

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A2024/034792

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED: No
19/11/2024	
DATE	SIGNATURE

In the matter between:

STAY AT SOUTH POINT PROPERTIES (PTY) LTD

Appellant

and

GIN JOINT CAFÉ

Respondent

JUDGMENT

YACOOB, J:

[1] The parties are embroiled in litigation in the regional court, Johannesburg, stemming from the termination of a lease agreement between the parties. The litigation appears to be characterised by a slew of technical points being taken, and this appeal is no exception.

[2] The background facts as gleaned from the papers, are the following. The appellant was the lessor of certain property and the respondent a lessee. The respondent then entered into a joint venture agreement with a third party to run a restaurant and bar on the property.

[3] The respondent left the property in February 2021, leaving behind certain movables. According to the appellant, some of the movables belong to the respondent and some to the third party. In March 2021, the appellant sued the respondent for, *inter alia*, payment of arrear rental. On 18 March 2021, the sheriff compiled an inventory of the movables that remained on the property, which the appellant contends it holds in security against the outstanding rental. The appellant sought and obtained default judgment against the respondent ("the rent judgment"), and the respondent has sought a rescission of the rent judgment ("the first rescission application").

[4] Almost simultaneously with the first rescission application, the respondent instituted an action for vindicatory relief and damages in August 2022. According to the appellant this summons was not served on its attorneys of record but on the appellant itself. Due to confusion on the appellant's part, the respondent obtained default judgment on 15 February 2023 for the delivery of movables including the goods retained by the appellant and those belonging to the third party ("the vindicatory judgment").

[5] The respondent then attempted to execute on the vindicatory judgment. The appellant, in response, sought relief in two parts, first seeking (and obtaining) the stay of the warrant of execution on an urgent basis, and, secondly, seeking the rescission of the vindicatory judgment ("the second rescission application"). The court below dismissed the second rescission application, upholding of one of five points *in limine* raised by the respondent. The dismissal of the second rescission application is the subject of the appeal now before us.

[6] The appeal was beset by a number of technical objections being raised. In my view none of these objections have any merit. It serves no useful purpose to dwell on them, save to the extent that they may be relevant to the costs order. It is more appropriate for this court to deal with the real issue before it and dispose of the matter.

[7] The point *in limine* on which the respondent was successful was pleaded as follows:

20.4 It is respectfully submitted that Blom [the deponent to the founding affidavit in the appellant's rescission application] provides not special authority on the part of the applicant to validate the effectiveness of the affidavit which he makes.

20.5 There is no express allegation by Blom that he has been duly authorised to depose to the affidavit and there are no facts in the founding affidavit which can infer that Blom, who is not a director of the applicant, but a so-called Walk-In Manager, has the authority on the part of the applicant to depose to the founding affidavit.

[8] It ought by now to be trite that there is no need for any person to be authorised to depose to an affidavit. However, it appears that it is not.

[9] The magistrate's reasons given in response to the appellant's Rule 51(1) notice include that the deponent states that the contents of the affidavit are within his personal knowledge but does not disclose how he acquired personal knowledge of the facts, a point also pleaded by the respondent. This question becomes irrelevant as it was not the foundation of the point raised by the respondents nor was it the basis of the magistrate's finding.

[10] The magistrate then sets out the law regarding how juristic persons act and the fact that a person who acts on behalf of a company "must allege that his is authorised by the Company to bring the proceedings". He then goes into what must be done once authorisation is placed in issue. However, the magistrate fails to appreciate that the authorisation that is relevant here is the authorisation to bring the proceedings and not the authorisation to depose to an affidavit. They are two different things. The respondent did not, in its point *in limine* as pleaded, place in issue the authority of the attorneys of record to bring proceedings on the appellant's behalf.

[11] The respondent confirms in its heads of argument that the point had nothing to do with the authority of the attorney to act. The question is indeed the deponent, Mr Blom's, authority to depose to the affidavits. However, all the authorities relied upon by the respondent deal with authority to institute proceedings.

[12] Later in the heads of argument the respondent, confusingly, then claims that the authority of the appellant to institute proceedings was challenged. However this claim was not pleaded. The only challenge was to Mr Blom's authority to depose to the affidavit, and that is the only point that was upheld by the court *a quo*. The respondent's representative's attempt to obfuscate the issues is by stating in the heads that there was a challenge to the authority of the appellant itself to institute proceedings is unfortunate. I have little doubt that the magistrate's confusion was assisted by the approach of the respondent's legal representatives.

[13] To the extent that it is unclear, a person only need have knowledge of the relevant facts to depose to an affidavit. There is no need for authority to depose to an affidavit.¹ Authority is necessary to institute proceedings, and a challenge to that authority is through the relevant rule of court, Rule 7 in the High Court and Rule 52 in the Magistrate's Court. In this case the pleaded point *in limine* was that Mr Blom did not have authority to depose to the affidavit. It has no merit and ought to have failed.

[14] In my view the respondent was mischievous in pursuing this unmeritorious (and unpleaded) point, and in attempting to misrepresent to this court what the real point was that was raised in the court *a quo*. and therefore a punitive costs order is warranted.

[15] This view is bolstered by the fact that the respondent, in addition to the obfuscatory approach it has taken with regard to the point *in limine*, has in this appeal taken unnecessary technical points, contending that the appeal has lapsed when it has clearly not lapsed, failing to cooperate in compiling a core bundle for the appeal and objecting to the core bundle that was produced. These are only some examples respondent's conduct.

[16] This then leaves the merits of the second rescission application. The respondent's heads contend that the merits are irrelevant. The appellant's heads of argument deal comprehensively with the merits and ask for the rescission of the default judgment. However at the hearing the argument was limited simply to the question of the point *in limine*, and Mr van der Merwe did not press the point further.

¹ *Ganes and Another v Telecom Namibia Ltd* 20024 (3) SA 615 (SCA) at [19]. See also in general on this point *PM v MM and Another* 2022 (3) SA 403 (SCA).

[17] In those circumstances, and where the magistrate has not considered the merits of the matter, it is appropriate to remit the matter to the magistrate for hearing on the merits.

[18] For these reasons it is ordered as follows:

1. The appeal succeeds with costs on the attorney and client scale.
2. The order of the magistrate is set aside in its entirety.
3. The matter is remitted to the Regional Court, Johannesburg, for determination on the merits of the application for the rescission of the judgment dated 15 February 2023


S YACOOB
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree.


S LIEBENBERG
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For the appellant:

C van der Merwe

Instructed by:

Vermaak Marshall Wellbeloved Inc

For the respondent:

RG Cohen

Instructed by:

Glynnis Cohen Attorney

Date of hearing:

06 August 2024

Date of judgment:

19 November 2024