



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES.

(2) OF INTEREST TO OTHER JUDGES: YES.

(3) REVISED.

2022-12-01

DATE

SIGNATURE

Case Number: A194/2021

In the matter between:

KAREL JOHANNES VAN AS N.O.

First Appellant

STAR STONE CRUSHERS N.O.

Second Appellant

CHRISTINE CATHERINE VAN AS N.O.

Third Appellant

and

GERTRUIDA SUSANNA JACOBS N.O.

First Respondent

DAWID MATTHEE N.O.

Second Respondent

JUDGMENT

POTTERILL J

Background

- [1] The appellants, Karel Johannes van As N.O., Star Stone Crushers CC and Christine van As N.O. [the appellants] are pursuant to leave granted by the Supreme Court of Appeal appealing the court *a quo*'s order to uphold a *point in limine*, dismissing the applicants' application with costs, with costs to include the costs of the counter-appeal. For ease of reference I refer to "*the appellants*" also as the applicants in the application and "*the respondents*", as in the appeal and application. The appeal was by agreement re-instated.
- [2] The respondents raised the point that the appellants' founding affidavit did not comply with Regulation 4(2) of the Regulations Governing the Administration of an Oath or Affirmation promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 [the Regulations].
- [3] The founding affidavit reflected that the deponent had signed the affidavit. Directly below it was printed:

"I certify that on the 26th (entered in manuscript) day of July 2019 at Pretoria (entered in manuscript) and in my presence the deponent signed the Affidavit and declared that he knows and understand the contents hereof, has no objection to taking this oath and considered the oath to be binding on his conscience, and I further certify that the requirements of Regulation GN 1258 of 21 July 1972, amended by GN R1648 on 19 August 1977, and as further amended by GN R1428 of 11 July 1980, and as further amended by GN R774 of 23 April 1982 in terms of Section 10 of the Justices of the Peace and Commissioners of Oaths Act, Act 16 of 1963 have been complied with in all respects."

Below this paragraph is printed "*Commissioner of Oaths*" and above the print a signature was appended. The affidavit and all the attachments were initialled on each page with two different initials. It was undisputed that one set of the initials was that of the deponent and the other that of the unidentified Commissioner of Oaths.

- [4] It is thus common cause that the full names of the commissioner, his or her designation and the area for which appointment was held, or his or her office appointed *ex officio* was absent. The respondents argue that these omissions constitute a lack of compliance with Regulation 4(2). It was not in the answering affidavit disputed that the oath was in fact administered. The argument went that this non-compliance left the appellants with no affidavit in support of the notice of motion as required in terms of Rule 6 of the Uniform Rules of Court and therefore the application should be dismissed with costs.
- [5] The appellants responded with a replying affidavit stating that the Commissioner of Oaths was Mr Derik Greyling, a practising attorney employed by Makole Osman Attorneys at 1st Floor, King's Gate, 5 10th Street, Menlo Park, Pretoria. The deponent's attorney, Ms. Magdel van Biljon was present and simultaneously deposed to her confirmatory affidavit in front of Mr Derik Greyling. In Ms Van Biljon's confirmatory affidavit the details of Mr Greyling are reflected in full as required in terms of Rule 4(2). Mr Greyling's affidavit is attached to the replying affidavit and confirms that Mr Van As took the oath in front of him on 26 July 2019. The signature reflected above the words "*Commissioner of Oaths*" is indeed his signature. He explained that he omitted to stamp the details of his business address and his designation on the founding affidavit, but did so on the confirmatory affidavit.

Regulatory Framework

- [6] Regulation 4(2) provides:

“4.

- (1) *Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.*
- (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 held his appointment or the office held by him if he held his appointment ex officio.”*

The findings of the court *a quo*

- [7] The court *a quo* found that despite Full Courts¹ having consistently found that the requirements of Regulation 4(2) are directory, the non-compliance of Regulation 4(2) left the founding affidavit deficient, leaving the respondents with no case to meet. The court *a quo* found this while acknowledging the trend “*of presiding officers to exercise their discretion to condone non-compliance with Regulation 4 on the premise that there is substantial compliance*”, and expressing that she did not conform to that school of thought.
- [8] The court *a quo* furthermore found that the non-compliance with this “*statutory provision in the absence of provisions relating to the condonation of same, as is in this case is fatal to the appellant's application. This is so as the Act does not make provision for built in mechanism of condonation.*”

¹ *S v Munn* 1973 (3) SA 734 (NC) at 737H; *S v Msibi* 1974 (4) SA 821 (T)

- [9] The court found that an improperly commissioned affidavit can be cured procedurally by handing up at the hearing a newly commissioned affidavit, but not *“by delivering a further affidavit which explains the oversight.”*

Can a court of appeal interfere with the exercising of a discretion?

- [10] The court *a quo* had exercised a discretion disallowing the founding *“affidavit”*. A discretion is however not unfettered and must be exercised judicially upon consideration of the facts of each case.

“The power of interference on appeal is limited to cases of vitiation by misdirection or irregularity, or the absence of grounds on which a court, acting reasonably, could have made the order in question. The Court of appeal cannot interfere merely on the ground that it would itself have made a different order.”²

- [11] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 (5) SA 245 (CC) at paras [83] and [85]-[87] the Court found that:

[85] A discretion in the true sense is found where the lower court has a wider range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of s 35 of the Restitution of Land Rights Act. It is ‘true’ in that the lower court has an election of which option it will apply and any option can never said to be wrong as each is entirely permissible.

[86] In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between equally permission options ...

² *Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A) at 670D-F

[87] ... In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own discretion without first having to find that the court of instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in a loose sense, it must be guarded."

[12] I can thus cautiously interfere with the loose discretion as exercised by the Court *a quo*.

Procedural misdirections

[13] The court incorrectly conflated an application for condonation and the exercising of a discretion. The regulations do not provide for condonation for non-compliance with Regulation 4(2), but that does not render a court powerless. As the court *a quo* itself remarked, the courts regularly exercise a discretion to condone non-compliance if there is substantial compliance with the Regulation. The court *a quo* turned a blind eye to the replying affidavit and did not exercise her discretion on the facts therein. In applying the *Plascon-Evans*³ rule the court ought to have accepted the version set out in the replying affidavit. When that version is accepted then there is a proper affidavit complying with Regulation 4(2) before court. The point *in limine* had to be dismissed.

³ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A); *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375D-F

- [14] The further procedural misdirection was that the replying affidavit did not cure the defects in the founding affidavit, but that in its stead a corrected founding affidavit should have been handed up at court.
- [15] A reply to the point *in limine* did not constitute new facts; a person signed as Commissioner of Oaths. Insofar as this signature is placed in dispute as not reflecting who's signature it is, the reply answers thereto. With no bar to accepting this evidence, the court was obligated in terms of the *Plascon-Evans* rule to accept this evidence. If this evidence is to be accepted the court must be satisfied as to who the Commissioner of Oaths was, his designation and that the deponent took the oath before him. If that is so, then the initial non-compliance with Regulation 4(2) has to be condoned. The court *a quo* materially misdirected itself in upholding the point.
- [16] It must be remarked, that handing up a founding affidavit at the hearing does not *ipso facto* cure the deficiency in the original founding affidavit, destroying the point *in limine*. The respondents can still argue that they are ambushed with a new affidavit that was not previously before court. It can lead to exactly the same argument requiring the court to exercise a discretion. Either option is thus open to a party to cure the deficiency in an affidavit. A party can also, with the leave of court, opt to call a witness to cure the deficiency.

Substantive misdirection

- [17] A court must be satisfied that a document had been sworn or attested to and signed in the presence of a Commissioner of Oaths. The Commissioner of Oaths must be an independent person that could not have influenced the deponent. As far back as 1979 Roper J in *Abromowitz v Jacquet and Another*⁴ in the WLD it was found that:

⁴ 1950 (2) SA 247 (W)

"I do not think, however, that it could be contended that the proper course, where an affidavit is imperfectly attested, is to reject it and proceed with the case as if no affidavit had been made, and without giving the party who tendered the affidavit an opportunity of putting the information contained in it before the Court in a regular manner."

- [18] In *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk*⁵ a Full Court of this Division found that:

"Even, however, if this approach be insufficiently formalistic, it nevertheless seems to be that the documents in question is an affidavit. It is now settled (at least in the Transvaal) that the requirements as contained in regs 1, 2, 3 and 4 are not peremptory but merely directory; the Court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proved or not."

- [19] The court *a quo* referred to this Full Court finding, but found that *"compliance is thus key."* She ignored the trite principle of *stare decisis* in not exercising her discretion on all the facts placed before her. The content of the replying affidavit was either ignored or rejected, but what is clear, is that the facts therein, contrary to the *Plascon-Evans* rule, were not factored in when the court *a quo* exercised its discretion. Excluding these facts was a material misdirection and an incorrect exercising of judicial discretion.

- [20] In a nutshell, the Commissioner of Oaths neglected to place his full names, designation *ex officio* and address on the founding affidavit. The Commissioner of Oaths explains this under oath in the replying affidavit. The fact that the deponent was in front of him and took the oath is confirmed in a confirmatory

⁵ 1979 (3) SA 391 (T) at 398G


affidavit. With nothing to gainsay these facts there was an affidavit before the court and the point *in limine* should have been dismissed.

[21] I accordingly make the following order:

21.1 The appeal is upheld with costs.

21.2 The order of the court *a quo* is set aside and replaced with the following:

“The point *in limine* is dismissed with costs. The matter is referred back to the High Court for adjudication on the merits.”



S. POTTERILL

JUDGE OF THE HIGH COURT

I agree



B. NEUKIRCHER

JUDGE OF THE HIGH COURT

I agree



N. TSHOMBE

ACTING JUDGE OF THE HIGH COURT

CASE NO: A194/2021

HEARD ON: 9 November 2022

FOR THE APPELLANTS: ADV. A. VORSTER

INSTRUCTED BY: Gildenhuys Malatji Inc.

FOR THE RESPONDENTS: ADV. J.G.W. BASSON

INSTRUCTED BY: Bernhard van der Hoven Attorneys

DATE OF JUDGMENT: 1 December 2022