

SOUTH AFRICA / JUDGMENT

Africa's Best Foods (Pty) Ltd v Ed Foods S.R.L (2022/1245) [2022]

ZAGPJHC 1048 (28 December 2022)

[2022] ZAGPJHC 1048

COURT

South Gauteng High Court, Johannesburg

BEFORE

RJ Moultrie

CASE / FILE NUMBER

2022/1245

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, JOHANNESBURG)

Case

no: 2022/1245

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

Date:

30 December 2022

In

the matter between:

AFRICA'S

BEST FOODS (PTY) LTD Applicant

/ Respondent

and

ED

FOOD S.R.L. Respondent

/ Applicant

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy to Caselines.

MOULTRIE AJ

Introduction

- [1] Africa's Best Foods (ABF), the applicant in this interlocutory application, is the respondent in the main application, launched by ED Food (EDF) on 17 January 2022 for payment of €28,000 plus interest pursuant to an agreement allegedly concluded between the parties. EDF is a company incorporated and having its principal place of business in Bologna, Italy.
- [2] The issues that I am required to decide arise out of the common cause fact that the deponents to the affidavits delivered by EDF together with the notice of motion in support of the main application (which I shall refer to as the founding affidavits) signed and purported to depose to them in Italy during a video conference call with a commissioner of oaths who was located in South Africa.
- [3] ABF delivered its notice of intention to oppose on 24 January 2022 and its answering affidavit on 14 February 2022, in which it raised points in limine alleging that the founding affidavits must be regarded as pro non scripto and disregarded by the Court for want of compliance with Rule 63 of the Uniform Rules of Court, which deals with the authentication of documents executed outside of South Africa, as well as the Regulations Governing the Administering of an Oath or Affirmation published in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963.
- [4] On 16 February 2022, EDF delivered an affidavit that had ostensibly been deposed to by the commissioner of oaths on 14 January 2022 in which he explained the process followed during the "virtual commissioning" of the founding affidavits. For reasons which will become clear below, I do not consider it necessary to recite the precise details of the process here.
- [5] On 17 February 2022, ABF served:
- (a) a notice in terms of Rule 30(2)(b), alleging that the delivery of the commissioner's affidavit (which ABF described as "a supplementary / supplementary confirmatory affidavit") constituted an irregular step because it "does not form part of the usual sequence of affidavits in terms of Rule 6" and because permission had not been obtained from the Court under Rule 6(5)(e) to file it; and

- (b) a notice in terms of Rule 30A(1), alleging firstly, that EDF had failed to comply with the Uniform Rules in that the founding affidavits had not been authenticated in accordance with Rule 63; and secondly, challenging the delivery of the commissioner's affidavit on the same basis set out in the Rule 30(2)(b) notice.
- [6] On 1 March 2022, EDF delivered its replying papers, comprising three affidavits deposed to on 1 March 2022 (again 'virtually' by the same deponents as the founding affidavits) and the Commissioner's affidavit that had been deposed to on 14 January
2022. In the 'main' replying affidavit, EDF's sole director, Mrs Katia Pedrini, disputed the validity of the points in limine that had been raised in the answering affidavit, contending in paragraph 9 that the founding affidavits
- "were properly commissioned" but indicating in paragraph 10 that the commissioner's affidavit "will in any event be filed together with this affidavit in support of this application".*
- [7] On 14 March 2022, ABF delivered the current application, in which it prays (on the same grounds set out in the Rule 30(2)(b) and 30A(1) notices) for orders:
- (a) that the Commissioner's affidavit be "set aside in its entirety or struck out, in terms of Rule 30 and Rule 30A"; and
- (b) that the founding affidavits be "struck out in terms of Rule 30A", with the further consequence that EDF's claim should be struck out.
- [8] Although it is apparent that the commissioner's affidavit was delivered twice by EDF, first on 16 February 2022 and then again on 1 March 2022, on neither occasion was it out of sequence as alleged by ABF, nor was it filed out of time (as was the case in the Rockridge case[1] sought to be relied upon by ABF). Despite the date of its deposition, it was filed on both occasions on a date after the delivery of the answering affidavit and before the time period for the delivery of a replying affidavit expired. Although ABF chose to identify it as "a supplementary / supplementary confirmatory affidavit", it was never suggested by EDF that it was to be regarded as forming part of its founding papers. To the contrary, it is clearly apparent from paragraph 10 of Pedrini's replying affidavit that it is filed as part of the EDF's replying papers, and this was expressly confirmed to me by EDF's counsel at the hearing of the matter.
- [9] As such, it was not necessary for EDF to obtain the permission of the court under Rule 6(5) (e) to deliver the commissioner's affidavit, and it was neither irregular nor non-compliant with the Uniform Rules. ABF's challenge to the delivery of the commissioner's affidavit therefore cannot succeed.

- [10] With regard to the challenge to the founding affidavits based on Rule 63, while it is undoubtedly correct that those affidavits are documents for the purposes of Rule 63[2] that were executed outside of South Africa and that EDF has not sought to have them authenticated in terms of Rule 63, that does not, in itself, mean that EDF has failed to comply with the Uniform Rules as contemplated by Rule 30A and as alleged by ABF.
- [11] While the “true purpose and effect” of the authentication of a document in accordance with the procedures provided for in Rule 63 and its precursors is simply that it may be regarded by a court on a prima facie basis as having been signed by the person by whom it purports on its face to have been signed, this is not the only means by which such a document may be authenticated: that may also be achieved “by reliable evidence tendered in the usual manner”. [3] This is expressly stated in Rule 63(4) which provides that

“[n]otwithstanding anything in this rule contained, any court of law ... may accept as sufficiently authenticated any document which is shown to the satisfaction of such court ... to have been actually signed by the person purporting to have signed such document”. This may be done “either by direct or circumstantial evidence, or both, and the strength of proof required is on a preponderance of probabilities”. [4]

I note, however, that it is my view that the requirement in rule 63(5) to “show to the satisfaction of the court” that the document was actually signed by the person purporting to have done so is a matter of evidence, which must be dealt with in the usual manner, and does not involve the exercise of a judicial ‘discretion’ to ‘condone’ non-compliance, as was suggested in Chopra and a number of other cases. [5]

- [12] As the author of Jones and Buckle explains, the authorities referred to in footnote 3 above confirm that the provisions of Rule 63(2) –
- (3) are “not exhaustive or imperative, but merely directory”, [6] in the sense that they may, but not must, be used to facilitate authentication of a document if a party chooses to rely on them. On the other hand, the party may also opt to attempt to prove the authenticity of the document in question by some other evidential

means. In the present case, EDF has apparently chosen to rely on the commissioner’s affidavit, which it has put up in reply.

- [13] The fact that EDF has not sought to comply with the requirements of Rule 63 in relation to the founding affidavit therefore does not constitute a failure to comply with the Uniform Rules as contemplated in Rule 30A, and ABF’s challenge to the founding affidavits on this basis therefore also cannot succeed.
- [14] I am not seized with the main application or any part thereof, including the point raised in limine by ABF regarding the non-compliance with Rule 63 in relation to the founding affidavits. The question that will have to be determined in that regard by the court seized with the main application is whether the answering affidavit contains any pertinent denial that the founding affidavits were signed by the persons by whom they purport to have been

signed and, if a material dispute of fact has indeed arisen in this regard, whether EDF has made the required showing of authenticity by means of the commissioner's affidavit put up in reply, or whether this is perhaps an issue that would require a referral to oral evidence in terms of Rule 6(5)(g). Furthermore, nothing in the current application requires me to attempt to resolve the further point raised in limine regarding whether the founding (or indeed the replying) affidavits have been validly commissioned in substantial compliance with the requirements of the Regulations published in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963. Despite the urging of EDF's counsel during the hearing of this matter for me to do so, it would not be appropriate for me to predetermine either of these issues.

[15] The usual principle is that the successful party should be awarded their costs. In this case, that is EDF. I do not, however, consider that the references to the commissioner in ABF's affidavits as an "alleged" commissioner of oaths constitute unfounded defamatory statements that justify an award of costs de bonis propriis against ABF's attorney or costs on a punitive scale, as EDF contends in its affidavits. EDF's counsel wisely did not pursue either submission in argument.

[16] The application is dismissed with costs.

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 5

October 2022

JUDGMENT

DELIVERED: 30 December 2022

APPEARANCES

For the Applicant / Respondent: Attorney WC Opperman of C&O Inc.

For the Respondent / Applicant: M Nieuwoudt, instructed by WerthSchröder Inc.

[1] Rockridge Game Farm (Pty) Ltd v Breedts and Others (34949/2013) [2017] ZAGPPHC 408 (27 July 2017) para 8.

[2] EDF's suggestion that they were deposed to before an officer prescribed by section 8 of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 is clearly unsustainable. In particular, the commissioner is not a person referred to in section 8(1)(a), and the reference in section 8(1)(b) to a "person appointed as a commissioner of the Supreme Court of South Africa" is clearly to a person specially appointed by the court to take evidence on commission in terms of Rule 65, and does not apply to a person who is ex officio a

commissioner of oaths.

- [3] Ex parte Holmes & Co (Pty) Ltd 1939 NPD 301 at 307. See also Ex parte Melcer 1948
- (4) SA 395 (W) 398; McLeod v Gesade Holdings (Pty) Ltd 1958
- (3) SA 672 (W) 674 – 675; Friend v Friend 1962
- (4) SA 115 (E) 116D–G; Blanchard, Krasner & French v Evans 2004
- (4) SA 427 432G–H; Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd 2003
- (6) SA 69 (C) 74F–H.
- [4] Chopra v Sparks Cinemas (Pty) Ltd 1973
- (2) SA 352 (D) at 358C.
- [5] Chopra (above) at 357A – 358D. See also Mountain View Hotel (Pty) Ltd v Rossouw 1985
- (2) SA 73 (NC) 79E–G; Chinatex Oriental Trading Co v Erskine 1998
- (4) SA 1087 (C) 1092D and McFarlane v Matisonn 2016 JDR 1342 (KZP) para 9.
- [6] Van Loggerenberg Civil Practice of the Magistrates' Courts in South Africa. Vol. II, Looseleaf OS (Juta, 2011) at Appendix B.

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