IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 2015/36648

A5024/2021

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

In the matter between:

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SIGNATURE **DATE:** 22 July 2022

BANCO DE MOCAMBIQUE **APPLICANT**

and

MORULAT PROPERTY INVESTMENTS 4 (PTY) LTD **RESPONDENT**

Coram: Dippenaar, Yacoob et Manoim JJ

Heard: 04 May 2022- virtual hearing conducted on Microsoft Teams

Final submissions
Received 16 May 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 22nd of July 2022.

Summary: **Circumstances when attorney can depose to discovery affidavit instead of client, - effect on appeal of error of law conceded by appellant in court of first instance - grounds for condonation on appeal considered**.

ORDER

On appeal from:

The Gauteng Division of the High Court, Johannesburg (Senyatsi J, sitting as Court of first instance):

[1] The appeal is upheld with costs, including the costs of the application for leave to appeal and the costs of two counsel, where employed;

[2] The order of the court *a quo* dismissing the appellant's defence to the action is set aside.

[3] The late filing of the appellant's discovery affidavit is condoned.

JUDGMENT

MANOIM J (DIPPENAAR and YACOOB JJ concurring)

Introduction

[1] This is an application to appeal an order of Senyatsi J (the *court a quo*) to dismiss the appellant's defence to an action for damages instituted by the respondent.

[2] The appellant is the defendant in the damages action brought at the behest of the respondent as plaintiff.

[3] The appellant is the central bank of Mozambique while the respondent is a property owning company that makes its revenue from renting out property.

[4] This appeal concerns whether the court a quo correctly dismissed the appellant's defence as a result of an alleged failure to comply with a prior court order to make proper discovery.

[5] The appeal raises several questions of a procedural nature as well as whether the appellant has prospects of defence in the main action if the appeal is granted.

Background

[6] The appellant and the respondent own adjacent buildings in central Johannesburg.

[7] On 19 October 2015, the respondent (the plaintiff in the main action) instituted an action against the appellant for damages. The cause of action was that the appellant had allegedly failed in its duty of care to the respondent by allowing its premises to be used by the occupants of its building to cause damage to the

respondent's building, leading the latter's tenants to vacate the building. The period covered was from 2011 to date. The amount claimed is R 4 219 014.00 plus interest at 9% per annum from the date of service of the citation and *intendit* to the date of final payment.

[8] The appellant gave notice of intention to defend on 23 October 2015. On 23 November 2015, the respondent applied for summary judgment. The appellant opposed, and in its affidavit, apart from certain points *in limine* not germane to the appeal, alleged it had a bona fide defence.

[9] The respondent did not proceed with its application for summary judgment. The appellant then filed its plea on 18 August 2016. [1]

[10] On the respondent's version, pleadings closed on 1 November 2016.[2] There was no further progress in this matter for the almost three years until the parties served notices to discover on each other. On 2nd August 2019, the respondent brought an application to compel the appellant to discover.

[11] On 29th October 2019, the appellant filed its discovery affidavit. But the affidavit was deposed to by its attorney Mr. Nascimento on its behalf, not one of its employees. On 1 November 2019, the respondent's attorney wrote to the appellants' attorney and contended that the *"purported discovery affidavit did not comply with the rules relating discovery and that the respondent would proceed with its application on 6 November 2019."* The respondent did not explain why the affidavit was not compliant.

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[1] Case Lines 01-108.

[2]

[12] The matter was then set down on the unopposed roll on 6 November 2019. Despite being on the unopposed roll, counsel appeared that day for the appellant. A settlement was reached between the parties which was made an order of court. In terms of the settlement the appellant agreed to furnish a discovery affidavit within twenty-one days. A note from the then counsel for the appellant to his attorney on 6 November states*: "I could only manage to obtain 21 days as from date of the order to file the discovery affidavit. This affidavit must be signed by the parties not the attorney."*

[13] What appears from the record is that the appellant's counsel had conceded that the attorney could not depose to the discovery affidavit and hence the need to file a new one signed by an employee of the appellant. (As I go on to discuss the appellant's new counsel contend that this concession was made erroneously.)

[14] The appellant did not file a new discovery affidavit within the requisite twenty-one-day period, which expired on 5 December 2019.

[15] Given that the order had not been complied with, the respondent brought an application on 8 January 2020 to dismiss the appellant's defence. On 16 March 2020, the appellant's attorney filed a notice of intention to oppose.[3] On 7 May 2020 the appellant filed another discovery affidavit this time deposed to by Luisa Novelle, an official of the appellant. Apart from the change in deponent this affidavit is identical to the one deposed to by the attorney on 30 October 2019. I will from now on refer to Nascimento's affidavit as the first discovery affidavit and Novelle's as the second discovery affidavit.

[3] It was styled as a notice of intention to defend as opposed to a notice to oppose. Nothing turns on this fact although the respondent's attorney took issue with the nomenclature at the time.

[16] The respondent set down its application to dismiss on the unopposed roll on 11 May 2020. Here the facts of what happened are disputed. The appellant contends that its attorney filed the second discovery affidavit as well as an affidavit requesting condonation, on both the respondent's attorneys and the clerk of Senyatsi J, who was the duty judge for the unopposed roll for that week. The respondent's attorneys contend that the attorney used the incorrect email address to send the documents to them. The attorney clearly attempted to send the documents, but he may well have been careless in not checking the email addresses.

[17] What is clear however is that the matter came up on the unopposed roll before Senyatsi J on 11 May 2020. As this was at the height of the lockdown there were no appearances from counsel for either party, just a practice note from the respondent. In the practice note another point was taken that in the condonation application Nascimento's affidavit had been deposed to by one of his employees. The court a quo gave the order to strike out the applicant's defence. Since this was an unopposed application, no reasons were given.[4]

[18] The appellant then appealed that decision. The court *a quo* refused leave to appeal on 16 September 2020 but did not give any reasons for doing so. The appellant then petitioned the Supreme Court of Appeal which granted leave to appeal to a full bench of this court on 21 January 2021. This is how this matter comes before this court.

Issues to be determined.

[4] An email from the learned judge's clerk confirms that there was no recording of this hearing.

[19] This court must determine whether:

a. It was competent on these facts for the attorney to have deposed to the first discovery affidavit;

b. If it was, whether the appellant was bound by the legal error made by its counsel when he agreed that it was necessary to file a discovery affidavit deposed to by one of the appellant's employees;

c. Whether the court on appeal has a discretion in these circumstances to overturn the decision of the court a quo not to condone the late filing of the second discovery affidavit; and

d. Whether it would be just and equitable to do so in the circumstances of this case.

[20] The general rule is that a discovery affidavit must be deposed to by the client not the attorney. The reason for this as was explained in *Maxwell and Another v Rosenberg and Others*[5] is that: *"Great weight is given to these affidavits and they should not be drawn in a loose manner so as to was not to allow an avenue for escape to the deponent if it should turn out that the affidavit was in the possession of another officer of the company."*

[21] Although the deponents in *Maxwell* were directors not attorneys, the policy consideration for not having attorneys depose is the same – to prevent an avenue for non-compliance where the deponent can claim ignorance of the existence of discoverable documents. Nevertheless, the courts have recognised that there are circumstances where it may be justified to have the attorney

[5] 1927 WLD.

depose. In *Rellams (Pty) Ltd v James Brown & Hamer Ltd* the court held that this would be:

"…*in very special circumstances and only if the attorney was in a position of his own knowledge to make a comprehensive affidavit.* [6]

[22] In *Rellams* the court went on to state that if the attorney did depose then:

"… the circumstances ought then to be disclosed in the affidavit to indicate to the other party the reason at least why the Rule was not being strictly complied with."[7]

[23] The appellant argues that it is common cause that Nascimento was based in Johannesburg where the building owned by the appellant, and whose tenants behaviour is the subject matter of the claim, is situated. The appellant is located in Mozambique. Nascimento has handled its affairs in South Africa in respect of the building. He was involved in litigation on behalf of the appellant when it endeavoured to regain control over the building from a company that had allegedly hijacked it. This as I indicated earlier is a central part of the appellant's defence to the action. He also claims to have inspected the premises and seen a servitude lane that divides the appellant's and respondent's respective buildings, and which is another fact relevant to the defence of the appellant.

[24] He is therefore, and this is not disputed, better placed because of his knowledge of the case to depose to the affidavit than any employee of the appellant. His

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[6] 1983 (1) SA 556 (N) at 558. See also *Gerry v Gerry* 1958(1) SA 295 (W) where the court also held that in special circumstances an attorney might depose provided the attorney is *"… in a position of his own knowledge"*

[7] Ibid.

version in this respect is vindicated in two respects as emerges from the appellant's condonation affidavit, which was filed to explain the late filing of the second discovery affidavit. In the first place the second affidavit is identical to his own. Secondly, he explains his difficulty in locating someone at the client who was willing to depose to the affidavit and when he did find that person – Luisa Novelle a legal advisor employed by the appellant – he explains that "… *she was new to the matter"* and *"... had to be informed*" of the issues by him. Indeed, before she signed, the cautious Ms Novelle went to the extent of sending two subordinates to South Africa to be briefed on the matter by Nascimento so they could in turn brief her.

[25] Ms Lombard who appeared for the respondent argued that nevertheless he had not complied with the case law as he had not indicated in the first discovery affidavit the reason, he, not the client, was the deponent. Ms Lombard is correct that these reasons only emerge later in the condonation affidavit and not in his discovery affidavit.[8]

[26] However, Nascimento explains that at the time he filed the first affidavit although the respondent's attorneys wrote to state that it was irregular, they did not explain why. Nor did his own counsel advise him at the time, hence the concession made at the hearing in November 2019 that the appellant needed to file a new discovery affidavit deposed to by the client. I find that on the unusual facts of this case the first discovery affidavit was not irregular because the appellant's

[8] There are some facts that are alleged in the affidavit resisting summary judgement to which Nascimento deposed in which his knowledge of the facts is evident.

attorney had deposed to it. Nascimento had greater knowledge of the relevant facts than did his client.

[27] This then leads on to the next issue. Is the appellant bound by a legal concession wrongly made? The law is clear on this point, it is not. In the leading case on the point *Matatiele Municipality and Others v President of the RSA and Others* the Constitutional Court held:

"It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law. Indeed, in Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others, this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that, 'if that concession was wrong in law [it], would have no hesitation whatsoever in rejecting it'. Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant.[9]

[28] Had the appellant's counsel been aware of the legal position he would not have made the concession that he did. At most a concession might have been made that the attorney should file a supplementary affidavit to indicate the circumstances that justified him deposing to the discovery affidavit.

[29] I now turn to the nature of this court's discretion to overturn the decision of the court of first instance. The debate before the court a quo concerned whether the appellant's late filing of the second discovery affidavit should have been

[9] 2006 (5) SA 47 (CC) at paragraph 67.

condoned. It is fair to assume, absent reasons, that the court did not accept the appellant's justification for serving the second discovery affidavit five months late.

[30] However, following the filing of the amended heads of argument by the appellant the central debate in this case has moved from one of whether condonation should have been granted, to whether there had been a mistake of law in respect of the first affidavit. This means that the court of first instance did not have the benefit of that debate before it and this court is at large to reconsider the matter based on this argument, to avoid what the court in *Matatiele* referred to as an *"intolerable situation*."

[31] It is still necessary to consider whether condonation should be granted for the late filing of the second discovery affidavit, since it now technically, serves as the operative filing in this matter. In any event the first affidavit, as Ms Lombard correctly points out in her supplementary argument, did not lay out the basis for why the attorney deposed to it and not the client. This means that on either scenario condonation is still a relevant consideration albeit now based on different factual footing to that before the court a quo.

[32] The approach to condonation, set out in *Melane v Santam* [10], which both parties cited as authority, is that the court in approaching the matter looks at a range of factors including the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. The court noted that the importance of the case and the prospects of success *"… may tend to compensate for a long delay."*

[10] 1962(4) SA 531 A at 532. See also Muluadzi

[33] In this case the second affidavit was filed five months late. In the condonation application several factors were cited to explain this delay; the difficulties caused by the Covid lockdown, the fact that the attorney had to deal with a client in another jurisdiction, translation difficulties and the bureaucratic challenges of dealing with decision makers working for a central bank. Ms Lombard argues that these facts may justify some delay but not as much as five months. Nevertheless, this criticism loses sight of two important facts. The first affidavit was filed in time and the second affidavit did not contain anything new that was not already in the first affidavit. Nor has discovery by the appellant proved of any significance in the conduct of this case. Nor were the respondent's attorneys blameless in respect of the delay. They complained that the first affidavit was not compliant but did not explain why. Moreover, as the appellant's counsel Mr. Bava points out, there was a three-year delay between the close of pleadings and the commencement of discovery.

[34] The case is of significance as the appellant is faced with a claim of R 4 219 014.00 plus interest. Nor is it a straightforward case. The theory of the respondent is that the appellant failed in its duty of care towards the respondent's tenants causing them to vacate. The appellant has raised as a defence that for some of the period in which the harm is alleged, its building had been hijacked and it had to litigate to regain control. For the other periods it alleges that it exercised proper control. It cannot be denied that it may have prospects of success in defending itself in what is an unusual cause of action. The late filing of the second discovery affidavit therefore ought to have been condoned.

[35] Finally, it would not be just and equitable for the defence to have been dismissed in the circumstances of this case where there had been an error of law regarding who qualified to be the proper deponent concerning a discovery affidavit that once deposed to by the client, was no different to that of the first affidavit nor in substance was the content of the discovery of any great significance.

[36] The appeal is successful. Costs must follow the result, including the costs occasioned by the application for leave to appeal.

[37] The following order is granted:

[1] The appeal is upheld with costs, including the costs of the application for leave to appeal and the costs of two counsel, where employed;

[2] The order of the court *a quo* dismissing the appellant's defence to the action is set aside.

[3] The late filing of the appellant's discovery affidavit is condoned.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION JOHANNESBURG

APPEARANCES

DATE OF HEARING	**:** 04 May 2022
DATE OF LAST SUBMISSION	: 16 May 2022
DATE OF JUDGMENT	: 22 July 2022
APPELLANTS' COUNSEL	: Adv. A. Bava SC
	: Adv. K. Moodley
APPELLANTS' ATTORNEYS	: Jose Nascimento Attorneys
RESPONDENTS' COUNSEL	: Adv N. Lombard
RESPONDENTS' ATTORNEYS	: Mervyn Joel Smith Attorneys