IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022/1245

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

14 MARCH 2024

In the matter between:

ED FOOD S.R.L. Applicant

and

AFRICA'S BEST (PTY) LIMITED Respondent

JUDGMENT

DEN HARTOG AJ

1. At the commencement of the hearing I was requested to adjudicate on

a point *in limine* raised by the Respondent. This point *in limine* was dismissed with costs on 7 March 2024 when I undertook to provide reasons in my judgment on the main application.

POINT *IN LIMINE*

2. The Respondent challenged the Applicant's founding and confirmatory affidavits on the basis that the affidavits were commissioned virtually and therefore not "in the presence of" the Commissioner of Oaths.

3. I heard argument on 4 March 2024 and stood the matter down to 7 March 2024 at 14:00, inviting the parties to file supplementary heads of argument on the point *in limine* by 12:00 on 6 March 2024.

4. Counsel for both Applicant and Respondent are thanked for their comprehensive heads.

5. The Respondent essentially contends that the commissioning of the founding and confirmatory affidavits via video conference call while the deponents to the affidavits were in Italy and the Commissioner of Oaths is in the Republic of South Africa, is in contravention of the Regulations governing the administering of an oath, and accordingly the affidavits are irregular and fall to be set aside.

6. The Respondent does not call for a dismissal of the application, but rather a referral to oral hearing.

7. The Applicant presented an affidavit by the Commissioner of Oaths, one Matthew James Kemp, the relevant portions of which read as follows:

> "***INTRODUCTION***
>
> *3. On 8 December 2021, I virtually commissioned the founding affidavit of Ms Katia Pedrini and the confirmatory affidavits of Dr Gian de Paulis and Mr Diego Vanetti (hereinafter referred to collectively as "the affidavits"), via a video conference call, on the platform "Zoom". I was therefore able to see, hear and speak to each of the three aforementioned deponents in a live video call.*
>
> *4. I am advised that:*
>
> *4.1 Ms Katia Pedrini ("Ms Pedrini") is the sole legal representative of the Applicant;*
>
> *4.2 Dr Gian de Paulis ("Dr de Paulis") is the sole director*

of the Applicant; and

4.3 *Mr Diego Vanetti ("Mr Vanetti") is the commercial managing director of the Applicant.*

5. *I will refer to Ms Pedrini, Dr de Paulis and Mr Vanetti collectively as "the deponents".*

6. *I am advised that the Applicant has as its principal place of business the address Via Ippolito Nievo, 4, 40069 Riale Di Zola Predosa, Bolgona, Italy. I am further advised that the signing of the affidavits was relatively urgent, and that there were no other reasonable means available to the deponents to commission the affidavits in the presence of a Commissioner of Oaths in the ordinary course.*

PROCESS FOLLOWED TO COMMISSION AFFIDAVITS

7. *Prior to the video call with the deponents, Ms Sheri-Leigh Pienaar of the law firm Werthschröder Inc, the attorneys representing the Applicant in these proceedings, sent me an e-mail containing the affidavits.*

8. *During the video call with the deponents, I forwarded the affidavits I received via e-mail from Werthschröder Inc to the deponents, and confirmed that the affidavits were the same affidavits transmitted to the deponents by Werthschröder Inc.*

9. *During the video call, I verified the identity of each of the deponents by requesting and viewing their identification documents, which they each held to the camera of the device which they were using for the video call, and which I could clearly view on my computer monitor.*

10. *I then confirmed with each of the deponents that the affidavits printed out by them for signature were the same transmitted via e-mail.*

11. *Once I confirmed each deponent's identity, I lead each individually in the oath by asking if they have read and understood the contents of their respective affidavits, if they had any objection to taking the prescribed oath, and whether they consider the prescribed oath to be binding on their conscience.*

12. *Mr Vanetti does not have a strong command of the English language and required a translation of the essential questions to be answered when deposing to an affidavit. Dr de Paulis assisted with the translation, and Mr Vanetti answered in the affirmative in English.*

13. *After each deponent answered that:*

    13.1 *they knew and understood the contents of their respective affidavits;*

    13.2 *they had no objection to taking the prescribed oath; and*

    13.3 *they considered the oath to be binding on their conscience.*

    I applied the oath and each deponent uttered the words: I swear the contents of the affidavit are true, so help me God".

14. *The deponents then initialled every page of their respective affidavits, signed above their name where applicable, scanned the affidavits and the annexures thereto, and sent*

it back to me via e-mail. Thereafter, I checked to confirm that the affidavits sent by the deponent matches the affidavit sent to the deponent, printed each affidavit, counter-initialled every page and the annexures thereto and signed where required. I then appended my certification and stamp at the end of the affidavit, as applicable.

15. I confirm to the above Honourable Court by means of this affidavit that to the best of my knowledge and belief data integrity was maintained, and request that the Court grant condonation for non-compliance with the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 and the Regulations published thereunder, insofar as that is necessary."

8. I interpose at this stage to mention that counsel for the Respondent made something of the fact that Dr de Paulis was an interested party and conflicted. I am of the view that Dr de Paulis merely assisted in the translation and in any event deposed to a confirmatory affidavit.

9. In my view it is only the Commissioner of Oaths that is not to be conflicted and the mere fact that one of the witnesses merely assisted in the translation in the taking of the oath is of no consequence.

10. Sections 7 and 8 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 provide as follows:

"*7.* ***Powers of Commissioners of oaths***

Any commissioner of oaths may, within the area for which he is a commissioner of oaths, administer an oath or affirmation to or take a solemn or attested declaration from any person: Provided that he shall not administer an oath or affirmation or take a solemn or attested declaration in respect of any matter in relation to which he is in terms of any regulation made under section ten prohibited from administering an oath or affirmation or taking a solemn or attested declaration, or if he has reason to believe that the person in question is unwilling to make an oath or affirmation or such a declaration.

8. ***Powers as to oaths outside the Republic***

(1) (a) The Minister may, by notice in the Gazette, declare that the holder of any office in any country outside the Republic shall in the country in which or at the place at which he holds such office, have the

powers conferred by section seven upon a commissioner of oaths, and may in like manner withdraw or amend any such notice.

(b) Any person appointed as a commissioner of the Supreme Court of South Africa shall for the purpose of the exercise of his powers or the performance of his duties as such commissioner have, at any place outside the Republic, the powers conferred by section seven upon a commissioner of oaths."

11. Regulation 3(1) of the regulations governing the administering of an oath or affirmation provides as follows:

"***3(1)*** *The deponent shall sign the declaration in the presence of the Commissioner of Oaths".*

12. One of the points taken by the Respondent is that the Commissioner whom I shall refer to as Mr Kemp, was not entitled to administer an oath outside the Republic of South Africa.

13. I disagree. Mr Kemp is an attorney, duly admitted to the High Court of South Africa and consequently a Commissioner of Oaths appointed by

the Supreme Court of South Africa in terms of the provisions of Section 8(1)(b) of the Justice of the Peace and Commissioner of Oaths Act. In addition, in Government Notice R1872 in GG7215 of 12 September 1980 as amended by GN R2828 in GG9018 of 30 December 1983 and GN R527 in GG0621 of 15 March 1985, the then Minister of Justice, Alwyn Louis Schlebusch conferred the powers of a Commissioner of Oaths outside the Republic on any person who exercises in a state to which independence has been granted by law a legal professional equivalent to that of an attorney, notary or conveyancer in the Republic.

14. In the premises, I am of the view that Mr Kemp is entitled to administer an oath outside the Republic of South Africa.

15. In argument and in later heads of argument, the Applicant relied on a judgment handed down by Monene AJ in an unreported judgment in the Limpopo Division of Polokwane under case number 9938/2022 in the matter between **Madaure Jacqueline Tinashe and University of Limpopo (Turfloop Campus)**.

16. In the judgment Monene AJ considers a judgment of **S v Munn** 1973 (3) SA 736 (NCD) at 734 H, which found that non-compliance with regulations would not invalidate an affidavit if there was substantial compliance with the formalities of the regulations (para 11).

17. Monene AJ also deals with the matter of **Knuttel N.O. v Bhana and Others** 2022) (2) All SA 201 ("Knuttel") wherein the administering of the oath via video conference was allowed under circumstances where the deponent was suffering from Covid during the time of the pandemic (para 12).

18. He the goes on and finds as follows:

> "*[18] It seems to me the law is clear on what the applicant in casu ought to, as a citizen of a neighbouring country and fellow "common wealth" nation Zimbabwe, have done if he wanted to have a properly commissioned affidavit and that is to have availed herself at the South African Embassy in Zimbabwe to get commissioning assistance. I hasten to add that regarding Section 8 of Act 16 of 1963 referred to supra issues of being merely directory as regulations are, do not arise, as this is a statutory provision that cannot just be ignored or disregarded. Cleary the legislature wanted affidavits deposed to outside the Republic to be commissioned through a well-set out process which the applicant could have and should have complied with if she was unable to travel to these shores for purposes of compliance with Rule 3(1).*"

19. This ruling, notwithstanding that there was a lack of financial resources and having a sick parent to take care of.

20. Monene AJ dismissed the application as being non-compliant with the regulations governing the administering of oaths and affirmations. The Applicant also referred to the matter of **Firstrand Bank Limited v Jacques Louis Briedenhann** 2022 (5) SA 215 (ECGq).

21. In this judgment reference is made to the Knuttel matter as well as the Munn matter.

22. On the meaning of administering the oath in the presence of the following comment is made:

> *""**In the presence of**"*
>
> *[21] The new Shorter Oxford Dictionary provides multiple contextual meanings for the word "presence'. Its meaning is given as, "the fact or condition of being present; the state of being with or in the same place as a person or thing; attendance, association." It is also given as "the place or space around or in front of a person". The phrase "in the presence of" suggests "in the company of, observed by"."*

23. Despite the above, Goosen J finds as follows:

> "*[56] It follows from what I have said that I would be disinclined to receive the affidavits given the elected non-compliance with the regulations. However, the discretion with which I am vested must be exercised judicially, upon consideration of all the relevant facts and in the interest of justice.*
>
> *[57] There can be no doubt that the evidence placed before me establishes that the purposes of Regulation 3(1) have been met. To refuse to admit the affidavits would, of course, highlight the importance of adhering to the principle to the rule of law. That point is, I believe, made plain in this judgment. To require the plaintiff to commence its application for default judgment afresh upon affidavits which would contain the same allegations but which are signed in the presence of a commissioner of oaths would not, in my view, be in the interest of justice. There is after all no doubt that the deponents did take the prescribed oath and that they affirmed doing so. It would therefore serve no purpose other than to delay the finalisation of this matter with an inevitable escalation of costs, not to receive the affidavits. In the circumstances, I accept the affidavits*

deposed to in the manner described in this judgment as complying in substance with the provisions of the regulations."

24. It is my respectful view that this is the correct approach and is consistent with that of the judgment by Wunsh J in **Marigold Ice Cream Co v National Co-operative Dairies Limited** 1997 (2) SA 671 (WLD) when he states at 681 A to C:

"*In conclusion, my initial assessment of the course which this aspect of the case should take, is, I consider, consistent with what was said in cases many years ago and which was cited by counsel;*

"Mr Jeppe's whole exception is founded on a pure technicality, and there is no advantage to be gained by either party if we uphold it. To uphold it, would be to allow useless costs to be piled up, and only the persons to benefit by these costs are the practitioners. The dispute between the parties is not one which is advanced by this exception, nor is the hearing of the case at all simplified. There is no question of embarrassment, no difficulty in knowing what evidence to produce."

(per Wessels J in Ritch v Bhyat 1913 TPD 589 at 593)

'The tendency of recent rules of procedure in this Court has been to sweep away all unnecessary technicalities and hindrances to the speedy and effectual administration of justice."

(per Lord de Villiers CJ in Le Roux v Prince (1883) 2 SC 405 at 407)"

25. I also refer to the judgment of **Crous International (Pty) Limited v The Printing Industries Federation of South Africa** [2017] 1 All SA 146 (GJ).

26. This matter comprised a claim for commission of an estate agent. the estate agent had complied with all the requirements for the issue of a fidelity fund certificate, but due to an error in the office of the Estate Agents Board, no fidelity fund certificate was printed for the legal entity.

27. In terms of Section 26 and 34(a) of the Estate Agents Board Act, No 112 of 1976, the Plaintiff had to be in physical possession of a certificate. The plaintiff in that matter did not comply with this legal requirement and was according to the evidence as a result of an error in the Estate

Agents Board Offices.

28. Relying on the Constitutional Court judgment of **Liebenberg N.O. and Others v Bergrivier Municipality** 2013 (5) SA 246 (CC), the Court found that:

> "*the approach or test to be applied is whether there has been compliance with the relevant precepts in such a manner that the objects of the statutory instruments concerned have been achieved*" (para [91]).

29. In the **Liebenberg v Bergrivier Municipality** matter, a municipality had failed to comply with relative and statutory provisions in respect of rural levies and property rates, the Court found that this does not necessarily result in the invalidity of the rates imposed and adopted the following approach:

> "*[26] Therefore, a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.*"

30. I find that based on the affidavit of Mr Kemp there has been substantial compliance.

31. I also seem it necessary to refer to the judgment of Satchwell J in **Uramin (Incorporated in British Columbia) t/a Areva Resources Southern African v Perie** 2017 (1) SA 236 GJ when she states

> *"[27] in summary, courts cannot be ignorant of the needs of the societies and economies within which they operate. Legal procedures must comport to the exigencies of globalisation and the availability of witnesses as I have discussed above. Courts must adapt to the requirements of the modernities within which we operate and upon which we adjudicate…*
>
> *…*
>
> *[32] At the time that the rules of Court were first formulated, witnesses from beyond the jurisdiction of the then Transvaal Courts travelled by train from the coast and then by motorcar and then by aeroplane. They may even have arrived at the coast after week-long voyages by steamship from another continent. Urgent messages arrived at this Court by way of telegrams whose contents and authors were difficult to authenticate.*

[33] Neither the uniform rules of Court nor the Civil Proceedings Evidence Act expressly stated that more modern technologies than pen and paper or living, breathing persons are permitted in the High Court. The legislation is not needed to do so. The Constitution and the rules enjoin us to make the necessary developments on a case-by-case and era-by-era basis."

32. I agree that the Courts must open themselves to the modern trend of technology. This does not mean that the Court can willy nilly accept non-compliance with acts and regulations, but must be aware of the requirement that there must be substantial compliance with such acts and regulations. As stated, in this case I am satisfied that there has been substantial compliance.

MERITS

33. The Applicant comes to this Court seeking an order in the following terms:

"*1.* The Respondent is ordered to make payment to the Applicant of:

1.1 EUR 28 000 (twenty-eight thousand euro); and

1.2 interest on the amount of EUR 28 000 at 9.75% from 20 March 2020 to date of payment;

2. Costs on the scale as between attorney and client."

34. This claim is based on an oral agreement concluded between the parties in settlement of a claim instituted by the Applicant as Plaintiff against the Defendant.

35. The agreement was initially communicated to the Applicant by the Respondent's attorneys as follows:

"Dear Sheri-Leigh

1. It is our client's instructions that the matter settled on the following terms:

1.1 that payment of approximately EU 40 000 will only be made by our client if;

1.1.1 the criminal charges brought against various parties in Italy had firstly been fully and permanently withdrawn; and

1.1.2 after such withdrawal, that the Court case in South Africa has been formally withdrawn, each party pay their own costs.

2. Kindly confirm the above and we look forward to hearing from you.

Caselines, 005-25

36. The Applicant then writes back to the Respondent and states as follows:

"Our client's instructions are that there was no agreement on an approximate figure. The exact amount agreed was EURO 48 000. Kindly confirm this with your client."

006-26

37. The Respondent then writes back to the Applicant and confirms that the agreed amount was EURO 48 0000.

005-27

38. This correspondence was exchanged during 13 to 23 September 2019.

39. The Applicant thereafter proceeded to withdraw the criminal charges as well as the action instituted.

40. The aforesaid facts and e-mails are common cause between the parties

41. The Respondent then proceeds to make two payments of EURO 10 000 to the Applicant on 20 December 2019 and 23 January 2020.

42. It is common cause that there was no time agreed as to when payment is to be made.

43. In my view, if there is no time agreed for payment, it is trite law that payment is to be made within a reasonable time, alternatively on demand.

44. There is a transcript of an exchange between the parties on WhatsApp wherein various requests and promises are made for payment on the outstanding amounts of EURO 28 000.

005-48 to 005-69

45. It is also common cause that formal demand was made on 3 May 2021.

005-39

46. In response to the demand, and on 12 May 2021, the Respondent sought a copy of the alleged settlement agreement in order to take proper instructions.

010-39

47. In response thereto the documents recording the agreement as referred to hereinbefore, were forwarded to the Respondent.

010-40 to 010-46

48. It is common cause that there was no further correspondence between the parties and this application was issued.

49. In the answering affidavit dated 14 February 2022, the Respondent states that the terms of the agreement as set out by the Applicant, is not a true version of the agreement. The Respondent particularly responds as follows:

> *"7.3.8.1.3.1 The Respondent would make payment of € 48 000, upon such payment terms to be agreed upon*

between the parties as and when payment was possible, in part, since the Respondent is a seasonal business;

7.3.8.1.3.2 *Alternatively, the Respondent will deliver mushrooms to the value of € 48 000 to the Applicant, as and when the Respondent is able to in view of being a seasonable business and in consultation with the Applicant."*

010-10

50. This is the very first time these terms are incorporated by the Respondent as terms of the agreement.

51. One would have expected, at the time the WhatsApp conversation started taking place as regards to the outstanding payment of EURO 28 000 that the Respondent would have made some sort of attempt to deliver mushrooms in terms of the agreement as alleged by it. In addition, one would have expected a very firm response to the demand sent out on 3 May 2021 seeking payment of EURO 28 000.00.

52. No responses to the demand was received, save for proof of the

agreement, which was provided and not one of these pleaded defences were raised.

53. It is trite law that a parties' failure to reply to a letter asserting to the existence of an obligation, justifies an inference that the assertion was accepted as the truth. See: **Benefit Cycle Works v Atmore** 1927 TPD 524.

54. In addition, in **Sewmungal and Another NNO v Regent Cinema** 1977 (1) SA 14 (N). At 820 B-D the following is found:

> "*There may be cases where the correspondence is wholly inconsistent with the litigant's version or where that version is so inherently improbable that a Court will be able to assert with confidence that cross-examination will not disturb the balance of probabilities. The examples are not exhaustive. Thus in Da Mata v Otto N.O. 1972 (3) SA 858 (AD) the Court was able to decide on the papers that there was no genuine dispute of fact, which could not be resolved on the affidavits, but in that case the unsuccessful litigant had, in certain respects, contented himself with bald denials. Furthermore, certain conduct of his was found to be wholly inconsistent with the existence of an agreement upon which he relied.*"

55. Similarly in this case, the conduct of the Respondent has been wholly inconsistent with the terms of the agreement as set out in the answering affidavit.

56. In the premises, I reject the Respondent's version.

INTEREST

57. In regard to interest, I have been called upon to consider interest to have started running in March 2020. In my view, interest is to run from date of formal demand, being 3 May 2021.

COSTS

58. I have been impressed upon by the Applicant to grant an order of costs on a punitive scale due to the conduct of the Respondent.

59. There have been various interlocutory applications in attempts to delay the matter, all of which have been dismissed.

60. Again before me, the point *in limine* was argued. I do not deem the raising of the point *in limine* to be dilatory as it constitutes a rather novel point and there was indeed caselaw supporting the contentions of the

Respondent, with which I disagree.

61. However, the Respondent's conduct by delaying payment for such a long extent of time raising a defence, which is highly improbable under circumstances where this has never been raised before. In fact, the Respondent has not even tendered to delivery mushrooms in terms of its own agreement between 2019 and to date hereof, some 5 years. I regard this conduct as reprehensible and worthy of a punitive cost order.

AMENDMENT

62. The Applicant sought to introduce an amendment when proceedings recommenced at 14:00 on 7 March 2024. The amendment came at an extremely late stage in these proceedings, the Applicant having known of the Respondent's defence from the filing of the answering affidavit in 2022. I am not going to allow this amendment to be effected and in fact dismissed the amendment with costs on the hearing on 8 March 2024.

63. In the result, I make the following order:

63.1. The Respondent is ordered to make payment to the Applicant of:

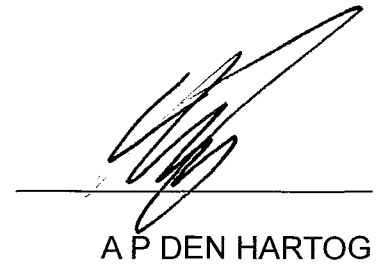
63.1.1. EURO 28 000 (Twenty-Eight Thousand Euro); and

63.1.2. interest on the aforesaid amount *a tempore more* from 3 May 2021 to date of payment;

63.2. Costs on the scale as between attorney and client;

63.3. The point *in limine* is dismissed with the costs occasioned thereby, to be paid by the Respondent on a party and party scale;

63.4. The application to amend is dismissed with the Applicant to pay the wasted costs occasioned by the amendment, if any, on a party and party scale.



A P DEN HARTOG

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: this judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation

to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be 14 March 2024

HEARING DATE:	8 MARCH 2024
DELIVERED:	14 MARCH 2024
Counsel for the Applicant in the main application: Attorneys for the Applicant	M H Nieuwoudt Werthschröder inc Ref: S Pienaar/KSD00022
Counsel for the Respondent in the main application: Attorneys for the Respondent	A Pillay C&O Incorporated Ref: CO/ABF4