

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2023-003795

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED: YES / <u>NO</u>
<u>26.8.2026</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between: -

NOTEFULL 1122 (PTY) LTD

APPLICANT

and

**MICHAEL BAKER N.O
(IN HIS CAPACITY AS EXECUTOR
OF THE LATE ESTATE THOMAS CHARLES
BARKER)**

1st RESPONDENT

**MASTER OF THE HIGH COURT
JOHANNESBURG**

2nd RESPONDENT

REGISTRAR OF DEEDS, PRETORIA

3rd RESPONDENT

**SUSANNA TINTINGER N.O.
(IN HER CAPACITY AS THE
LIQUIDATOR OF THOMAS
MAXWELL KITHCEN (PTY) LTD
(in liquidation)**

4th RESPONDENT

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

- [1] This is an application in terms of Section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013. The Applicant seeks leave to appeal against the judgment granted by this court dated *20 August 2025* under case number *2023-003795*¹ where the application was dismissed with costs inclusive of counsel's fees on scale B.
- [2] The Applicant is not appealing the liquidator's - Fourth Respondent's - order of sequestration of the estate of the late Thomas Charles Barker which was granted under case number *2017-42679*.

APPLICATION UNDER CASE NUMBER 2023-003795

- [3] The application under case number *2023-003795*, which is the subject of the appeal, concerns the Applicant's claim for specific performance. The Applicant sought an order compelling the transfer of immovable property from the deceased estate of Thomas Charles Barker ("*the deceased estate*").

¹ S1

- [4] The Applicant's contention is that it had purchased the said immovable property more than 24 years ago from the deceased. Yet, the property is still registered in the deceased's name, the contract of sale was further not recorded in terms of section 20 of the Alienation of Land Act 68 of 1981 and during 2021 the municipality account in respect of the immovable property was still in the deceased's name.

FACTUAL MATRIX:

- [5] The facts in this matter can be summarized as set out here in after. The owner of the immovable property ("property") was Mr. Thomas Charles Barker (hereinafter referred to as the "deceased") who passed away on the *31st of March 2018*.
- [6] The said property accordingly forms part of the late Thomas Barker's estate. The deceased estate is represented by the First Respondent, who is the executor of the deceased estate and a family member of the deceased. The executor did not oppose the transfer of the immovable property.
- [7] The deceased's company, known as *Thomas Maxwell Kitchens (Pty) Ltd* was liquidated. The Fourth Respondent is the duly appointed liquidator of the insolvent estate of the company of the deceased, known as *Thomas Maxwell Kitchens (Pty) Ltd (in liquidation)* (hereinafter referred to as the "insolvent estate").
- [8] The insolvent estate has a claim against the estate of the deceased, in terms of a loan account, for a total amount of *R1 372 896.00*, which loan account is due and owing to the insolvent estate, by the deceased estate, and which amount has never been repaid.
- [9] The insolvent estate which the Fourth Respondent represents, and its creditors, have a direct and substantial interest in the transfer of the sole asset in the deceased's estate. The transfer of the property would have

prejudiced the Insolvent Estate of Thomas Maxwell Kitchen (Pty) Ltd (In liquidation).

[10] The Fourth Respondent as liquidator opposed the application for the transfer of the property based upon the following:

[10.1] the claim of *R1 372 896.00* which the insolvent estate of the company has against the deceased's estate and

[10.2] the property sought to be transferred is the only asset in the deceased's estate to which the creditors have a claim.

[11] Despite the Applicant's knowledge of the Fourth Respondent, it had not joined the liquidator to the transfer application. The Fourth Respondent had to intervene in the transfer of the immovable property application.

[12] The Applicant alleged that it purchased the property from the deceased more than 24 years ago but that it never took transfer. The said property is still registered in the name of the deceased estate and had never been transferred or registered in the name of the Applicant.

[13] Prior to the launch of the transfer application, the Fourth Respondent brought an application for the sequestration of the deceased, prior to his passing, which application for sequestration was still pending at the time of the application.

[14] The final sequestration order was granted by this court.

LEAVE TO APPEAL – PREVAILING POSITION

[15] Section 17(1)(a) of the Superior Courts Act 10 of 2013 regulates applications for leave to appeal and it provides that:

"Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (i) the appeal **would have** a reasonable prospect of success; or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."*

[16] The new or amended Superior Court's Act, Act 10 of 2013 had the effect that it repealed the old Superior Court's Act, Act 59 of 1959.

[17] The traditional test that was applied by the Courts in considering leave to appeal applications has been whether there is a reasonable prospect that another Court **may come** to a different conclusion to the one reached by the Court *a quo*.²

[18] With the enactment of section 17, the test obtained statutory force. In terms of section 17(1)(a)(i) leave to appeal may now only be granted where the Judge or Judges concerned is of the view that the appeal **would have** a reasonable prospect of success, which made it clear that the threshold to grant leave to appeal has been raised.

[19] In *Mont Chevant Trust v Tina Goosen and 18 Others*³, at paragraph 6, it was held that:

*"It is clear that the threshold or granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come at a different conclusion, see Van Heerden v Cronwright & others 1985 (2) SA 342 (T) at 342H **the use of the word "would" in the new statute indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against.**" (my emphasis)*

² Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 890B

³ 2014 JDR 2325 (LCC)

- [20] *In Notshokuvu v S* (2016) ZASCA 112 at paragraph 2, it was held that:
- “An appellant, on the other hand, faces a higher and stringent threshold, in terms of the Act compared to the provisions of the repealed Supreme Court Act 59 of 1959. (See Van Wyk v S, Galela v S [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para [14].)”*
- [21] The test is thus no longer whether another court may arrive at a different conclusion, but whether it would. This signifies a stricter threshold.
- [22] The Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhitha* (1221/2015) [2016] ZASCA 176 (25 November 2016) explained the effect of the amendment of section 17(1)(a) as follows:
- [16] *Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there is truly a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.*
- [17] *An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.*” (my emphasis)
- [23] With regard to the meaning of reasonable prospects of success, it was held in *S v Smith* 2012 (1) SACR 567 (SCA) 570, at para 7, as follows:
- “What is the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper*

grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal". (my emphasis)

[24] A mere possibility of success arguable on appeal or that the case is not hopeless is simply insufficient.

[25] In order to consider whether another court would come to another decision I must consider the four grounds of appeal as raised by the Applicant.

GROUND OF APPEAL:

[26] The Respondent's criticism of the Court's order rests on four central points⁴, namely:

[26.1] THE DEPONENT'S PERSONAL KNOWLEDGE:

The Applicant in its Heads of Argument asserted:⁵

"The Court strongly criticised the fact that Mr Irving deposed to the founding affidavit as opposed to Mr Hemsley, who had first-hand knowledge of the events in 2000.

Such criticism is unwarranted as the Applicant is a corporate entity represented by its Group General Manager who are entitled to rely on company records and their institutional knowledge of the affairs of the company."

⁴ T1

⁵ N42

[26.2] **LOCUS STANDI:**

The Applicant stated in its Leave to Appeal application⁶:

“The Court concluded that the Applicant lacked locus standi after undertaking a time-sequenced analysis of the incorporations within the corporate group and the subsequent conversions from close corporations to companies.”

[26.3] **2015 STEPS TO FACILITATE AMENDMENTS:**

The Applicant in its Leave to Appeal⁷ stated:

- “4. The Court erred in its reasoning that the Applicant relied on the 2000 agreement, yet 2015 steps signified a new agreement not relied on in support of the relief claimed.*
- 5. The Court respectfully misconstruing the 2015 conduct as a novation or new agreement as opposed to a ratification of the earlier and operative 2000 agreement.”*

[26.4] **RES INTER ALIOS ACTA – LIQUIDATOR AS STRANGER TO SALE:**

“Finally, the Court held that the liquidator, despite being a stranger to the sale, could impugn the agreement.”

[27] I deal with each of these grounds in turn here in below:

⁶ Para 2 at T3

⁷ Paras 4 and 5 at T5

FIRST GROUND - DEPONENT'S PERSONAL KNOWLEDGE

[28] The Applicant's counsel argued that the court erred in its finding that Mr. Irving lacked personal and firsthand knowledge of the events in the year 2000.

[29] The Applicant claimed that the court erred in law or fact by failing to recognise that:

[29.1] the court overlooked the Applicant's corporate nature as a juristic person;

[29.2] the entitlement of executive appointments such as the group general manager to rely on company records and institutional knowledge;

[29.3] the failure to recognize that first-hand participation is not required.

[30] In essence, the Applicant contends that, as a corporate entity, it may be represented by Mr Irving, its Group General Manager, who is entitled to rely on the company's records and institutional knowledge in relation to its affairs.

CONSIDERATION OF PERSONAL KNOWLEDGE

[31] Mr. Irving deposed to the affidavit on the basis of a resolution⁸ of the Applicant's directors authorising him to act as company representative in this matter. It furthermore authorises him to give lawful instructions to counsel, and to sign, endorse and execute all legal documents, including affidavits, for court action or applications pertaining to the debt owed to the applicant by the respondent.

[32] Mr Irving stated in his Founding Affidavit the following:

[32.1] he is the Group General Manager of the Applicant;

⁸ A18

[32.2] that the facts contained in the affidavit fall within his own personal knowledge, save where expressly indicated otherwise and were to the best of his belief both true and correct.

[33] However, he then added the following:

"3. Where I rely on the information conveyed to me by others, I believe such information to be correct and have no reason to believe otherwise. Moreover, where possible, such information is confirmed by confirmatory affidavits.

4. Where in this affidavit, I refer to facts which do not primarily fall within my own personal knowledge, I beg that those allegations be admitted as evidence, notwithstanding the possibility of such facts being hearsay, pursuant to the provisions of Section 3 of the Law of Evidence Amendment Act, on the basis that it is in the interests of justice to do so under the prevailing circumstances." (my emphasis)

[34] From the deponent's own wording, the following is clear:

[34.1] Certain information was conveyed by others to him which he believed to be correct and that he had no reason to believe otherwise (self-determination) – the sources of information were not specified;

[34.2] Some of the evidence is hearsay (he did not disclose which evidence constituted hearsay and why it should be accepted as evidence).

[35] It is therefore clear that Mr. Irving's affidavit contained both personal knowledge and hearsay evidence. No indication was however given of which evidence constituted hearsay.

[36] The failure to distinguish clearly between personal knowledge and hearsay evidence creates doubt as to which evidence fell within the deponent's personal knowledge.

- [37] The facts presented in the Applicant's Founding Affidavit supporting the Notice of Motion should have been stated succinctly, clearly, and in chronological order.⁹
- [38] The Founding Affidavit had to set out at least the following information:
- [38.1] The Applicant's right to apply for the relief sought - its *locus standi*.
 - [38.2] Jurisdiction;
 - [38.3] The cause of action relied upon;
 - [38.4] The evidence to support the application
- [39] Mr. Irving's failure in the Applicant's Founding Affidavit:
- [39.1] to establish *locus standi*;
 - [39.2] to deal specifically with the conversion of the legal entities and
 - [39.3] payments by Advancenet (Pty) Ltd who only commenced to trade in 2002 add concern and unease in respect of Mr. Irving's personal knowledge.
- [40] More so, as the Applicant's cause of action was based upon an offer to purchase concluded in *January 2000*.¹⁰
- [41] The Applicant had knowledge of the following facts when it deposed to the Founding Affidavit, yet elected not to deal with these material issues, namely:
- [41.1] the conversion of the corporation *Notefull 1122 CC* (registered on 17 February 2000) to the company *Notefull 1122 (Pty) Ltd* only took place on 21 February 2003 – both the Applicant and *Notefull 1122 CC* did accordingly not exist in 2000. Mr. Irving had to address the said entities and the conversion in the Founding Affidavit to establish the Applicant's *locus standi*.
 - [41.2] the failure to have pleaded that the offer to purchase in 2000 would have been between *Notefull 1122 CC* and the deceased,

⁹ Reynolds NO v Mecklenberg (Pty) Ltd 1996 (1) SA 75 (W) at 78

¹⁰ Paragraph 12 at A10

Mr. Thomas Charles Barker, and not the Applicant who only came into being in 2003.

[41.2.1] This fact constituted material evidence which the deponent, if he had personal knowledge, would have known and ought to have disclosed.

[41.3] the attempt to address material omitted issues in relation to *locus standi* in a supplementary affidavit. Facts which had to be known to the deponent if he had personal knowledge when deposing to the founding affidavit.

[41.4] the use of the words “*I*” and “*me*” in paragraphs 36 and 37 of the Supplementary Affidavit deposed to by Mr. Irving which is clearly indicative of a reference to Mr. Hemsley and not to Mr. Irving.¹¹

[41.5] *Advancenet (Pty) Ltd* who paid the purchase price and rates and taxes only started to trade in 2002. The Applicant accordingly ought to have pleaded and extensively dealt with the entity who paid the purchase price in 2000. The Founding Affidavit had to address the following:

[41.5.1] the opening of a bank account in *August 1989*,

[41.5.2] the fact that *Advancenet* was registered in *August 1987* and traded as *Fire Trade 26 CC*;

[41.5.3] *Fire Trade 26 CC* thereafter underwent a name change to *Micro Figurations*;

[41.5.4] *Micro Figurations’* name was thereafter altered to *Advancenet CC*, which was subsequently converted into *Advancenet (Pty) Ltd*.

¹¹ J14

[42] Although a group general manager can depose to an affidavit on behalf of a company, legal entity- he cannot merely state and declare his position.¹² This is acknowledged by the Applicant who referred to the fact that a Group General Manager can represent a legal entity and that the manager are entitled to rely on company records and their institutional knowledge of the affairs of the company.¹³ Additionally, a general group manager has to:

[42.1] confirm his authority – his power to represent the company and depose to the affidavit and

[42.2] identify the source of his knowledge from which he derives personal knowledge, namely whether knowledge was derived from direct oversight, daily management or control and possession of company systems, operations or records. He has to declare that the company books, files, electronic data and administrative records are in his possession or control.

[43] Nowhere in the Founding Affidavit does Mr. Irving state on what basis, save for stating that he is the Group General Manager, he alleges that he has personal knowledge of the offer to purchase concluded in the year 2000. Mr. Irving failed to identify the source of his knowledge – he failed to explain in his affidavit whether he has:

[43.1] in his possession and under his control the relevant Applicant's files or records;

[43.2] whether he inspected the Applicant's relevant books, files records and documentation of the Applicant or

[43.3] whether he has verified the records with the directors.

[44] In application proceedings, the affidavits take the place not only of the pleadings in action proceedings, but also of the essential evidence which would be led at trial. The deponent thus "*testifies*" in motion proceedings. From this it follows that

¹² Nedbank Limited v Tru Essence Products (Pty) Ltd and Another (86612/2014) [2015] ZAGPPHC 1062 (14 July 2015)

¹³ Para 23 N42

generally relief may only be granted in motion proceedings if it is supported by admissible evidence in the affidavits. Whether the deponent's evidence is admissible depends on whether he has personal knowledge of the facts.

- [45] In *President of the Republic of South Africa and Others v M & G Media Ltd*¹⁴ the Supreme Court of Appeal remarked as follows on the meaning of personal knowledge:

"A court is not bound to accept the ipse dixit of a witness that his or her evidence is admissible... Merely to allege that that information is within the 'personal knowledge' of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired, so as to establish that the information is admissible, and if it is hearsay, to enable its weight to be evaluated." (my emphasis)

- [46] Ngcobo CJ further in this matter held:

"An indication of how the alleged knowledge was acquired is necessary to determine the weight, if any, to be attached to the evidence set out in the affidavit. The key question is whether the deponent would, in the ordinary course of his or her duties or as a result of some other capacity described in the affidavit, have had the opportunity to acquire the information or knowledge alleged."

- [47] In the matter before court Mr Irving does not identify the source of his knowledge or inform the court of his duties. Personal knowledge can accordingly not simply be assumed.

- [48] Where a deponent to a Founding Affidavit lacks personal knowledge of the material facts, the reliability and evidentiary value of the "evidence" placed before the court are compromised. In trial proceedings, a court must remain

¹⁴ *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA); 2011 (4) BCLR 363 (SCA) para 38

vigilant in managing witness testimony and ensuring strict compliance with the rules of evidence. The same vigilance is required in motion proceedings. However, the court must guard against adopting an unduly formalistic approach.

- [49] Although the Applicant was authorised by a resolution to launch the proceeding, the competence of a deponent to depose to an affidavit must nevertheless still be assessed.
- [50] A resolution authorising a deponent to act on behalf of a company does not, by itself, establish that the deponent has personal knowledge of the material facts necessary to sustain the Applicant's case. Where such knowledge is absent, the authority conferred by the resolution cannot cure the evidentiary deficiencies in the affidavit.
- [51] The offer to purchase¹⁵ forming the basis of the relief was apparently concluded in *January 2000* between the deceased and the Applicant represented by Mr. Phil Hemsley, who is both a director of the Applicant and the deponent in the intervention application to the sequestration proceeding.
- [52] Mr Hemsley, apart from the deceased, is the sole source of information on the property's acquisition, its terms, purchase price, and reasons for the transfer delay.
- [53] Although the resolution authorising Mr. Irving to initiate and execute all documentation for the transfer application was duly signed by Mr. Phil Hemsley,¹⁶ no explanation is provided regarding why Mr. Hemsley, who is a party to the offer to purchase, did not personally depose to the Founding Affidavit. It is respectfully submitted that Mr. Hemsley would have been best positioned to provide direct evidence concerning the aforementioned offer.

¹⁵ FA3 at A20

¹⁶ Annexure FA1 at A18

[54] When an original party to a contract is available but fails to depose to an affidavit, any third person with personal knowledge of the facts may depose to it, though the statement risks being dismissed as hearsay unless properly substantiated. A court may draw an adverse inference or question why the best evidence (the actual party to the contract who is available) was withheld in favour of the third party (general manager).

[55] Although a Group General Manager can accordingly depose to an affidavit such deponent cannot simply state his employment position, but he must establish his authority and personal knowledge. The manager had to explicitly state why he claims to have personal knowledge – the source of his knowledge. He had to state that he has in his possession and is in charge of the relevant company books and financial records. Mr. Irving failed to do this.

[56] In *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & another* 2010(5) SA 112 (KZP, para 13, it was held that:

“[F]irst-hand knowledge of every fact which goes to make up the applicant’s cause of action is not required, and that where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company’s possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts.”

[57] I was referred by Applicant’s counsel to the matters of *Rees*¹⁷ and *Colbec*¹⁸ as proposition that a General Manager has personal knowledge. However, in *Rees* reference was made to the case of *Maharaj* where Corbett JA stated:

“Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates’ courts), of requiring that a deponent to an affidavit in support of

¹⁷ *Rees & Another v Investec Bank Ltd* 2014(4) SA 220 (SCA) at 225H-226G;

¹⁸ *Colbec Estates (Pty) Ltd & Another* 2009(3) SA 384 (T) at 391F-392B

summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts state. The mere assertion by a deponent that he “can swear positively to the facts” (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words. . . . In my view, this is a salutary practice... (my emphasis)

[57.1] In the matter before me the deponent did not disclose the source/s of his knowledge (company records or his dealings with the affairs of the Company) or what specifically his duties boiled down to.

[58] In this matter, there is a resolution to proof Mr. Irving's authority, but the basis for his personal knowledge remain non-disclosed.

[59] In *Barclays National Bank Ltd v Love*¹⁹ the court, in the context of summary judgment, held that “[a]lthough it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his own knowledge he should . . . at least give some indication of his office or capacity which would show an opportunity to have acquired personal knowledge of the facts to which he deposes.”

[60] The principle in *Love* above is sound: a deponent must show how the alleged knowledge was acquired and establish the basis on which that knowledge can properly be regarded as personal.

[61] The basic approach is that a deponent must either state under oath that the facts fall within his personal knowledge, or that knowledge must appear from the other facts.

[62] Nothing turns on the deponent's description of his office; whether he is the managing director, a director, an alternate director, the secretary, the general manager or a manager of the company. The fundamental principle remains

¹⁹ 1975 (20) SA 514 (D)

that the facts and the cause of action which are verified must fall within his personal knowledge.²⁰

[63] Mr. Irving's affidavit fails to candidly and frankly address and identify the source/s of his personal knowledge as Group General Manager.

[64] Mr Irving also did not address the elephant in the room, why Mr. Hemsley acting on behalf of the Applicant in 2000, and the only and best source of evidence did not depose to the Founding Affidavit.

[64.1] Additionally, Mr. Irving failed to:

[64.1.1] allege any communication with Mr. Hemsley,

[64.1.2] to specifically address why Mr. Hemsley, who constituted the best source of information, did not depose to the Founding Affidavit and/or

[64.1.3] to annex a Confirmatory Affidavit by Mr. Hemsley;

[65] The Applicant elected to present its evidence via Mr. Irving without any explanation why Mr. Hemsley who represented the Applicant in 2000 (a party to the offer to purchase in 2000) was not used. There is also no Confirmatory Affidavit by Mr. Hemsley. This effects the probative value of the evidence. Mr. Hemsley would have been best positioned to provide direct evidence concerning the aforementioned offer.

[66] The interwoven thread of personal and hearsay evidence in the Founding Affidavit, without specifically identifying the hearsay evidence from the deponent's personal knowledge leads to uncertainty about whether the deponent's knowledge is indeed personal.

[67] The fact that Mr Hemsley did not provide an affidavit is significant, as hearsay evidence cannot be considered without an explanation for the absence of the direct evidence.

²⁰ *Northern Cape Scrap & Metals (Edms) Bpk v Upington Radiators & Motor Graveyard (Edms) Bpk* 1974 (3) SA 788 (NC) 794B; *Jeffrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T) 872C;

- [68] The assertion by the deponent of personal knowledge alone is insufficient to be determinative; the court does not simply endorse all claims of personal knowledge without critical evaluation.
- [69] The Applicant's cause of action is reliant on an offer to purchase in 2000 between the deceased and Mr. Hemsley.
- [70] Mr Hemsley, apart from the deceased, is the sole source of information on the property's acquisition, its terms, purchase price, and reasons for the transfer delay.
- [71] In *Director of Hospital Services v Mistry*²¹ the court put the position as follows:
- "When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ... and as been said in many other cases: "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny."*
- [72] The Applicant, who bears the burden of proving the transfer of property, in motion proceedings, had to determine the most appropriate manner in which to present its evidence. By choosing to present the evidence through Mr. Irving, without providing an explanation for why Mr Hemsley could not do so, the probative value of the evidence is affected.
- [73] As the deponent, Mr. Irving was not in a position to provide the most direct (best) evidence, which Mr. Hemsley could have supplied. Although Mr. Hemsley, a representative referenced in the offer to purchase, had signed the resolution. He did not depose to the Founding Affidavit. No adequate or

²¹ 1979 (1) SA 626 (A) at 635H-636B

credible explanation has been offered for Mr. Hemsley's absence as deponent.

[74] In this matter the deponent's own papers cast doubt on the correctness of the allegation of personal knowledge.²²

[74.1] The deponent does not distinguish between hearsay evidence and facts within his personal knowledge.

[74.2] The basis for his personal knowledge is also not dealt with. It is clear that Mr. Irving is a Group General Manager of the Applicant not a director. When this position was assigned to him, also remains undisclosed.

[74.3] The fact that Mr. Irving also failed to address the conversion of *Notefull 1122 CC* to *Notefull 1122 (Pty) Ltd* to establish *locus standi* and the fact that payments were made by *Advancenet (Pty) Ltd* which only commenced trading in 2002 also raise serious concern about Mr. Irving's personal knowledge.

[74.4] Even the exact purchase amount of *R139 514.57* is not depicted in the offer to purchase, but rather a rounded off figure of *R139 515.00*. The said difference remains unexplained.

[74.5] The fact that the offer to purchase is undated was also not addressed in the papers.

[75] The aforesaid loopholes in the Applicant's case are material. Essential evidence had not been pleaded in the Founding Affidavit and created serious concern about the deponent's knowledge of the agreement of sale in 2000. I am accordingly of the firm opinion that another court will not come to a different finding in respect of personal knowledge of the Applicant.

²² Northern Cape Scrap & Metals Edms Bpk v Upington Radiators and Motor Graveyard (Edms) Bpk 1974 (3) SA 788 (NC) 794 D-E

am accordingly of the firm opinion that another court will not come to a different finding in respect of personal knowledge of the Applicant.

SECOND GROUND OF APPEAL – LACK OF LOCUS STANDI

[76] In its second ground of appeal the Applicant argued that the court erred in finding that the Applicant's lacked *locus standi* by employing a time-based analysis on the dates of the Applicant's incorporation.

[77] Additionally, the Applicant claims that the court erred in law and/or fact to recognize that:

[77.1] the evidence conclusively demonstrated that payment of the purchase price was affected by *Advancenet (Pty) Ltd* a related company within the group.

[77.1.1] If the evidence did, without doubt, demonstrate that payment of the purchase price was affected by *Advancenet (Pty) Ltd* the following facts would not have presented themselves:

[77.1.1.1] The Offer to Purchase²³ reflected that the purchaser - *Notefull 1122 (Pty) Ltd* paid the purchase price to the deceased – *Advancenet (Pty) Ltd* is not referenced.

[77.1.1.2] The purchase price of *R139 515.00* had been paid. Yet, Mr. Irving in the Founding Affidavit stated that the purchase price was *R139 514.57*.

[77.1.1.3] The liquidator stated that *Advancenet (Pty) Ltd* began trading

²³ Clause 1.1 at A20

in 2002 and did not exist in 2000. It is part of a group of companies and was first registered as *Firetrade 26* CC. The payment to the deceased came from a Standard Bank account active since *August 1989*. Mr. Irving elected not to deal with this crucial evidence in the Applicant's Founding Affidavit.

[77.1.2] The liquidator noted that the municipal accounts remained in the deceased's name²⁴, but acknowledged that *Advancenet CC* or *Advancenet (Pty) Ltd* had paid these accounts.

[77.2] it was never the intention that the property will be acquired by Mr. Hemsley.

[77.2.1] However, in an email from Mr. Frederick Rall to Mr. Irving dated *26 January 2015*, regarding the said property the following was relayed:

"Thom has asked me if we know what is happening with the transfer of the flat Phil bought for/from him." (my underlining)

[77.2.2] The reference to Thom must be to the deceased and Phil to Mr. Hemsley.

[77.2.3] The phrase "*transfer of the flat Phil bought for/from him*" is problematic, as it ambiguously suggests Mr. Hemsley bought the property either for or from the deceased - two mutually exclusive scenarios. It is also evident that the flat was bought for/from

²⁴ A69

Thom by Mr. Hemsley. No mention was made that the Applicant had purchased the property to be transferred.

[77.3] the judgment ignores the collaborative steps taken in the process of the conversion ratifying the transaction.

[77.3.1] Mr. Irving on the Applicant's behalf, being *dominus litis* - failed to deal with the conversion of the corporate entities in his Founding Affidavit. The deponent himself in setting out the Applicant's cause of action had ignored and not referenced the steps taken in the process of conversion. This aspect was not addressed in Mr. Irving's Founding Affidavit, exposing the Applicant's lack of *locus standi* and questioning the deponent's personal knowledge. If the deponent himself negated to plead the process of conversion and only attempted to rectify such an omission in his Supplementary Affidavit to cure the Applicant's lack of *locus standi*, this court can only question the deponent's knowledge of the sale transaction and the conversion process.

[77.4] the court failed to recognize that section 21 of the Company's Act allows ratification of pre-incorporation contracts deeming them binding if adopted.

[77.4.1] The answer to this proposition is that Applicant's case was simply never reliant on the ratification of a pre-incorporation contract (an agreement made in writing by a person on behalf of a proposed company before it was officially registered). It was founded on an agreement of sale of the property entered during *January 2000*. The evidence as set out in the Founding Affidavit rejects this argument.

The purpose of the Applicant's application is best set out in its own wording in paragraph 12 of the Founding Affidavit which states:

"12. This is an application whereby the applicant seeks:

12.1. specific performance pursuant to a written agreement and ancillary relief thereto following from the conclusion of a written agreement of purchase and sale concluded between the applicant and the deceased, being Thomas Charles Barker ("the deceased"), in January 2000."

[77.5] the conversion of the companies was fully explained in a supplementary affidavit evidencing statutory succession of rights, which were not extinguished by the change in form of the corporate entities involved.

[77.5.1] The conversion had to be addressed and explained in the Founding Affidavit as it effected the Applicant's *locus standi*. To do so in a Supplementary Affidavit is simply insufficient.

[77.5.2] In *Mars Incorporated v Candy World (Pty) Ltd* 265/89) [1990] ZASCA 149; 1991 (1) SA 567 (AD); [1991] 2 All SA 25 (A) (28 November 1990), the Court said the following:

"In accordance with the general rule that it is for the party instituting proceedings to allege and prove that it has locus standi, the onus of establishing that issue rests upon the applicant."

[77.5.3] It is trite that in motion proceedings, the Applicant must establish *locus standi* in the Founding Affidavit and not in the Replying Affidavit.²⁵

[77.6] the deceased conduct and cooperation into 2015 reaffirmed the purchaser's identity, consistent with the group's intention from inception that the corporate vehicle of the Applicant would hold title in the property.

[77.6.1] The events of 2015 were not pleaded and disclosed in the Founding Affidavit. The Applicant's cause of action was furthermore solely reliant on the sale agreement of the property in *January 2000*.

CONSIDERATION LACK OF LOCUS STANDI

[78] A preliminary procedural question that has to be considered in the judicial process is whether the parties to the litigation possess the necessary standing or legal capacity to litigate.²⁶

[79] Legal standing is not only a procedural question but is also a question of substance; it concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted.

[80] The fact of standing must appear from the initiating process.²⁷

[81] The general rule is that it is for the party instituting proceedings to allege and prove its *locus standi*. It must accordingly appear *ex facie* the founding

²⁵ Giant Concert CC v Minister of Local Government, Housing and Traditional Affairs KwaZulu-Natal and Others, 2011 (4) SA 164 KZP at para 16)

²⁶ Watt v Sea Plant Products Bpk 1998 4 All SA 109 (C)113-114; 1999 4 SA 443 (C).

²⁷ Nienaber v Union Government 1947 1 All SA 244 (T); 1947 1 SA 392 (T); United Methodist Church of SA v Sokufundumala 1989 4 SA 1055 (O)

papers that the parties have the necessary legal standing (*locus standi in iudicio*).²⁸

[82] *In Langeberg Ko-operasie Bpk v Folscher and Another 1950 (2) SA 618 (C)* an application was brought by one Whitehead. In his founding affidavit he described himself as the secretary of the Applicant. After an objection has been taken of no *locus standi* Whitehead filed another affidavit saying that he had been described as secretary in error and that he was, in fact, the general manager of the Applicant. At pages 620 - 21 of the case N Thompson J said:

"In my view he (Whitehead) should not be allowed at this stage to amend his first affidavit in such a vital respect, and after the point that he had no locus standi had been taken by the respondent... However that may be, it seems to me to apply for an amendment at this stage is too late, and I am not prepared to accede to the amendment being made in an endeavour to right the question of locus standi. In a recent case, namely the case of Geanotes v Geanotes 1947(2) SA 512 (C) at 515 HERBSTEIN AJ quoted with approval the case of Pountas' Trustees v Lahanas 1924 WLD 67, a decision of KRAUSE J, where he said: I think it has been laid down in this Court repeatedly that an applicant must stand or fall by his petition and the facts alleged therein, and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of facts of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.'

HERBSTEIN AJ went on to say:

'It seems to me that correctly state the practice of this Court.'

I agree with the statement of HERBSEIN AJ. It seems to me that / should not allow the affidavits which were filed yesterday to influence my decision on

²⁸ Mars Incorporated v Candy World (Pty) Ltd 1991 (1) SA 567 (A) p. 575
Kommissaris van Binnelandse Inkomste v Van der Heever [1999] 3 All SA 115 (A), 1999 (3) SA 1051 (SCA) para 10
Four Wheel Drive Accessory Distributors CC v Rattan NO 2019 (3) SA 451 (SCA) para 7

this point that there was no locus standi as shown by the applicant, and as the matter stood when the objection was taken, because it is quite clear to me that an application by a secretary without anything more being said was not sufficient to show authorisation to embark upon litigation by the applicant."

- [83] In the Fourth Respondent's Answering Affidavit she states that it is clear from a CIPC report and search that the Applicant did not exist in 2000. During 2000 it was a closed corporation named *NOTEFULL 1122 CC* with registration number 2000/007298/23.²⁹ The conversion from a closed corporation to a company only took place on 21 February 2003.³⁰
- [84] Subsequently, the Applicant delivered a Supplementary Affidavit to deal with what it termed the "*corporate identity*" issues.
- [85] The connections between *Notefull 1122 CC*, *Notefull 1122 (Pty) Ltd*, the deceased, and *Advancenet (Pty) Ltd* - which ought to have been addressed in the Founding Affidavit - were only dealt with in the Supplementary Affidavit.
- [86] The connections referred to herein before were within the knowledge of the Applicant at the time of launching the application. The Applicant had elected to pursue motion proceedings accordingly the Applicant had to take care that all the material evidence was before the court in the form of an affidavit. The Applicant had delivered a Supplementary Affidavit in which it stated that it had addressed issues raised by the liquidator – Fourth Respondent.
- [87] The sale agreement in respect of the immovable property, between the purchaser and the deceased (seller), forms the foundation of the relief sought. The Applicant relies upon the written sale agreement being completed in *January 2000*. As was alluded to before the Applicant did not exist in 2000 and Mr. Hemsley also only became a director of the Applicant in *May 2003*.³¹ Mr. Hemsley's authority to conclude the sale on the

²⁹ Annexure AA2 at L133

³⁰ L136

³¹ Para 12.2 at A10.

company's behalf remained unexplained. The Applicant had elected not to deal with the crucial nexus between *Notefull 1122 Close Corporation* and *Notefull 1122 (Pty) Ltd*. The Applicant's entitlement to litigate must have been addressed in the Founding Affidavit.

[88] To simply state that the connection issues were raised by the Liquidator and subsequently addressed in a Supplementary Affidavit is insufficient. The Applicant's right to litigate - based upon the written offer to purchase, in which the Applicant was depicted as the purchaser, is vital to its entitlement to the relief sought.

[89] The Founding Affidavit did not establish the Applicant's right to litigate.

[90] In *Director of Hospital Services v Mistry*³² the court put the position as follows:

"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ... and as been said in many other cases: "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny."

[91] The parties to the offer to purchase is reflected as the deceased (seller) and *Notefull 1122 (Pty) Ltd* as purchaser. However, the said offer to purchase is undated and signed by Mr. Hemsley on the Applicant's behalf.³³ Mr. Hemsley only became a director of the Applicant during *May 2003*. The Applicant must have had:

[91.1] knowledge of all of the aforesaid at the time of initiating the application,

³² 1979 (1) SA 626 (A) at 635H-636B

³³ A23

[91.2] had to disclose and deal with this information but elected not to do so.

[92] In its Supplementary Affidavit, the Applicant sought to clarify *locus standi* with the intention of addressing a significant deficiency in the evidentiary support for its claim.

[93] The Applicant's *locus standi* was only addressed in a Supplementary Affidavit, although the Applicant must have known these facts at the time of Mr. Irving having deposed to the Founding Affidavit.

[94] The discrepancies as to the Applicant, being a close corporation, and then a company, the overlapping of the various other companies, the reference to both Mr. Hemsley and Mr. Irving, indiscriminately, and at least two offers to purchase, are all material and relevant concerns to question whether the Applicant had the necessary *locus standi*.

[95] Similarly I am of the firm opinion that another court will not come to another conclusion in respect of the Applicant's Lack of Locus Standi as set out in the Founding affidavit. This ground of appeal cannot succeed.

THIRD GROUND OF APPEAL – CONDUCT SINCE 2015 NOT A NEW CONTRACT

[96] Mr. Irving on behalf of the Applicant failed to properly address the alleged 2015 offer, in his Founding Affidavit.

[97] This failure to address the 2015 Offer to Purchase must be seen in light of the fact that the Applicant's case was reliant on the Offer to Purchase which was concluded in 2000.³⁴

[98] Additionally, the further discrepancies as to the Applicant, being a close corporation, and then subsequently converting to a company, the

³⁴ Paragraph 12 dealing with purpose of the application at A10.

overlapping by the various other companies – *Advancenet (Pty) Ltd*, the reference to both Mr. Hemsley and Mr. Irving, indiscriminately in the Supplementary Affidavit, and at least two offers to purchase, were never addressed in the Founding Affidavit.

- [99] The aforesaid discrepancies were questioned by the Court as the Applicant was required to make out its case, in full, in the Founding Affidavit, which the Applicant clearly failed to do.
- [100] The Applicant attempted to address the material omissions outlined here in before only in its Supplementary Affidavit. However, the 2015 offer to purchase was not pleaded in the Founding Affidavit. The reason clearly must have been that the Applicant's case stems from the offer to purchase in 2000 and not in 2015.
- [101] All steps taken in 2015 – termed by the Applicant as implementation measures that facilitated performance in 2000 were unfortunately not addressed or pleaded in the Founding Affidavit. The Applicant intended to cure the omission of crucial evidence from its Founding Affidavit by addressing them in its Supplementary Affidavit which resulted in more confusion and questions.
- [102] Another court will also not find that the steps taken in 2015 facilitated performance and transfer of the 2000 agreement which was the foundational bargain. This was simply not the Applicant's pleaded case. The 2015 steps were not dealt with in the Applicant's Founding Affidavit and was not the case which the Respondents had to meet.

GROUND 4 – INTER ALIOS ACTA

- [103] The Applicant argues that the liquidator – Fourth Respondent – was a stranger to the sale agreement.

- [104] The Fourth Respondent is the only party opposing the transfer of the property as there was no opposition by the executor – the First Respondent.
- [105] The Applicant pleaded that the liquidator's right to dispute the transaction is limited by the operation of the doctrine *res inter alios acta, inter alia* on account of the following: -
- [105.1] the liquidator's opposition was premised entirely on inferential facts, which in themselves were individually insufficient to impugn the sale in circumstances where both parties (the deceased seller and the Applicant as purchaser) insisted on its validity;
- [105.2] the parties to the sale consistently affirmed the bargain and the liquidator cannot in law recast the parties' transaction from the sidelines;
- [105.3] the Applicant's payment of the purchase price and the rates and taxes over the property for many years reinforces the validity of the sale;
- [106] The Fourth Respondent as the liquidator of *Thomas Maxwell Kitchens (Pty) Ltd* is a professional appointed to wind up the company. Her core function is to take custody of the company's assets, convert them into cash, investigate the company's financial affairs and to distribute the proceeds fairly to the creditors according to statutory legal priorities.
- [107] The immovable property, which the Applicant wanted transfer of is the sole and biggest asset in the company's estate.
- [108] The Fourth Respondent, as the liquidator, accordingly, has a duty to investigate the sale of the immovable property to the Applicant as the transfer of the immovable property will be to the prejudice of the body of creditors as a whole.

- [109] The Applicant as liquidator has a definite interest in this matter, namely to:
- [109.1] challenge the Applicant's version and
- [109.2] to place facts before the court which was omitted by the Applicant in its Founding Affidavit.
- [110] Initially, the Applicant had also elected not to join the Fourth Respondent to these proceedings despite knowing of the Liquidator, as the Applicant itself had intervened the sequestration application. Only after the Fourth Respondent had intervened in the transfer application, did the Applicant disclose material issues which had to be in the Founding Affidavit in a Supplementary Affidavit.
- [111] Accordingly, the opposition by the Fourth Respondent was both necessary and justified.
- [112] The opposition by the Fourth Respondent is further necessary and justified, as the property in question, is the only asset in the now insolvent estate of the deceased, and therefore, the creditors, have a claim thereto.
- [113] The Applicant's claim is based upon an agreement of sale entered into during January 2000.
- [114] In the offer to purchase, *Annexure FA 3.2*, the following appears which create uncertainty relating to the sale of the property, namely:
- [114.1] the seller is depicted as the deceased and the purchaser as *Notefull 1122 (Pty) Ltd*. However, the latter company only came into existence on *21 February 2003*.
- [114.2] *Notefull 1122 (Pty) Ltd* was represented by Mr. Phil Hemsley, who only became a director of the company in *May 2003*. Mr. Hemsley could not in 2000 have bound the company who came into being only in 2003. His authority to conclude the sale

on the company's behalf during *January 2000* remains unexplained.

[114.3] The purchase price was *R139 514.57*, although the offer depicts *R139 515.00*.

[114.4] The deceased was paid the purchase price, but no proof was provided.

[114.5] *Advancenet (Pty) Ltd* who paid the purchase price and the municipal rates and levies in respect of the property only started to trade in *2002*. Only in the Applicant's Supplementary Affidavit did the Applicant explain that:

[114.5.1] *Advancenet* was registered in *August 1987* and traded as *Fire Trade 26 CC*. *Fire Trade* underwent a name change to *Micro Figurations* and thereafter to *Advancenet CC*, which was later converted into *Advancenet (Pty) Ltd* (company).

[114.5.2] The banking account from which payment was made had been opened since *August 1989*.

[114.5.3] *Advancenet (Pty) Ltd* paid the purchase consideration, on behalf of the Applicant, a company within the group of companies.

[115] Essential elements of the Applicant's case are lacking in its Founding Affidavit namely the contracting party's identity and *locus standi*. The failure of Mr. Hemsley, as a representative party to the offer to purchase, despite signing the resolution to institute proceedings, to depose to the Founding Affidavit remains unexplained and is questioned. Mr. Irving's contradictory evidence as alluded to here in before also raises concerns about his lack of knowledge of what occurred. Mr. Irving also failed to explain why Mr.

Hemsley could not himself provide the Founding Affidavit as evidence or a Confirmatory Affidavit.

- [116] The aforesaid omitted and crucial evidence from the Founding Affidavit and the Applicant's attempt to cure the defects in its Supplementary Affidavit clearly raised issues which the liquidator acting on the creditors' behalfs had to challenge.
- [117] Another court will not come to another conclusion regarding to the liquidator's challenge of the sale agreement. To the contrary the liquidator has a statutory duty to act in the creditors' best interest by investigating its financial affairs and taking control of the company's assets. Had the liquidator not acted and challenged the sale the liquidator could have been removed by the Master or court and could also suffer personal financial liability for any losses.
- [118] This opposition by the Respondent is further necessary and justified, as the property in question, is the only asset in the now insolvent estate of the deceased, and therefore, the creditors, have a claim thereto.

CONCLUSION:

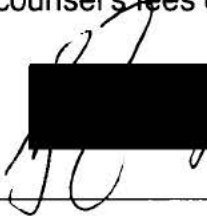
- [119] The Applicant presented its evidence in the Founding Affidavit in an evasive and unclear manner. This created material discrepancies and left essential facts, necessary to sustain the cause of action, inadequately addressed. As a result, the Applicant failed to make out a proper case for the relief sought.
- [120] After the liquidator intervened, the Applicant sought, by way of a Supplementary Affidavit, to cure the defects in its Founding Affidavit. That attempt did not remedy the material omissions; rather, it underscored that essential facts had not been placed before the Court from the outset.
- [121] Having considered each of the four grounds for leave to appeal, I am not persuaded that another court would reach a different conclusion or that there

is a compelling reason for leave to be granted. The application for leave to appeal must therefore be dismissed.

[122] In the result, I make the following order:

Order

1. The Application for Leave to Appeal is dismissed with costs on a party and party scale inclusive of counsel's fees on scale B.




S VAN ASWEGEN

ACTING JUDGE OF THE HIGH COURT

PRETORIA

For the Applicant:

Adv JC Viljoen
jcv.law@mweb.co.za
083 289 5120
Instructed by Fred Rall Attorneys Inc
jswart@rwl.co.za
012 362 8990

For the
Fourth Respondent:

Adv Z Schoeman
zjaan@webmail.co.za
072 123 2614
Instructed by Tintingers Incorporated
bpotgieter@tingtingers.co.za
012 346 7275