payment of an amount of R1 541 217.00 by virtue of an alleged loan agreement entered into with the first respondent and alleged deed of surety signed by the other respondents. The respondents in their answering affidavit have raised five points *in limine*. The first point *in limine* was that of capacity of the deponent of the appellant's founding affidavit; second alleged deficiencies in the founding affidavit; third alleged unlawful loan agreement; fourth jurisdiction and fifth alleged wrong process.

[2] With regard to the first point *in limine*, the respondents have submitted that there are no details concerning the capacity of the deponent of the appellant's founding affidavit, Olof Abraham Breytenbach and/or his supposed authorization to depose to the founding affidavit on behalf of the appellant. With regard to the second point *in limine* the respondents have submitted that the appellant's founding affidavit did not constitute an affidavit as contemplated in the Rules read with the Regulations Governing the Administering of an Oath or Affirmation in that the so-called commissioner of oaths *ex officio* who commissioned the appellant's founding affidavit did not state his designation nor area for which he holds his appointment or office, given that he appears to have been appointed *ex*

officio. Further that no annexures to the affidavit were initialed by either the deponent or the commissioner of oaths, and also that the certificate in terms of section 15(4) of the Electronic Communications and Transaction Act 25 of 2002 was signed and dated 26th August 2019, that is almost a month after the affidavit was commissioned on 31st July 2019.

[3] With regard to the third point *in limine* the respondents have submitted that the loan agreement attached to the appellant's founding affidavit was an unlawful agreement and should be declared *null* and *void*, in that the loan amount exceeds the threshold prescribed in terms of section 42(1) of the National Credit Act (NCA); the appellant was not registered as a credit provider at the time of entering into the alleged loan agreement; at the time of entering into the agreement the appellant was neither in the process of registering as a credit provider; and at the time of entering into the alleged loan agreement, the appellant did not hold a valid clearance certificate issued by the National Credit Regulator.

[4] Regarding the fourth point *in limine*, the respondents have submitted that the appellant has failed to make out a case or make allegations concerning why this court has jurisdiction to hear the matter, and that the respondents denies that this court had jurisdiction to hear the appellant's application. With regard to the fifth point *in limine*, the respondents have submitted that the appellant has wrongly commenced application proceedings in circumstances where action proceedings should have been employed, in that the appellant was clearly aware that there

would be numerous disputes of fact, particularly concerning the quantum of the appellant's claim.

[5] The appellant's in its replying affidavit in reply to the respondents' first point *in limine* has submitted that the deponent of an affidavit does not require any authority to execute the affidavit or prosecute proceedings, and further that authority to do so may be challenged in terms of Rule 7. With regard to the second point *in limine*, the appellant has submitted that the affidavit does comply with the applicable regulations, and further that the Regulations are merely directory and not peremptory, and thus there has been substantial compliance. Regarding the third point *in limine* the appellant has submitted that the agreement is clearly a large agreement and exempted from the provisions of the NCA, and thus the transaction is not a loan agreement for the purposes of the NCA and that the appellant need not register as a credit provider. With regard to the fourth point *in limine* the appellant has submitted that all the written agreements were executed within the area of jurisdiction of this court and/or enforced within the area of jurisdiction of this court. Regarding the fifth point *in limine* the appellant has submitted that the respondents' answering affidavit has failed to raise a genuine factual dispute.

[6] When the matter came before MG Phatudi J, counsel for the respondents abandoned the third and fourth points *in limine*. Counsel for the respondents also abandoned the second point *in limine*. However, after counsel for the respondents had notified the court that the respondents were abandoning the second point *in limine*, the court engaged counsel for the respondents, and when

counsel for the respondents stood by the respondents' decision to abandon the point *in limine*, the court, *mero motu* raised the abandoned point *in limine* and also seek the grounds upon which the respondents were abandoning the second point *in limine*. That is when counsel for the respondents submitted it to court that he believes that there is no merit in that point *in limine*, and that if the court had a problem with the commissioning of the affidavit, it will take it up with counsel for the appellant. Counsel for the respondents submitted that there was substantial compliance hence they are abandoning that point *in limine.* However, the respondents ended up partially abandoning the second point *in limine* and pursuing the remainder of it in relation to the annexures to the founding affidavit not initialed or signed by either the deponent or the commissioner of oaths.

[7] With regard to the fifth point *in limine* counsel for the respondents asked direction from the court as he was of the view that the fifth point *in limine* was intermingled with the merits of the application. The respondents argued the first *in limine*, the remainder of the second point *in limine* and the fifth point *in limine*. MG Phatudi J upheld the first and second points *in limine* and struck off the matter from the roll with costs. The court *a quo* did not make a ruling on the fifth point *in limine*. In upholding the two points *in limine* the court *a quo* found that there was no proper application before court.

[8] The appellant is appealing with the leave of the Supreme Court of Appeal against the whole of the judgment and order of MG Phatudi J. This court is called upon to determine whether the Regulations to the Justices Peace Act applicable to the execution of affidavits are peremptory or directory; whether there was

compliance with the Regulations; and whether the deponent required authority to execute the founding affidavit and/or whether there was compliance with the usual formalities pertaining to affidavits generally.

[9] The respondents have raised a point *in limine* in its heads of arguments in relation to the non-appealability of the ruling of MG Phatudi J when he upheld the two points *in limine* and struck off the matter from the roll. The respondents have submitted that the ruling made by the court *a quo* is not final and, as a result, is not appealable. It is the respondents' contention that a ruling striking off a matter from the roll is not final in its effect, it does not definitively pronounce on the rights of the parties as it does not grant final definitive relief and it does not dispose of a substantial portion, or any portion for that matter of the main proceedings. The respondents submit that it is still open to the appellant to merely approach the court with an application for reinstatement, and have the application re-enrolled. This court is thus also called upon to determine whether the ruling of the court *a quo* in striking off the appellant's application from the roll is appealable.

[10] The first issue which this court will determine is whether the ruling of the court *a quo* in striking off the appellant's application from the roll is appealable. In *Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd*[1] the court in relation to the appealability of an order held that on the test articulated in *Zweni v The Minister of Law and Order 1993 (1) SA 523 (A),* the order is not appealable if it has the following attributes (a) not final in effect and is not open to alteration by the court

[1] [2019] ZASCA 61 (20 May 2019) at para 4

below; (b) not definitive of the rights of the parties; and (c) does not have the effect of disposing of a substantial portion of the relief claimed.

[11] The court *a quo* in upholding the respondents' points *in limine* has held that "there is no proper application before court". In motion proceedings affidavits constitute evidence. By holding that there is no proper application before court which is as a result of an alleged defective founding affidavit, imply that there is no evidence to substantiate the orders which the appellant was praying for in its notice of motion. The affidavit at issue is the founding affidavit upon which the appellant's case will be made. In this case a supplementary affidavit will also not suffice as there is nothing to supplement since there is no proper affidavit before court. This is not a matter which will be merely reinstated as there is no evidence upon which the appellant will be able support its claim. The manner in which the point *in limine* was upheld renders the appellant's founding affidavit to be *void ab initio* to the extend that the defect in it will not be rectified by a supplementary affidavit.

[12] It can therefore not be said that the appellant's claim remained intact. Without the evidence to support its claim, the appellant's claim has been disposed in full. If the appellant's wishes to persue its claim it will have to start afresh as its founding affidavit is not capable of been supplemented due to nature of the defect which the court *a quo* has found to exist. Even though the order of the court *a quo* has been couched as a striking off, in actual fact it is a dismissal of the appellant's claim. What must be looked at, is not the manner in which the order has been couched, but its final effect and impact. In the case at hand, even

though the order is that of a striking off, its final effect and impact is that it disposes the whole of the appellant's claim, as the court *a quo* had also found that the end results of the two points *in limine* are fatal to the appellant's case. It therefore follows that the order being a dismissal of the appellant's claim, it is susceptible to be appealed upon.

[13] The issues whether the Regulations Governing the Administering of an Oath or Affirmation are peremptory or directory, and whether there was compliance with the Regulations by the appellant in commissioning its founding affidavit will be dealt with at the same time. The court *a quo* has held that properly interpreted, sub-regulation 4(2) is in itself peremptory, leaving no discretion upon a commissioner of oaths to impress a corporate law firm on the affidavit when administering an oath or affirmation.

[14] Regulation 4(2) of the Regulations Governing the Administering of an Oath or Affirmation provides that:

> "(2)The commissioner of oaths shall-
>
> (a)sign the declaration and print his full name and business address below his signature; and
>
> (b)state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment *ex officio*."

[15] As per the founding affidavit of the appellant, it shows that the deponent of that affidavit had signed it on 31st January 2019 before a commissioner of oaths. That commissioner of oaths has also signed the appellant's founding affidavit. Below the signature of the commissioner of oaths, there is a template typed full names;

business address and designation. However, the commissioner of oaths instead of completing his full names, business address and designation on the template, put an office stamp next to where the commissioner of oaths has signed. The office stamp had the following details: Daniel Paul Viller; Vermaak Beeslaar Attorneys Inc; commissioner of oaths *ex officio*; 358 Serene Street; Garsfontein, Pretoria; Tel 012 361 9970. The corporate office stamp does not state the designation of the commissioner of oaths.

[16] The placing of the corporate stamp next to the signature, and the failure to insert the designation of the commissioner of oaths is the point *in limine mero motu* raised by the court *a quo* after the respondents have abandoned it. The court *a quo* held that an attorney who is administering an oath or affirmation *ex officio* as a commissioner of oaths, may not merely impress a corporate seal of his law firm and leave it to the court to speculate whether he had complied strictly with the regulation. The court *a quo* further held that the signature on the foot of the affidavit could not be verified as to whether it was that of the commissioner of oaths as anyone from the law firm could have place that stamp on the document since there is no confirmatory affidavit by Daniel Paul Villiers to verify and authenticate the capacity with which he purported to act as a commissioner of oaths. The court *a quo* further held that nowhere in the government notice 19033 dated 10th of July 1998 where a law firm incorporated in terms of either the Attorneys Act 1979 (now repealed), or the corporate laws of the Republic was designated a commissioner of oaths within the purview of the relevant Regulations.

[17] Turning to the question whether the Regulations Governing The Administering of Oath or Affirmation are peremptory or directory, it was held in *S v Msibi*[2] that the requirements as contained in the Regulations are not peremptory but merely directory. The court in *Msibi* further held that where the requirements of the Regulations have not been complied with, the court may refuse to accept the affidavit concerned as such or give effect to it, but the question should in each case be whether there has been a substantial compliance with the requirements. In my view, *Msibi's* case has been correctly decided in relation to whether the Regulations are peremptory or directly, and I therefore align myself with that decision.

[18] Turning to the question whether there was compliance with the Regulations by the appellant in commissioning its founding affidavit, in relation to the issues which were *mero motu* raised by the court *a quo*. The court *a quo* had issues in relation to failure by the commissioner of oaths to insert his designation below his signature, and also as to who might have affixed the corporate office stamp of the commissioner of oaths next to the signature of the commissioner of oaths. The court *a quo* has held that sub-regulation 4(2) is itself peremptory, leaving no room upon a commissioner of oaths to impress a corporate law firm on the affidavit when administering an oath or affirmation. I have already found that the Regulations are not peremptory

[2] 1974 (4) 821 (T)

but directory, and therefore the court *a quo* has erred in holding that the Regulations were peremptory.

[19] The commissioner of oath had duly signed the appellant's founding affidavit and did not put an electronic signature. In terms of the Regulations, the details of the commissioner of oaths must appear strictly below the signature of the commissioner of oaths. In view, whether the full names and business address has been printed or affixed by corporate stamp below the signature or next to signature is immaterial. What must be looked at is whether the full names, designation and business address of the commissioner of oaths appears on the certificate. Even if there are certain deficiencies like in the case at hand, the court must look at the information as a whole and determine whether the deficiencies are that material to render the whole affidavit defective, what prejudice will that cause to the affected party and the interest of justice. If the deficiencies are not that material, in my view, there is substantial compliance. In the case at hand even though Daniel Paul Viller did not insert his designation, it can be determined that he is from Vermaak Beslaar Attorneys and a commissioner of oaths, and therefore, failure to insert his designation is not that material under the circumstances, and there was substantial compliance. If there is doubt as to whether the details that appears on that certificate is not that of the commissioner of oaths, it is for the party who

had the doubt to challenge and substantiate that. In this case the respondents were correctly satisfied that there was substantial compliance and did not have issues with that. For the court to hold that it could not be determined as to whose signature was put at the foot of the affidavit had based its conclusion on speculation and suspicion as no facts were placed before it that substantiate the doubt. Since there was substantial compliance by the commissioner of oaths in commissioning the appellant's founding affidavit, the court *a quo* had erred in finding that the founding affidavit was not in conformity with the Regulations.

[20] In relation to the second point *in limine* the only issue that the respondents have pursued is that the annexures to the founding affidavit have not been initialed or signed by either the deponent or commissioner of oaths. In terms of Regulation 3(1) what is required of the deponent is to sign a declaration in the presence of the commissioner of oaths. Regulation 3(2) provides that if the deponent cannot write, he shall affix his mark at the foot of the declaration. Regulation 4(1) provides that the commissioner of oaths shall certify below deponents' signature or mark. There is nowhere in the Regulations where it makes provision for signing or initialing of the annexures to the affidavit by the deponent and commissioner of oaths. Although it is desirable and advisable for the deponent and commissioner

of oaths to sign or initial the annexures to show that they form part of the affidavit, it is not a requirement in terms of the Regulations.

[21] The manner in which the court had raised the second point *in limine mero motu* after the respondents' have abandoned it need some comments, as it raises the question whether the court *a quo* did not go beyond what the respondents were seeking, by granting a relief which the respondents had abandoned. In *Fischer v Ramahlele*[3] Theron JA and Wallis JA said:

> "[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may be instances where the court may *mero motu* raise a question of law that emerges from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.
>
> [14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however, interesting or important they may seem to it, and to insist that the parties deal with them. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional

[3] 2014 (4) SA 614 (SCA) at para 13 and 14

evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues identified to be determined because they are relevant to future matters and relationship between the parties. That is for them to decide and not for the court. If they wish to stand by the issues they have formulated, the court may not raise new ones and compel them to deal with matters other than those they have formulated in the pleadings or affidavits."

[22] Counsel for the respondent had notified the court *a quo* that there was no merit in the second point *in limine* as there was substantial compliance with the Regulations, and further that the Regulations were directory and not peremptory. Counsel for the respondents submitted it to court that he did not want to argue the appellant's case, and that if the court *a quo* had a problem with the commissioning of the affidavit, the court *a quo* will take it up with counsel for the appellant. It was clear that despite having initially raised that point in their answering affidavit as a point *in limine*, they did not wish to pursue it anymore. The parties have therefore formulated the issues that the court must determine, and the court *a quo* was supposed to respect their wishes and not compel them to argue what they did not wish to pursue. Even though this point of law emanates from the pleadings, the respondents were well aware of it and did not wish to pursue it anymore as maybe they have realized that they did not have sufficient facts to substantiate that point. It was therefore not for the court *a quo* to build up a case for the respondents on the facts which were based on speculation and suspicion. The court *a quo* therefore erred in raising that point *in limine mero motu* despite it been abandoned by the respondents.

[23] Turning to the first point in limine, the respondents have stated that there are no details concerning the capacity of the deponent of the appellant's founding affidavit, Olof Abraham Breytenbach and/or his supposed (or not) to depose to the founding affidavit on behalf of the appellant. What the respondents are here disputing is the authority of the deponent of the appellant's founding affidavit to depose that affidavit. Rule 7(1) of the Rules read as follows:

> "Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it came to the notice of a party that such a person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed , whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application."

[24] In a similar issue challenging the authority of a deponent to depose an affidavit was raised in *Unlawful Occupiers, School Site v City of Johannesburg*[4] where Brandt JA said:

> "The issue raised had been decided conclusively in the judgment of Flemming DJP in Eskom v Soweto City Council 1992 (2) SA 703 (W), which was referred to with approval by this Court in Ganes and another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA) at 624I-625A. The import of the judgment in Eskom is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7 (1) of the Uniform Rules of Court."

[25] It is trite that a deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of

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[4] 2005(4) SA 199 (SCA) at 206G-H

the proceedings and the prosecution thereof that must be authorized. (See *Ganes and Another v Telecom Namibia* at para 19). The deponent of the appellant's founding affidavit has stated that the contents of the affidavit are within his personal knowledge and belief both true and correct, and that he is deposing the affidavit in support of the accompanying notice of motion. If the respondents doubt his authority to depose the affidavit, the proper remedy for them is provided for in Rule 7 (1). Even if the respondents' have not raised the issue of authority of the deponent of the appellant's founding affidavit within 10 days of becoming aware that, it could still with the leave of court upon showing good cause have challenged that in court. In that event if the court found merit in respondent's application, the court was supposed to have postponed the proceedings to enable the deponent of the appellant's founding affidavit to prove his authority to act, and not dispose the matter in the manner in which the court *a quo* did. In my view, the court *a quo* erred in upholding the respondents' two points *in limine*. It follows that the appeal stands to succeed.

[26] In the result I make following order:

26.1 Respondents' point *in limine* regarding the appealability of the striking off order is dismissed.

26.2 The appeal is upheld with costs including the costs of the application for leave to appeal to the Supreme Court of Appeal.

26.3 The order of the court *a quo* is set aside and substituted with the following:

"The respondents' two points in limine are dismissed with costs."

26.4 The matter is remitted to the court *a quo* to hear further arguments.

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

SEMENYA DJP

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

MULLER J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARENCES

Counsel for the appellant	**: Adv C van der Spuy**
Instructed by	**: Lanham-Love van Reenen attorneys**
Counsel for 1st to 4th respondents	**: Adv NG Louw**
Instructed by	**: Manly Inc**
Date heard	**: 5th November 2021**
Electronically circulated	**: 11th November 2021**