

SOUTH AFRICA / JUDGMENT

Dique v Viljoen (14218/2007) [2007] ZAGPHC 206 (14 September 2007)

[2007] ZAGPHC 206

COURT

High Courts - Gauteng

BEFORE

Nthai

CASE / FILE NUMBER

14218/2007

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CASE

NUMBER: 14218/2007 DELIVERED ON: 14 SEPTEMBER 2007

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IN

THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL

PROVINCIAL DIVISION)

In

the matter between:

ANDRIES

PETRUS JOHANNES DIQUE

Plaintiff

and

MARIUS

VISSER VILJOEN

Defendant

JUDGMENT

NTHAI AJ

A.

INTRODUCTION

[1] This is an application for summary judgment for the payment of the sum

of R300 000 - 00 (three hundred thousand), together with interest on the aforesaid amounts of R300 000 - 00 on the rate of 15.5% per annum, calculated from 4 September 2004 to date of payment and costs of the action on attorney and client scale.

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- [2] The defendant elected not to file opposing papers. In any event, the time for filing such opposing papers had expired on 5 June 2007 in accordance with rule 32 of the uniform rules of court.
- [3] This matter came before me on an unopposed basis. However, on the day of the hearing of the matter, Mr Hinrichsen who appeared on behalf of the defendant confirmed to this court that the defendant had elected not file any opposing papers. However, he appeared only for the purposes of raising a point of law. According to him, the affidavit deposed to by the plaintiff was defective as it was not properly attested to before a commissioner of oaths.
- [4] The affidavit referred to was attested on 22 May 2007 before Stephen K Hale, Justice of the Peace: Western Australia.
- [5] In support of this argument, Mr Hinrichsen referred to rule 63 of the uniform rules of court. In essence the argument revolves around the correct interpretation of the provisions of rule 63 which reads as follows:

"63

- (1) In this rule, unless inconsistent with the context-

"document" means any deed, contract, power of attorney, affidavit or other writing, but does not include an affidavit or solemn or attested declaration purporting to have been made before an officer prescribed

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by section eight 'of the Justices of the Peace and Commissioners of' Oaths Act, 1963 (Act 16 of 1963);

"authentication" means, when applied to a document, the verification of any signature thereon.

- (2) Any document executed in any place outside the Republic shall be deemed to be sufficiently authenticated for the purpose of use in the Republic if it be duly authenticated at such foreign place by the signature and seal of office -

.

- (a) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office abroad; or
- (b) of a consul-general, consul, vice-consul or consular agent of the United Kingdom or any person acting in any of the aforementioned capacities. or a pro-consul of the United Kingdom; or
- (c) of any Government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or
- (d) of any person in such foreign place who shall be shown by a certificate of any person referred to in paragraph (a), (b) or (c) or of any diplomatic or consular officer of such foreign country in the Republic to

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be duly authorised to authenticate such document under the law of that foreign country; or

- (e) of a notary public in the United Kingdom of Great Britain and Northern Ireland or in Zimbabwe, Lesotho, Botswana or Swaziland; or
- (f) of a commissioned officer of the South African Defence Force as defined in section one of the Defence Act, 1957 (Act No. 44 of 1957), in the case of a document executed by any person on active service .

. .

(3) If. any person authenticating . a document in terms of sub-rule (2) has no seal of office, he shall certify thereon under his signature to that effect.

(4) Notwithstanding anything in this rule contained. any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the office. to have been actually signed by the person purporting to have signed such document.

(5) No power of attorney, executed in Lesotho, Botswana or Swaziland, and intended as an authority to any person to take, defend or intervene in any legal proceedings in a magistrate's court within the

Republic shall require authentication: provided that any such power

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of attorney shall appear to have been duly signed and the signature to have been attested by two competent witness." (Underlining supplied)

[6] The point of law raised by the defendant's counsel is strenuously opposed by the plaintiff's counsel.

[7] It is so that a party that finds it necessary to file an affidavit or other document executed outside the Republic of South Africa it should be authenticated. The affidavit is signed and attested to before Mr Stephen K Hale; "Justice of the Peace: Western Australia". It is trite that in looking at

..

the document, the court must be satisfied that it is a genuine one.¹ Related to this, authentication may also be informal. In which case proof of the genuineness of the signature in any manner that may satisfy the court should suffice. It has been contended by the defendant that the signature is not genuine and that the affidavit has not been authenticated in terms of the rule.

[8] Related to the above, the question is whether the provisions of sub rule 63(

4) are applicable.

McLeon v Gesade Holdings (Pty) Ltd 1958 (3) SA 672 (W)

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[9] In the words of Malan J in *Blanchard, Krasner & French v Evans*:² "The rules set out above are not exhaustive but are, as Erasmus Superior Court Practice B1

- 407 B, said, merely directory. They do not take away from the power of the Court to consider other evidence directed at the proof of a document executed in a foreign place, and to accept such a

document as being duly executed." (Underlining supplied)

[10] In *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd*,³ van Reeneri J articulated the position as

follows:

'The rules relating to the authentication of a document executed in

foreign countries have been designed to ensure that such

documents are genuine before use can be made thereof in the

Republic of South Africa. The prescribed formalities are not

mandatory, and the genuineness of such documents may be

proved on a balance of probabilities by means of direct or

circumstantial evidence or both. (See *Chopra v Sparks Cinemas*

(Pty)Ltd and Another 1973 (2) SA 352 (0) at 358B-0; see also Ex

2004(4) SA 427 (W) 432, para 4

See also *Zhou v Hong* 2006(1) NR 85 at 95J - 96 E 2003 (6) SA 69 (C) 74 - 5

[12

[13]

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parte *Holmes & Co (Ply) Ltd* 1939 NPD 301;Â· *Friend v Friend* 1962 (4) SA 115 (E).) ...

[11]

Counsel for the defendant referred me to the case of *Moskovitz v Commercial Union Assurance Co of SA Ltd*.⁴ The relevance of this case as I understand it, is that the court in that case held that a document which; on the face of it was an affidavit, but which contained false information, had been signed by the deponent (the plaintiff), without reading it and that he had infact not taken an oath or affirmed its contents or acknowledged its correctness or appeared before a commissioner of oaths, although a Â·commissioner of oaths had signed it, was not an affidavit and was not iri substantial compliance with the requirements of . regulation 7(b)(i) to furnish an affidavit.

In the instant case, no evidence is placed before me to verify that the signature appearing on the affidavit is that of Mr Stephen K Hale. Furthermore, there is no indication that the affidavit written in Afrikaans was ever translated into English to enable Mr Hale to understand it. There is simply no evidence presented to prove that the affidavit is genuine.

I agree with counsel for the defendant, that in terms of rule 32(2), the burden of proof of proof to show that the document is in fact an affidavit lies squarely upon the shoulders of an applicant who prefers to proceed by 1992(4) SA 192 (W)

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way of a summary judgment and further that the applicant cannot rely

upon the other side not being able to prove the contrary in order to discharge the onus.⁵ On the face of it, the document was signed and

sworn to before Mr Stephen K Hale in Western Australia. Other than that

no further evidence is presented to prove that Mr Stephen K Hale is

indeed a commissioner of oaths in Western Australia.

[14] I see no reason why this court should accept that the affidavit has been

properly authenticated. The court is entitled to .condone non-compliance with the strict requirements of the rule. ⁶ However, in the instant case, I am not inclined to exercise my discretion in favour of the plaintiff as envisaged

in subrule 63(4)

[15] In the result, the following order is made:

[15.1] The application for summary judgment is refused;

[14.2] The defendant is granted leave to defend the action.

Engineering Requisites (Pty) Ltd v Adam 1977 (2) SA 175 (0) Mountain View Hotel (Pty) Ltd v Rossouw 1984(2) SA 71 (NC) See also rule 63(4)

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S A NTHAI

ACTING JUDGE OF THE HIGH COURT

For the Plaintiff:

Adv LD Scholtz

Instructed by Tintingers Attorneys

For the Defendant: Adv D Hinrichsen

Instructed by Senekal Simmonds Attorneys

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