IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 3082/2010

In the matter between:

PRICEWATER HOUSE COOPERS ADVISORY SERVICES (PTY) LIMITED N.O. **1st Applicant**

THE CENTRAL BANK OF SWAZILAND **2nd Applicant**

And

DIAMOND AFRICA (PTY) LIMITED **Respondent**

Neutral citation: Pricewater House Coopers Advisory Services (Pty) Limited & Another v Diamond Africa (3082/2010) [2013] SZHC 08 (28th February 2013)

Coram: M. Dlamini J.

Heard: 29th November 2012

Delivered: 28th February 2013

Application proceedings - commissioner of oaths not listed in the Commissioner of Oaths Act and Justices of Peace Act - whether

recognizable in our jurisdiction- effect of statement purportedly signed under such circumstances – procedure to be taken on the question of whether the application should be dismissed or not.

Summary: The applicants are seeking for a winding up order of respondent on the basis that respondent is engaged in a pyramid scheme. Respondent strenuously opposes this application.

[1] The respondent has raised two points *in limine viz*.:

i) That the founding affidavit of Linda MaCphail was inadmissible for want of a recognized Commissioner of Oaths.

ii) That the applicant have no *locus standi* by virtue of respondent not being a financial institution for purposes of the Financial Institution Act No.6 of 2005.

[2] The other two points *in limine* on jurisdiction and contention on the confirmatory affidavit of Mhlabuhlangene Dlamini were abandoned during submissions by respondent. I must mention from the onset that I do not intend to address the second *point in limine* herein for the reason that it is a point intertwined with the merits of the case. This is because during *viva voce* submission, Counsel on behalf of respondent expounding on the second point submitted that the respondent was not conducting a pyramid scheme but a genuine business. This therefore calls for me to enquire on the activities of the respondent in order to ascertain whether they smerk of pyramid conduct or not. I will therefore address the second *point in limine* when I deal with the merits of this case later.

[3] It is common cause that the supporting affidavit of Linda MaCphail on behalf of 1st applicant was commissioned by a Police officer practicing as such in the Republic of South Africa although commissioned in Mbabane, Kingdom of Swaziland.

[4] In reply addressing the first point of law, the 1st applicant avers that there is no substance in respondent's objection to the admissibility of the founding affidavit because:

> "*Swazi law only requires that an oath be administered by a Commissioner of Oaths."*

[5] The applicant does not tell us which is this "*Swazi law"* nor were any authorities cited in support of this "*Swazi law*".

[6] **De Villiers J. P**. in **Gardwood Municipality v Rabie 1954 (2) S.A. 404** at **406** as cited in **New Mall (Pty) Ltd v Tricor International (Pty) Ltd (302/2012) [2012] SZHC 180** at page 23 describes an affidavit as:

> "*a sworn statement in writing sworn to before someone who has authority to administer an oath."*

[7] The learned judge highlights further on affidavits:

> *"……..a solemn assurance of a fact known to a person who states it, and sworn to as his statement before some person in authority such as a Judge or a Magistrate or a justice of the peace, or a Commissioner of court or Commissioner of Oaths*." (underlined, my emphasis)

[8] It appears that there are three categories of offices that can administer an oath according to **His Lordship De Villiers J. P**. in **Gordwood** *ibid*. These are appointed commissioner of oaths, judicial officers and justices of peace. This position is true of our jurisdiction as well.

[9] Two pieces of legislation are available in our jurisdiction *viz.* The Commissioner of Oaths Act No.23 of 1942 as amended and the Justices of Peace Act No. 63 of 1954.

[10] The Justices of Peace Act No. 63 of 1954 promulgates Regional Secretary, Cadets, Commissioner and his deputies as justices of peace.

[11] The Commissioner of Oaths Act lays out a detailed catalogue of officers designated as Commissioners of Oaths. Magistrates, are also listed, although Judges are not. Justices of peace are also mentioned.

[12] A hierarchy of Police officers excluding Constables and Sergeants are also mentioned as Commissioners of Oath in the Commissioner of Oaths Act.

[13] Turning to South African legislation, Section 8 (1) of the Justices of Peace and Commissioners of Oaths Act 1963 empowers gazetted Commissioners of Oaths to administer oaths even beyond the borders of South Africa. It appears, I may assume, that this provision operated in the mind of the Commissioner of Oaths in *casu* when he administered the oath to Linda MaCphail.

[14] However, I must point out that this could never be the intention of the legislature in South Africa. When the law maker extended the authority of

duly appointed Commissioners of Oath beyond their area of jurisdiction *viz.* the Republic of South Africa, it simply meant that Commissioners of Oath may commission a document even outside the Republic and that document was admissible only in the courts of South Africa. It can not by any stretch of imagination be held to be admissible in the country where it was commissioned other than in South Africa unless of course the commissioner of oaths may show special circumstances such as that he was during the commissioning functioning under the SADC, SAPCO joint operation or any regional or international venture, although the question as to whether he is not an interested party in the proceedings will still have to be decided.

[15] As a result therefore, I agree with Mr. L. Maziya that the supporting affidavit of Linda MaCphail cannot be held as evidence as it is contrary to the principle highlighted by **Herbstein and Van Winsen "The Civil Practice of the High Courts of South Africa" 5th Ed Vol. 1** at page **449** as follows:

> *"The affidavits must be sworn before a person competent to administer an oath."*

[16] The next question concerns the outcome of the entire application *viz*. whether to dismiss the application as advanced by Mr. Maziya for the respondent. In reaching a determination on this question, I am guided by the *ratio decidendi* propounded in the case of **Caldwell v Chelcourt Ltd 1965 (1) S.A. 304**.

[17] In the **Caldwell** case *supra*, the contention was that the founding affidavit, although signed by the deponent and a commissioner of oaths' signature

appeared, it was not commissioned accordingly. The court interrogated the objection and concluded that the respondent was correct. The honourable judge at page 307 found:

> "*It seems to me equally consistent with the deponent merely having been asked to say that she acknowledged that she knew and understood the contents of the document and then being asked to sign it*."

[18] From the above, the learned justice concluded:

> "*if that is what happened, then this document was never sworn and it is not an affidavit such as is required by the rules of Court. If it was signed in that way, it is no more than a written statement not made on oath. In the result it seems to me that I cannot hold that the second document referred to is an affidavit sworn in the manner required. If it is not a sworn document, it does not itself constitute any evidence nor can it be held to rectify the admitted deficiencies in the original document."*

[19] Finally the judge holds:

> "*For these reasons it seems to me that the point taken by the respondent is a good one and that I have nothing before me upon which I can properly come to any conclusion as to whether the applicant is entitled to the relief sought."*

[20] He then adjudged at the same page:

"……the preliminary objection must be upheld with costs."

[21] He then wisely asks:

"*It only remains for me to consider whether the application should be dismissed or whether I should give the applicant an opportunity once again of attempting to rectify the deficiencies in her papers."*

[22] He divulges:

"*Mr. Didcott (Counsel for respondent) was originally disposed to ask that the application be dismissed with costs*." (words in brackets my explanation)

[23] Similarly, Mr. Maziya for the respondent in *casu* has applied that applicant's application be dismissed.

[24] It would appear that **Caney J.** in **Caldwell's** case *op.cit*. was very much alive to the *dictum* in **Trans-African Insurance Co. Ltd. v Maluleka 1956 (2) S. A. 273 (A.D.)** at **278** where **Schreiner J. A**. stated:

"*No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible, inexpensive decision of cases on their real merits*."

[25] The *dictum* by **Schreiner J. A**. was applied in our *locus classicus*, **Shell Oil Swaziland (PTY) Ltd v Motor World (Pty) Ltd t/a Sir Motors** Appeal Case No. 23/2006 where their Lordships held at page 23:

> *"…the current trend in matters of this sort, which is now well-recognised and firmly established, viz. not to allow technical objections to less than perfect procedural aspects to interfere in …."* (Words underlined my emphasis).

[26] The court then proceeded to recite **Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004(2) SA 81 (SE)** at 95F-96A, par 40:

> *"The Court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs."*

[27] Their Lordships in **Shell Oil** *op. cit* propound at page 24:

> *"The above considerations should also be applied in our courts in this Kingdom. The Court has observed a tendency among some judges to uphold technical points in limine in order it seems, I would dare to add, to avoid having to grapple with the real merits of a matter. It is an approach which this Court feels should be strongly discouraged."*

[28] I agree *in toto* with the *orbiter dictum* in **Shell Oil** case. I do note however, that the issue in that case was also on the manner in which the founding

affidavit was deposed. In that case, the respondent had taken an issue on the date upon which the supporting affidavit was deposed. It was said that it had been deposed prior to the date of the resolution by the company's directors authorizing the deponent to institute court processes in that matter.

[29] At para 41 page 24 their Lordship again wisely held:

> *"In the present case the defect, if such it was, in the applicant's papers was that he had sworn to his affidavit a day prior to the formal resolution of his company authorizing him to do so. But the notice of motion, of which such affidavit was the founding document, was only served and filed on the same day that the formal resolution was passed. This is a matter obviously highly technical in nature. By refusing to allow the applicant to remedy it, and not approaching the matter "with a fair measure of common sense", the Court a quo afforded the respondent no material advantage as fresh papers to remedy the defect could immediately thereafter have been prepared and filed by the appellant."* (words underlined my emphasis).

[30] I note that in **Shell Oil** *ibid* case, the appellant had remedy the defect in its reply. In *casu* the defect has not been remedied despite the opportunity available to the applicants under reply. I further take note as appears in the underlined wording of **Shell Oil** case that where the remedy has not been rectified, the court, depending on the circumstances of the case, I may add, should give the party at fault the opportunity to remedy the discrepancy in order to avoid filing of " *fresh papers*" thereby mitigate litigation costs as per common sense dictates.

[31] Bearing in mind the *dictum* cited herein the learned **Caney J.** in **Caldwell** *op.cit*. granted leave to the applicant at page **308**:

> *"file a sworn affidavit in a place of such document."*

and further ordered applicant to pay:

> *"costs of to-day"*

[32] In *casu*, it is clear that applicant, to use **His Lordship Schreiner J. A**.'s words, was "*slack in the observant of the rules*". He could have attended to the defect when it was raised by the respondent in its answering affidavit. This as **Schreiner J.A.** correctly observed "*no doubt parties and their advisers should not be encouraged*". This must, as in **Caldwell's** case *ibid*, be meted with costs in order to show the Court's disapproval.

[33] *Fortiori* in the absence of any demonstrated prejudice by respondent for the deficiency in applicant's application, I am not inclined to divert from the procedure adopted by **Caney J**. in **Caldwell's** case *ibid* and adopted by our **Shell Oil** case, *op. cit.* I therefore enter similar orders as follows:

1. The point *in limine* is upheld;

2. Respondent is ordered to pay costs of 29th November 2012;

3. Applicant is granted leave to file the same statement but commissioned accordingly within ten (10) days from date of judgment, if so advised;

4. Should respondent wish to raise an issue on the affidavit filed under this order on the issue of commissioner of oath as amended only, it may do so within three (3) days from date of filing by applicant, failing which, this court shall proceed to adjudge on the merit.

M. DLAMINI

JUDGE

For Applicants **:** M. Magagula of Magagula, Hlophe Attorneys

For Respondent **:** Adv. L. Maziya instructed by T. L. Dlamini & Associates