

THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case Number **5327/2022**

Reportable:yes/no

Circulate to other Judges: yes/no

Circulate to Magistrates: yes/no

In the matter between:

PHUMELELA LOCAL MUNICIPALITY

Applicant

and

TELKOM SA SOC LIMITED

Respondent

CORAM:

BERRY, AJ

HEARD ON:

25 MAY 2023

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 31 MAY 2023.

RULE 30A JUDGMENT

- [1] I informed the legal representatives of both parties that I was previously employed by the Respondent and left its employ voluntarily at the end of 2011.
- [2] Both parties confirmed that they did not have any objection if I heard the matter.
- [3] The Respondent issued summons against the Applicant and brought an Application for Summary Judgment on 7 March 2023.
- [4] The Respondent attached a document which purports to be an Affidavit, in support of the Summary Judgment Application in terms of Rule 32(2)(a). I refer to the document as an “Affidavit” for ease of reference.
- [5] The Applicant takes issue with the “Affidavit” in that the deponent states in the introduction to the Affidavit:

“I, the undersigned,

AMAN BALWANTH

Do hereby make oath and say that...”

- [6] At the end of the Affidavit the Commissioner of Oath states:

“I hereby certify that the deponent has acknowledged that he knows and understands the content of this affirmation, which was signed to before me at Midrand on this the 7th day of March 2023, the regulations contained in government notice number 3619 of 21 July 1972 and 1648 of 19 Aug 1977 having been complied with.”

- [7] The “Affidavit” was affirmed at a Police Station and the official SAPS stamp is affixed next to the Commissioner of Oath’s signature.
- [8] The Applicant filed an Application in terms of Rule 30A(1)(b) to strike out the claim, in that the Respondent did not comply with Rules 32(2)(a), 32(2)(b) and 32(4).
- [9] In terms of Rule 32(2)(a), 32(2)(b) and 32(4) a Plaintiff may bring an Application for Summary Judgment, after a Defendant has delivered a plea.
- [10] The Application for Summary Judgment must be supported by an Affidavit containing certain averments.
- [11] The Affidavit is the only evidence that may be adduced at the hearing of the Summary Judgment Application in terms of Rule 32(4).
- [12] The Applicant submits that the “Affidavit” does not comply with Rule 32 in that it is not an Affidavit, nor an Affirmation, as provided for in the Regulations made in terms of Sec 10 of the Justices of Peace and Commissioners of Oaths Act 16 of 1963.
- [13] The Applicant’s main contention is that the word “oath” contained in the heading to the declaration contradicts the affirmation taken by the Commissioner of Oaths. It therefore does not constitute an oath nor an affirmation, as required by the Regulations.
- [14] The Respondent submits that the Rule 30A Application should be disposed of at the same time the Summary Judgment Application is heard. The Court ordered that it should be heard separately and that the Rule 30A Application must be heard separately on 25 April 2023.

- [15] The Respondent referred the Court to Erasmus, Superior Court Practice RS 20, 2022, D3-8, where it is stated that a Court has a discretion to condone non-compliance with the Regulations, as it is directory and not peremptory.
- [16] The Applicant submits that the Regulations draw a distinct differentiation between an oath and an affirmation and therefore the document before Court cannot be regarded as an oath or an affirmation.
- [17] The Applicant's contention is that the document placed before the Commissioner purports to be an oath, whilst the Commissioner attested to an affirmation, thus the Commissioner did not fulfil his obligations to ascertain what the deponent was attesting to.
- [18] In ABSA Bank v Botha NO¹ the Court held that the Applicant in Summary Judgment proceedings bear the onus to prove that the document is an Affidavit.
- [19] In Parys-Aan-Vaal Woonstelle (Pty) Ltd and Another v Plexiphon², Daniso J dealt with a matter where the Commissioner did not delete the word "she" in the certificate.

"[12] The commissioner of oaths has omitted to delete the inapplicable gender. It is the applicant's case that *ex facie* the affidavit it is unclear whether the deponent is a male or female. The deponent has merely been described as a manager and on the certificate by the commissioner of oaths the deponent is identified as a "*he/she*." The applicant argues that in the light of the afore-mentioned defects the court would be unable to give effect to the presumption of

¹ ABSA BANK V BOTHA NO 2013 (3) SA 563 (GNP).

² Parys-Aan-Vaal Woonstelle (Pty) Ltd and Another v Plexiphon 115 CC (3489/2021) [2022] ZAFSHC 2 (20 January 2022).

regularity for the purposes of assuming that the oath was sworn to and signed in the presence of the commissioner of oaths.

[20] The Court held that the failure of the Commissioner to delete the appropriate gender justified an inference that the deponent did not appear before the Commissioner.

[21] The Court relied on the peremptory requirements of rule 6(5)(d)(ii) of the Uniform Rules of the Court which provides that any person who opposes the grant of an order sought in the notice of motion must deliver an answering affidavit in response to the applicant's case.

[22] An Affidavit is a written declaration sworn to by the deponent in the presence of a commissioner of oaths.

[23] Regulation 4(1) reads:

Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.

[24] The provisions of Regulation 4(1) are directory, not peremptory in that failure to comply can be condoned at the discretion of the Court where it is clear from other indications in the document that an oath was in fact administered by the commissioner of oaths.

[25] Regulation 1(1) reads:

An oath is administered by causing the deponent to utter the following words:

"I swear that the contents of this declaration are true, so help me God."

[26] Regulation 1(2) reads:

An affirmation is administered by causing the deponent to utter the following words:

“I truly affirm that the contents of this declaration are true.”

[27] Regulation 1(1) and 1(2) requires from the Commissioner to ascertain whether the deponent is making the declaration under oath; or wishes to affirm that the declaration is true.

[28] An oath requires different words to be said by the deponent than what is required when the deponent affirms that the declaration is true.

[29] The Commissioner has a duty to ascertain what the deponent wishes to do by asking him whether he wishes to take the oath; or would prefer to affirm the truth of the declaration.

[30] The Commissioner must then ask the deponent to make the appropriate statement either in terms of Regulation 1(1) or Regulation 1(2).

[31] The Commissioner did not confirm whether the deponent was making a declaration under oath, or an affirmation that the declaration is true.

[32] The failure to ascertain whether the deponent was taking the oath or making an affirmation, supports the inference that the Commissioner did not properly administer the oath or an affirmation.

ORDER

[33] The following order is made:

1. The Founding Affidavit attached to Respondent's Application for Summary Judgment delivered on 07 March 2023 does not meet the requirements to constitute an Affidavit or an Affirmation.
2. The Respondent's Application for Summary Judgment is struck out.
3. The Respondent is ordered to pay the costs of this Application.

AP BERRY, AJ

APPEARANCES:

For the Applicant:

Instructed by:

Adv. NG Laubscher

Lizel Venter Attorneys

c/o McIntyre Van Der Post Attorneys

BLOEMFONTEIN

For the Respondent:

Instructed by:

Adv. M Desai

Govender Patel Dladla Inc

c/o Webber Attorneys

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