IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG.

CASE NUMBER: 3620/2020

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

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15 September 2022

In the matter between:

SIBANI GROUP (PTY) LTD Applicant

and

DOVES GROUP (PTY) LTD ` Respondent

JUDGMENT

OLIVIER AJ:

Introduction

[1] The applicant claims specific performance of the respondent's obligation to pay in terms of a Service Level Agreement ("the agreement") concluded between the parties on 28 February 2018.

[2] In terms of the agreement, the respondent appointed the applicant to provide construction and renovation services to its various franchise outlets. The applicant contends that it rendered certain services in terms of the agreement and that, despite demand, the respondent failed to pay an amount R1 543 317.07 that was due and payable.

[3] The respondent denies that the applicant performed in terms of the agreement. As this is a claim for specific performance, the respondent contends that the applicant is obliged not only to prove that it performed work, but that it performed the work in accordance with the specific terms of the agreement. The respondent contends that the applicant has failed to establish a *prima facie* case.

[4] As captured in the joint practice note, the issues for determination are whether: (1) the deponent to the founding affidavit is a competent witness; (2) the evidence establishes the applicant's performance in terms of the agreement and the respondent's indebtedness; (3) the defendant is entitled in these proceedings to challenge its indebtedness in circumstances where it allegedly failed to object to invoices and the applicant’s notice of breach.

Point in *limine*

[5] The respondent questions whether the deponent to the founding affidavit has personal knowledge of the material facts on which the applicant bases its case – and furthermore submits that the documents the deponent attaches to

the affidavit do not relate to the material facts of the applicant's performance and cannot assist in giving him personal knowledge of these facts.

[6] The deponent to the founding affidavit is Amon Tendai Toto. He describes himself as an in-house legal adviser for the applicant on a retainer basis. He states in the affidavit that he can "confidently" assert the facts deposed to and that they are within his personal knowledge and/or derived from his "personal inspection" of the applicant's "business records" and "an extensive briefing" with Khumbulani Lembede, who is a director of the applicant. The deponent concludes by stating that the facts are to the best of his knowledge both true and correct unless the contrary appears from the context.

[7] He claims to depose to the affidavit on the basis of a resolution 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.

[8] The respondent argues that the deponent cannot claim to have personal knowledge of how, where and when the applicant performed in terms of the agreement, simply by virtue of his position as adviser. The deponent is not employed by the applicant and he was not involved in any aspect of the applicant's alleged performance in terms of the agreement.

[9] The respondent submits further that the documents attached to the affidavit – the agreement, the applicant's breach letter and a spread sheet (which is a payment reconciliation) – do not establish the deponent's personal knowledge of the essential facts relating to the applicant's performance in terms of the agreement. The payment reconciliation and the breach letter are only evidence of the fact that the applicant asserts a claim against the respondent and that a dispute exists between the parties; the spread sheet does not give him personal knowledge of the applicant's specific performance. He has not

attached any reliable documentation proving when, where and at what cost the applicant rendered services to the respondent in terms of the agreement.

[10] The deponent claims to have consulted with Lembede “extensively”, yet no confirmatory affidavit from him is attached.

[11] The effect of this, according to the respondent, is that the allegations of the applicant's performance are hearsay evidence, and so too are the allegations of the cost of the work and the allegation that the respondent "audited" the work, thus satisfying itself as to its quality.

[12] The applicant argues that the deponent is deposing to the affidavit as in-house adviser, not as the applicant’s attorney. The application deals with an agreement that he is familiar with as legal adviser. He has inspected the records of the applicant, which is adequate compliance. He has verified with the directors regarding the records. There is a resolution from directors, so his affidavit cannot be hearsay evidence.

[13] 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 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. The hearsay evidence rule applies to all proceedings, including applications. According to Section 3(4) of the Law of Evidence Amendment Act 45 of 1988, hearsay evidence is “evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence.”

[14] In *Maharaj v Barclays National Bank Ltd* the court held that the mere assertion by a deponent that he can swear positively to the facts is not

regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words.[1]

[15] In *President of the Republic of South Africa and Others v M & G Media Ltd* 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. In this case there is no indication that the facts to which Mr Chikane purports to attest came to his knowledge directly, and no other basis for its admission has been laid. Indeed, the statement of Mr Chikane that I have referred to is not evidence at all: it is no more than bald assertion.[2]

[16] If the deponent to a founding affidavit lacks personal knowledge of the material facts, the integrity and veracity of the "evidence" placed before the court is compromised. In any trial, a court should be vigilant to manage how witnesses testify, ensuring that the rules of evidence are observed scrupulously. Similar vigilance should be displayed in motion proceedings – however, courts must be mindful not to adopt an over-formalistic approach.

[17] The deponent relies on a resolution passed by the applicant's directors authorising him to act on their behalf and to perform certain actions. Often there is a conflation of the authority to launch proceedings, and the competence of a deponent to depose to an affidavit.

[18] In *Ganes and Another v Telecom Namibia Ltd,* the court observed that the "deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit" but that it is the "institution of the

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[1] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423D—E.
[2] 2011 (2) SA 1 (SCA) at para 38.

proceedings and the prosecution thereof which must be authorised."[3] The resolution means naught if the deponent lacks personal knowledge of the material facts necessary to make the applicant's case. If he has no personal knowledge, no resolution will save the affidavit.

[19] The entire claim is based on the founding affidavit of the deponent, who bases part of his personal knowledge on "extensive" consultation with Lembede. The deponent does not disclose what the nature of his "extensive" consultation with Lembede was. Lembede is referred to only once in the affidavit, and that is in relation to the notice of breach which he sent by e-mail. The notice of breach is one of the three documents attached to the founding affidavit. Considering the deponent's description of their interaction, it is doubtful that it would have been limited only to this issue.

[20] Under such circumstances Lembede should have deposed to a confirmatory affidavit, at least confirming the correctness of the content in the founding affidavit as it relates to him. Where the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency.

[21] One might expect an explanation why a confirmatory affidavit was or could not be obtained from Lembede, and submissions on why the evidence nevertheless should be admitted. This assumes, of course, that the applicant or deponent in this case was alive to the need for a confirmatory affidavit.

[22] Technically, then, the "evidence" gleaned from Lembede is hearsay. Nevertheless, this is not necessarily fatal, depending on the weight the court decides to attach to it. The difficulty faced by the applicant, however, is that the extent on which the deponent has relied on Lembede to form his own knowledge, is not known.

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[3] [2003] ZASCA 123; [2004] 2 All SA 609 (SCA) at para [19].

[23] Although it is not essential for the deponent to have been involved personally in the completion of the work or services, he must at least with sufficient particularity explain how he knows, for example, when, where and how the applicant performed in terms of the agreement. If the personal knowledge he purports to have is based on documents he consulted, then such documents must actually be the source of his knowledge.

[24] The information in the spread sheet is only a summary of certain information, namely projects (both completed and ongoing), project costs (in the case of completed and ongoing projects), and payments by the respondent. The deponent does not state that he has consulted the original invoices, or the requisition quotations, or any other relevant documents that form the basis of the spread sheet. He states that he consulted business records, but without explaining what these are.

[25] The present situation is not akin to that of a manager in the collections department of a credit provider, who deposes to affidavits in summary judgment applications as a matter of course. In such cases the deponent exercises overall control of the relevant accounts and all the necessary information can be found in the relevant files. All necessary documents are attached to the founding affidavit. No reliance is placed on unspecified “extensive” consultation with another person to gain personal knowledge.

[26] In summary, the deponent relies heavily on a spread sheet that contains scant information; the extent of the hearsay evidence is unclear and in the absence of at least a simple confirmatory affidavit by Lembede, I take the view that the deponent lacks personal knowledge of the material facts.

[27] The point in *limine* is accordingly upheld. Considering this finding, it is unnecessary for me to consider the merits of the application.

[28] The respondent, as the successful party, is entitled to its costs.

IN THE RESULT THE FOLLOWING ORDER ISSUES:

a. The point in *limine* is upheld.
b. The application is dismissed with costs.

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M Olivier
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 16h00 on 15 September 2022.

Appearances
For the Applicant: I. Mureriwa
Instructed by S E Kanyoka Attorneys
For the Respondent: M. Seape
Instructed by CMS RS Partners Inc

DATE OF HEARING: 24 May 2022
DATE OF JUDGMENT: 15 September 2022