IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No.293/2021

In the matter between:

SIBONISO BHEKI SIMELANE Applicant

And

FEEDMASTER (PTY) LTD Respondent

Neutral Citation: Siboniso Bheki Simelane vs. Feedmaster (Pty) Ltd (293/2021) [2022] SZIC104 (25 August 2022)

Coram: **V.Z. Dlamini – Acting Judge**
(Sitting with D.P.M. Mmango and M.T. E Mtetwa – Nominated Members of the Court)

Last Heard: 27 June 2022

Delivered: 25 August 2022

SUMMARY: ***Applicant raised a point in limine that the Respondent's Answering Affidavit was defective and should be disregarded because the deponent omitted to aver that the allegations made therein were true and correct; consequently, a sworn statement opposing the application had not been file by the Respondent.***

Held: ***Although the deponent omitted to make the said averment, the statement in the affidavit was made under oath administered by a duly authorized commissioner of oaths. The Court was therefore enjoined to evaluate the affidavit as a whole to determine the truthfulness or otherwise of the allegations made therein. Omission will not result in a miscarriage of justice.***

RULING

INTRODUCTION

[1] The Applicant, a liSwati male of Luve area in the district of Manzini instituted an application by notice of motion supported by an affidavit, against the Respondent a company incorporated in terms of the Company laws of Eswatini on the 12th October 2021 in which he sought the following relief:

1. *Directing that the Respondent pay to the Applicant the sum of* ***E30, 660.00 (Thirty Thousand Six Hundred and Sixty Emalangeni)*** *being the total sum of monies Applicant would have earned under his contract of employment.*

2. *Directing that the Respondent to pay costs of suit.*

BACKGROUND FACTS

[2] The Applicant alleged that he had been employed by the Respondent as a Heavy Duty Driver on three (3) months renewable contracts since the 11th October 2019 until the premature termination of the final contract on the 12th April 2021. Before the contract termination, he was offered a four (4) months

contract from April to July 2021; the termination of the fixed –term contract was without notice. Consequently, the relief sought by the Applicant was for notice and the remainder of the contract.

[3] The Respondent opposed the application by filing an answering affidavit deposed to by Mr. Neville Fouche, a South African national employed by the company as Logistics Manager. Before the matter could be heard on the merits, the Applicant objected to the Respondent's answering affidavit on the basis that the latter had failed to make an affidavit on oath and as such the answering affidavit was inadmissible. Moreover, the Applicant contended that the defect rendered the evidence presented in the founding affidavit unassailable. The Respondent opposed the point of law raised by the Applicant. Consequently, at this stage the Court has to determine whether the answering affidavit was admissible.

PRELIMINARY ISSUE

ARGUMENTS

[4] The Applicant contends that since it is trite that an affidavit contains not just allegations, but evidence as well, a person who deposes to same must take an oath and state that *"the facts deposed to are within my personal knowledge and belief true and correct"* or some words to that effect. Failure to include the averments in italics in an affidavit renders it an unsworn statement, thus inadmissible. It was further submitted by the Applicant's counsel that the fact that the answering affidavit was administered by a commissioner of oaths who certified that the deponent said the *"oath binds his conscience"*, did not cure

the defect in the absence of the oath itself being the *"formal statement that something is true"*.

[5] The Applicant's counsel relied on the following legal sources and authorities: **Hoffman and Zeffert**: ***The South African Law of Evidence*** **4th Edition, Butterworths; Herbstein and Van Winsen**: ***The Civil Practice of the High Court of South Africa*** **5th Edition, Juta and Co; Civil Evidence Act of 1902; Commissioner of Oaths Act of 1942**; and **S v Khan 1963 (4) SA 897 (A).**

[6] The Respondent's counsel submitted that no defect existed in the affidavit at all; if there was, it was cured by the oath that was administered by the commissioner of oaths. Moreover, counsel contended that since the Court exercised equitable powers, the objection raised by the Applicant was a mere technicality and the defect, if any, would not result in a miscarriage of justice. Counsel referred the Court to the provisions of **Section 11 (1)** of the **Industrial Relations Act of 2000 (as amended).**

ANALYSIS OF ARGUMENTS

[7] The impugned portion of the answering affidavit reads as follows:

"I, the undersigned

NEVILLE FOUCHE

Do hereby make oath and state that;

1.

I am an adult South African male currently employed by the Respondent as the Logistics Manager.

2.

I am duly authorized to depose to this affidavit by virtue of the fact that I am in charge of the Logistics department.

3.

I wish to respond to the Applicant's founding affidavit in the manner set out below;"

[8] An affidavit consists of five sections: title (type of affidavit); statement of identity; statement of truth (knowledge); statement of facts (body); closing statement of truth (ending), inclusive of signature. See: *Guidebooks for Representing Yourself in Supreme Court Civil Matters, www.SupremeCourtBC.ca* . *Ex facie* the answering affidavit's statements of identity and knowledge at **paragraphs 2** and **3**, which are quoted above, the deponent Mr. Fouche omitted to state the following averment: *"the facts deposed to are within my personal knowledge and belief true and correct"*. For this omission, the Applicant argued that the contents of the answering affidavit does not constitute a sworn statement and as such should be disregarded by the Court.

[9] The Applicant's objection has also vexed Courts in other Roman Dutch Common Law jurisdictions. The High Court of the Kingdom of Lesotho dealt with a similar question in the case of **TS'EPISO SELIKANE v MANAPO NKHOPE & 2 OTHERS CCA/0027/2020.** Due to its import to the question

for determination in the present case, we will quote the relevant portion of the **TS'EPISO SELIKANE case (supra)** extensively.

[10] At **paragraphs 6** to **10** of the **TS'EPISO SELIKANE** decision (supra), the Court said the following:

> *"Non-Affidavit*
>
> *The 1st respondent submits that the applicant's founding affidavit should be expunged because:*
>
> > *"1.5.1 The statement of applicant does not constitute evidence for failure to follow mandatory prescripts of Regulation 7 of Government Notice NO.80 of 1964. Deponent has not deposed to truth and correctness of his averments as the law demands"*
>
> *.....It is common cause that the words being complained about were not included in the founding affidavit of the applicant. But, does it mean that, the absence of those words without more, should translate into the affidavit no longer being regarded as such. In my judgment, the answer should be in the negative, as the ensuing discussion demonstrates. In support [of] his contention, Advocate Mafaesa called in aid the dictum of Schultz P in Matime and Others v Moruthoane and Another LAC (1985-89) 198 at 199C-D where it was said:*
>
> > *"The next difficulty that I have with the application in the High Court is that the deponents who purported to give evidence did not say that they had personal knowledge of the facts deposed to. It is true that in respect of some of the facts it appears from the affidavits themselves that knowledge is established. But when one has regard to the basic*

facts that had to be established there is lack of admissible evidence to make the simple case that was sought to be made."

I revert to this dictum in due course.

In my considered view, in casu, it is apposite to consider what constitutes an affidavit. In Goodwood Municipality v Rabie 1954 (2) SA 404 (c), De Villiers JP quoted Van Zyl's Judicial Practice 2nd Edition at p.354 wherein an affidavit is defined as follows:

"[A]n affidavit means a solemn assurance of a fact known to the 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 peace, or a commissioner of the court, or a commissioner of oaths"

The definition read together with Oaths and Declarations Regulations NO.80 of 1964 leaves me in no doubt that the applicant's founding affidavit is a solemn assurance by him of the facts he alleges are known to him.

Reliance by the 1st respondent on the dictum of Matime v Moruthoane is misplaced. What the learned Judge was saying in that case was not that because of absence of the line in the affidavit that the applicant was deposing to the truth and correctness of his averments, the affidavit was not an affidavit properly so-called. What the learned Judge was saying was that the absence of that averment taken together with the absence of 'basic fact' which had to establish the applicant's case rendered the founding affidavit deficient.

The correct statement of the law, in my view, is to be found in the decision of The Master v Slomovitz 1961 (1) SA 669 at 671h-672C where Jansen J said:

> *"Reference was made to cases such as Brighton Furnishers v Viljoen, 1947 (1) SA 39 (G.W) and Raphael Co. v Standard Produce Co. (Pty) Ltd., 1951 (4) SA 244 (c) for the proposition that when an application is brought in representative capacity the petitioner must say that the facts are within his personal knowledge. In the present case there is no allegation to this effect in the petition itself; at most there is the allegation in the verifying affidavit 'that the facts and allegations contained in the aforegoing petition are to the best of my knowledge and belief true and correct. It is suggested that even if the petition were properly brought in a representative capacity, it would necessarily fail on this basis. But it seems to me that no such general proposition can be extracted from the cases. In general an application must be based on proper evidence (not e.g. hearsay) and it must appear from the petition and annexures as a whole that the foundation for relief is so evidenced – it is not merely a question of the petitioner stating that the facts are within his personal knowledge. The very nature of the papers may belie such a statement even though it does not appear; or make it unnecessary where it is absent....The mere omission in the present case of an allegation that the facts are within the personal knowledge of the applicant is not conclusive – the petition and annexures must be approached as a whole...."*

[11] Then in conclusion, the Court in **TS'EPISO SELIKANE (supra)** at **paragraph 11** stated that:

"Based on the above authorities, I have no doubt that the fact that the applicant in his founding affidavit did not state that the facts were within his knowledge and correct, but only stated so in his replying affidavit is not fatal, for the simple reason that the applicant's papers looked in totality shows that the facts he is alleging are within his personal knowledge. I therefore, find that this point was not well taken, and ought to be dismissed."

[12] We are persuaded that the dictum of the learned **Mokhesi J** in **TS'EPISO SELIKANE (supra)** is the correct statement of the Common Law with regard to the question that arose for decision in the present matter. Despite the Court affording counsel the opportunity to furnish it with any case law in this jurisdiction or elsewhere that upheld the point of law raised, the Applicant's counsel never referred the Court to any.

[13] In the Court's view, the point raised by the Applicant is untenable for three reasons. Firstly, on the principle laid down in **TS'EPISO SELIKANE (supra)**; secondly, in the answering affidavit, Mr. Fouche states that he is authorized to depose to the affidavit by virtue of being in charge of the Logistics department, an averment that is not controverted by the Applicant in his replying affidavit. Lastly, the statement was made under oath administered by a commissioner of oaths. The authority of the commissioner of oaths who administered the oath was not challenged.

[14] The truthfulness or otherwise of the allegations deposed to in the answering affidavit will be established when the Court adjudicates over the merits of the matter in due course. In our view, the omission of the averments in issue, which are now accepted in this jurisdiction as the typical averments included in the statement of truth (knowledge) section of an affidavit, will not result in a miscarriage of justice.

CONCLUSION

[14] Based on the above reasons, the point *in limine* cannot succeed.

[15] In the premise, the Court orders as follows:

[a] The Applicant's point *in limine* is dismissed.

[b] There is no order as to costs.

The Members agree.

V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

For Applicant : Mr. M. Magagula
(Zonke Magagula & Co)

For Respondent : Mr. S. Mabuza
(Mtshali Ngcamphalala Attorneys)