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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 5528/2020

1. REPORTABLE: YES

2. OF INTEREST TO THE JUDGES: YES

3. REVISED

In the matter between:

**MOHALE RAOFE EZEKIEL MOGALE
(IDENTITY NUMBER 6[...])**

Applicant

And

**BMW FINANCE SERVICES(SOUTH AFRICA)(PTY) LTD Respondent
(REGISTRATION NUMBER: 1990/004670/07)**

In re:

**BMW FINANCE SERVICES(SOUTH AFRICA)(PTY) LTD
(REGISTRATION NUMBER: 1990/004670/07)**

Plaintiff

And

MCHALE RAOFE EZEKIEL MOGALE

Defendant

(IDENTITY NUMBER 6[...])

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representative ' email addresses. The date for the hand-down is deemed to be the 11th September 2024

JUDGEMENT

LEDWABAAJ

Introduction

1. The applicant raises a dispute about the opposing affidavit deposed to by Rian Lubbe on behalf of the respondent. He submits that because the deponent declared that he is a male, the Commissioner of Oaths certificate states the deponent's gender as both male and female, it is irregular, makes it unclear as to who is the deponent and is prejudicial to him as the applicant.

2. In the disputed opposing affidavit, the deponent describes himself as "*an adult male*". In the certificate below the deponent's signature, the Commissioner of Oaths states that "*THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT, THAT SHE HAS NO OBJECTION AGAINST TAKING THE PRESCRIBED OATH AND THAT SHE CONSIDERS THE PRESCRIBED OATH TO BE BINDING ON HER CONSCIENCE*".

3. The applicant's complaint relates to the pronoun "*SHE*" that appears twice in the Commissioner of Oath's certificate along with "*HER*" , when they are read with the description "*an adult male*" and "*HE*".

4. The applicant's submission is that while the deponent declares that he is male, the Commissioner of Oath certifies that he is male (with "HE" in the first part) and female(with "SHE and "HER" in the second part) .

5. I understand the applicant's submission to be that the difference meant the affidavit was not commissioned in the prescribed manner, making it highly probable that the prescribed oath was not administered by the Commissioner of Oaths in the presence of the deponent.

6. The other issue raised by the applicant is that the respondent's opposing affidavit was served and filed on the 3rd March 2022 instead of the 10th February 2022. It was delivered fifteen days outside the prescribed period without condonation application explaining the delay.

7. The background is that the applicant applies for the dismissal of the condonation application sought by the respondent. The respondent has delivered the disputed opposing affidavit against the dismissal application. The applicant's submission is that the respondent's opposing affidavit does not comply with the Regulations made under Section 10 of the Justice of the Peace and Commissioner of Oath Act 16 of 1963 (the Act) and it was delivered outside the required period without condonation application. The opposing affidavit should be ignored for the applicant's dismissal application to be dealt with on unopposed basis.

The legal framework

8. Commissioner of oath is done in terms of the Act. The Act was passed to consolidate and amend the laws relating to the appointments, powers and duties of justices of the peace and Commissioners of Oaths.

9. Section 5 of the Act empowers the Minister to appoint a Commissioner of Oaths for any fixed area to hold that office during the Minister's pleasure.

10. Section 7 of the Act empowers any Commissioner of Oaths to administer an oath or affirmation to or take a solemn or attested declaration from any person within the area for which she/he is a Commissioner of Oaths.

11. Section 10 of the Act gives the President the power to make regulations generally for the better carrying out of the objects and purpose of the Act, including prescribing the form and manner in which an oath or affirmation shall be administered and a solemn or attested declaration shall be taken, when not prescribed by any other law.

12. In terms of Regulation 2(2), if a deponent acknowledges that she/he knows and understands the contents of the declaration and informs a Commissioner of Oaths that she/he does not have any objection to taking the oath and that she/he considers it to be binding on her/his conscience, a Commissioner of Oaths shall administer the oath prescribed by Regulation 1(1)

13. Regulation 3(1) states that the deponent shall sign the declaration in the presence of Commissioner of Oaths.

14. In terms of Regulation 4(1), below a deponent's signature or mark, a Commissioner of Oaths shall certify that the deponent has acknowledged that she/he knows and understands the contents of the declaration.

Analysis

15. Rule 6(5) (d)(ii) of the Uniform Rules requires that any person opposing the granting of an order sought must serve and file an answering affidavit.

16. An affidavit can be described as a written statement sworn to by a deponent in the presence of and before a Commissioner of Oaths.¹ A deponent is required to appear in person before a Commissioner of Oaths

17. An affidavit must satisfy the general requirements as contained in the Regulations promulgated in terms of section 10 of the Act(the Regulations).²

18. It is a basic requirement of an affidavit that it must be signed in the presence of a Commissioner of Oaths.³ Regulation 3 (1) requires a deponent to sign a declaration or make a mark in the presence of Commissioner of Oaths.

19. Where the Commissioner of Oaths has failed to indicate whether a deponent is male or female, the inference is irresistible that a deponent did not appear in person before a Commissioner Oaths.⁴

20. Regulation 2(2) read with 4(1) requires a deponent to acknowledge that she/he knows and understands the contents of the declaration and that she/he does not have any objection to taking the oath which she/he considers to be binding on her/his conscience. A Commissioner of Oaths must certify this below a deponent's signature or mark.

21. I read Regulations 3(1) and 4(1) to oblige a Commissioner of Oath to properly identify the gender of a deponent. This identification is an indication that a deponent appeared before a Commissioner of Oaths as required by Regulation 3(1)

22. Should a Commissioner of Oath not certify that an affidavit was sworn to or

¹ Oosthuizen v Steyn (2020) ZAGPPHC 161; 2021(4) SA 307(GP)(Oosthuizen)- par 31

² Absa Bank Ltd v Botha NO & Others (39228/12)(2013) ZAGPPHC 163; 2013 (5) 563(GNP)(Absa) - par 6

³ Absa-para 7 and 12

⁴ Oosthuizen- par 31

affirmed, the court will be reluctant to assume its regularity.⁵

23. The use of proper pronoun in certifying that the deponent has acknowledged that she/he understands the contents of the declaration and regards as binding to her/his conscience is imperative.

24. Non-compliance with the requirement of a certificate that the deponent has acknowledged that he/she knows and understands the contents of the affidavit is directory. This may be condoned at the discretion of the court.⁶

25. Depending upon whether substantial compliance with the Regulation has been proven or not, the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations.⁷

26. In this case, for the purpose of exercising the discretion whether to condone the respondent's opposing affidavit, regard must be had to Rule 6(5)(d)(ii) of the Uniform Rules. It requires an opposing party to respondent by way of an affidavit.⁸

27. The only available documents to be used for the purpose of discretion are founding and opposing affidavits. There is no supporting, confirmatory or supplementary affidavits by either a Commissioner of Oaths or deponent that support substantial compliance.⁹

28. In this case the opposing affidavit declares the deponent as an adult male. In certifying that the deponent has acknowledged that he knows and understands the contents of the declaration and that he has no objection to taking the prescribed oath he considers binding on his conscience, the Commissioner of Oaths confusingly

⁵ Absa- par 8

⁶ Oosthuizen- par 29

⁷ Absa- par 8. Oosthuizen- par 30

⁸ Oosthuizen- para 31 and 33

⁹ Absa- par 12

certified the deponent as male and female in the same sentence. The Commissioner of Oaths' usage of contradictory and confusing pronouns resulted in the disjoint between the deponent's declaration and the Commissioner of Oaths certificate

29. Like in the Oosthuizen case, in this case the Commissioner of Oaths certificate described the deponent as both male and female.

30. In both Absa and Oosthuizen cases, the affidavits were not received by the courts for non-compliance with the regulations.

31. I decline to condone the non-compliance with the Regulations and find that the purported opposing affidavit was not properly commissioned. The applicant's point in limine in this regard should be upheld

32. This order should provide the respondent, if so advised, with an opportunity to address the complaint.

33. In view of the decision I made regarding the respondent's affidavit, it is not necessary to decide whether it is in the interest of justice that the late delivering of the respondent's opposing affidavit should be condoned or not.

34. The respondent is given an indulgence which should not be at the applicant's costs. There is no reason why the respondent should not pay the costs for indulgence.

Order

(a) The objection of the plaintiff to the attestation of the defendant's opposing affidavit is sustained,

(b) The respondent is granted leave to have its opposing affidavit re-attested or supplemented, if so advised.

(c) The respondent's re-attested supplemented affidavit is to be served and filed within fifteen days of the date of this order

(d) The respondent is ordered to pay the costs of this application on party and party scale.

**LEDWABA LGP
ACTING JUDGE OF THE HIGH COURT
POLOKWANE; LIMPOPO DIVISION**

APPEARANCES

FOR THE APPLICANT: No heads filed
INSTRUCTED BY: Lebepe and Associates
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FOR THE RESPONDENT: Adv Chuene
INSTRUCTED BY: MACROBET INC
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DATE OF HEARING: 2 AUGUST 2024

DATE OF JUDGMENT: 11 SEPTEMBER 2024