

SOUTH AFRICA / JUDGMENT

Absa Bank Ltd v Botha NO and Others (39228/12) [2013] ZAGPPHC 163; 2013 (5) SA 563 (GNP) (7 June 2013)

[2013] ZAGPPHC 163

COURT

North Gauteng High Court, Pretoria

BEFORE

Kathree-Setiloane

CASE / FILE NUMBER

39228/12

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REPORTABLE

NORTH GAUTENG HIGH COURT, PRETORIA

CASE NO: 39228/12

DATE:07/06/2013

In the matter between:

ABSA BANK LTDPlaintiff

and

GERHARDUS BARTHOLOMEUS BOTHA, NO.....First Defendant

BELINDE BOTHA, NOSecond Defendant

GERHARDUS BARTHOLOMEUS BOTHA.....Third Defendant

J U D G M E N T

KATHREE-SETILOANE, J:

- [1] Courts are regularly faced with affidavits, purportedly attested to in the presence of a commissioner of oaths, where the deponent to the affidavit declares that she is a female, yet the commissioner of oaths certifies that the deponent is a male. Every so often the commissioner of oath's use of the pronoun "he" as opposed to "she", in certifying that the deponent has acknowledged that she understands the contents of the declaration, is overlooked as a mere administrative error by the commissioner of oaths. As is clear from this matter, however, the defendants were not prepared to overlook the commissioner of oath's use of the incorrect pronoun in certifying that the deponent has acknowledged that

she, inter alia, understands the contents of the declaration and they, therefore, lodged an objection in terms of Rule 30 of the Uniform Rules of Court.

- [2] The defendants' Rule 30 objection was made against the following backdrop. On 15 August 2012, the plaintiff made an application for summary judgment. The defendants objected to the application for summary judgment, in terms of Rule 30, as an

irregular proceeding on the grounds that the plaintiff's affidavit in support of summary judgment ('the verifying affidavit') does not constitute an affidavit as contemplated in Rule 32(2) of the Uniform Rules of Court. The plaintiff opposes the setting aside of the application for summary judgment as an irregular proceeding in terms of Rule 30.

- [3] The defendants' principal ground of objection is that the plaintiff's purported verifying affidavit does not constitute

an affidavit as the deponent to the affidavit, Ms Suney Du Plessis, declares that she is a female in the affidavit, yet the commissioner

of oaths certifies that she is a male. Ms Du Plessis specifically declared, in this regard, that she is "a major person in the employment of the Plaintiff as a manageress of the Plaintiff", yet the commissioner of oaths certified that "the Deponent acknowledged that he1 knows and understands the contents of this affidavit..." The defendants contend that it is unclear from the affidavit whether the deponent is a male or female, because although she describes herself as a female, by virtue of using the word "manageress", the commissioner of oaths certified that the deponent is a male. The defendants accordingly submit that the purported verifying affidavit does not constitute an affidavit, as contemplated in Rule 32(2) of the Uniform Rules of Court, as it was not commissioned in the prescribed manner, thus making it highly probable that the prescribed oath was not administered by the commissioner of oaths in the presence of the deponent.

The verifying affidavit

- [4] Rule 32(2) of the Uniform Rules provide:

"The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no bona fide defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of the application for summary

judgment

shall state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof."

[5] The verifying affidavit represents the cornerstone of the summary judgment procedure under Rule 32(2), which permits the grant of a final judgment or order in a defended action without full pleadings or a trial.² The deponent to the verifying affidavit is required to swear positively to the facts verifying the cause of action, and the amount

claimed, if any, and that in his or her opinion, the defendant does not have a bona fide defence to the action and, that the notice of intention to defend has been delivered solely for purposes of delay. The purpose of the verifying affidavit is to satisfy the court that the plaintiff's cause of action is not only valid but also unimpeachable and, that any defence to it is likely to be spurious and raised solely for the purpose of delay.³ Courts are, therefore, reluctant to grant summary judgment unless satisfied that the plaintiff has an unanswerable case.⁴

[6] The verifying affidavit must satisfy the general requirements for affidavits as contained in the Regulations⁵ ("the Regulations") promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 ("Justices

of the Peace and Commissioners of Oaths Act"). In terms of the Regulations the oath or affirmation is administered by a commissioner

of oaths.⁶ Before a commissioner of oaths administers the prescribed oath or affirmation, the commissioner of oaths is required to ask the

deponent:

- (a) Whether he knows and understands the contents of the declaration;
- (b) Whether he has any objection to taking the prescribed oath; and
- (c) Whether he considers the prescribed oath to be binding on his conscience⁷.

[7] If the deponent answers these questions in the affirmative, the commissioner of oaths must administer the oath⁸. The deponent is required to sign the statement in the presence of the commissioner of oaths⁹ and, if unable to write, he or she must affix his mark in the presence of the commissioner of oaths at the foot of the statement.¹⁰ In terms of Regulation 4 (1) the commissioner of oaths is required to certify that the deponent has acknowledged that he or she knows and understands the contents of the declaration. Regulation 4(1) reads as follows:

"Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration."

The commissioner of oaths is, thereafter, required to sign the declaration, print his full name and business address below his

signature, and state his designation and the area for which he holds his appointment or his office if he has been appointed ex officio.

- [8] Although Rule 32(2) expressly requires that an affidavit accompany an application for summary judgement, a statement which was merely affirmed in accordance with the Regulations also complies with the requirements of Rule 32(2). Subject to whether there has been substantial compliance with the Regulations, the court has a discretion to refuse an affidavit which does not comply with the Regulations. Should a commissioner of oaths not certify that the verifying affidavit in a summary judgment application had been sworn to or affirmed, the court will be reluctant to apply the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium*¹¹, also known as the “presumption of regularity”, for purposes of making the assumption that the document had, in fact, been sworn to (or affirmed) and signed in the presence of the commissioner of oaths.

“He” means “she”

- [9] The plaintiff contends that because Regulation 4(1) uses the pronoun “he” to describe the deponent, there was nothing

irregular in the commissioner of oaths describing the deponent as “he” as opposed to “she”. Section 6 of the Interpretation Act, 33 of 1957 provides that:

“In every law, unless the contrary intention appears–

Words importing the masculine gender includes females;

...”

Relying for support on s 6 of the Interpretation Act, the plaintiff contends that because Regulation 4(1) contemplates the word “he” to include both the male and female genders, it is of no significance that the deponent is certified by the commissioner of oaths as being a male as opposed to a female. The plaintiff submits, in this regard, that there can be no doubt that the deponent, Sunel Du Plessis, attested to the affidavit as this has been certified by the commissioner of oaths. Thus, the plaintiff’s contention is that *ex facie* the verifying affidavit there has been substantial compliance with the Justices of the Peace and Commissioners of Oaths Act and the Regulations promulgated thereunder. Accordingly, the plaintiff submits that the defendants’ Rule 30 objection is frivolous and an abuse of the court process.

- [10] I do not agree. Section 6 of the Interpretation Act makes it clear that the words importing the masculine gender also include the feminine. It follows that if, in legislation (including subordinate legislation) the masculine gender is used then it includes the female gender. Thus, where the pronoun “he” is used, as in the case of Regulation 4(1), then it includes reference to the female pronoun “she” as well. What this means, in the context of Regulation 4(1), is that regardless of whether the deponent is male or female, the commissioner of oaths is required to certify below the deponent’s signature or mark that the deponent has acknowledged that he (where the deponent is a male), or she (where the deponent is a female) understands the contents of the declaration and that he or she (depending on the gender of the deponent) has stated the manner, place and date of taking the declaration. Thus, if the deponent is a female, the commissioner of oaths would be required to use the

pronoun “she”, and if the deponent is a male, the commissioner of oaths would be required to use the pronoun “he”. In a case, such as this, where the commissioner of oaths certifies that the deponent has acknowledged that “he” knows and understands the contents of the declaration, but from the declaration itself it is apparent that the deponent is a female, because she declares as much, then the Court would be unable to place reliance on the certification of the commissioner of oaths because ex facie the affidavit it would be unclear whether the deponent is a male or a female. Hence, the Court would be unable give effect to the

“presumption of regularity” for purposes of assuming that the declaration was sworn to (or affirmed) and signed in the presence of the commissioner of oaths.

- [11] Rule 32(2) places the burden of proof squarely upon the shoulders of an applicant, who elects to proceed by means of a summary judgement application, to demonstrate that the document is an affidavit¹² because the verifying affidavit in a summary judgment application is an indispensable condition for such an application. In *Engineering Requisites (Pty) Ltd v Adam*¹³ Erasmus J described the status of a verifying affidavit as the sine qua non to the summary judgment procedure:

“It can also truly be said that the affidavit required by Rule 32(2) is the sine qua non to an application for summary judgment and there should be no room left for speculation by an applicant utilising such proceedings as to whether the document accompanying this notice of application is an affidavit or not.”

- [12] It is a basic requirement of an affidavit that it must be signed by the deponent in the presence of the commissioner of oaths.¹⁴ However, in the application for summary judgment which is the subject matter of these proceedings, it cannot be said that the plaintiff’s

verifying affidavit complies with this requirement, because although the deponent unambiguously describes herself as a “manageress”,

which undeniably means that she is a female,¹⁵ the commissioner of oaths certified that the deponent to the affidavit, who purportedly signed it in his presence, is a male –

clearly this could not have been the deponent. Perhaps the commissioner of oaths was mistaken. But that is not the case made out

by the plaintiff. Neither, for that matter, is there a supporting affidavit from either the commissioner of oaths or the deponent to the verifying affidavit confirming that the verifying affidavit was signed by the deponent in the presence of the commissioner of oaths. The omission thus justifies the inference that the deponent had not signed the verifying affidavit in the presence of the commissioner of oaths.

- [13] The situation is compounded by the reference in the certificate of balance to the deponent as a manager. The certificate of balance is attached to the plaintiff’s particulars of claim in the action. Are both the certificate and the commissioner of oaths wrong? Or is the title

“manageress” inappropriate? What is the court to believe? The Court should not be placed in a situation where it is required to speculate as to the gender of the deponent to an affidavit and, more particularly, whether the deponent had, in fact, sworn to and signed the affidavit in the presence of the commissioner of oaths. Simply put, the Court

should not be called upon to speculate on the question of whether the verifying affidavit, in an application for summary judgment, is an affidavit or not. Accordingly, on the face of it, the plaintiff’s verifying affidavit is inherently contradictory and irregular, and for that reason I find that it does not constitute an affidavit as contemplated in Rule 32(2) of the Uniform Rules of Court.

[14] It is settled law that a Rule 30 application will only be granted where the irregular step would cause prejudice to the applicant seeking to set it aside.¹⁶ In *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others*¹⁷ the Court held that:

“The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the further conduct of the case is not affected by the irregular step and the irregular step can be simply ignored.”

This cannot be said to be the situation in the summary judgment application of the plaintiff. Prejudice to the defendants in the

further conduct of the case arises from the fact that they are faced with the obligation of either putting up security or disclosing their defence in the circumstances where the cause of action of the plaintiff is not verified by dint of a verifying affidavit, which is ostensibly irregular for want of being attested to in the presence of the commissioner of oaths.

Liquid document.

[15] A further ground of objection raised by the applicant in these proceedings is that the plaintiff has failed to attach the liquid document, upon which it bases its claim, to its verifying affidavit.¹⁸ It is common cause between the parties that although the liquid document, upon which the plaintiff bases its claim, is not attached

to the verifying affidavit, it has been attached to the plaintiff’s summons.

[16] Rule 32(2) of the Uniform Rules requires the plaintiff, in an application for summary judgment, to attach a copy of the liquid document upon which it bases its claim to its verifying affidavit, the purpose of which is to ensure that a defendant against whom the remedy is sought should be allowed, at least, to see the document upon which the plaintiff founds its claim.¹⁹ Thus, where the plaintiff’s claim is based on a liquid document, but the plaintiff omits to attach a copy of the liquid

document to its verifying affidavit, the application is defective and summary judgement cannot be entered. However, should the liquid document relied upon be attached to the summons, having been verified in the summary judgment application, the omission to again superfluously attach it to the summary judgement application cannot prejudice the defendant and would,

therefore, not be fatal to the application. The omission to attach a copy of the liquid document to the verifying affidavit, where it has already been attached to the summons is, however, condonable²⁰. The plaintiff in these proceedings has, nevertheless, elected not to seek condonation for its non-compliance with Rule 32(2) despite being granted an opportunity by the Court to do so at the hearing of the matter. However, in my view, even if the plaintiff had elected to seek condonation for its non-compliance with Rule 32(2), there would be no purpose in condoning the plaintiff's non-compliance with the Rule because, as a consequence of the finding that the plaintiff's verifying affidavit is not an affidavit, as contemplated in Rule 32(2), the plaintiff could not have verified the cause of action in the summons to which the liquid document is attached.²¹ The situation in this matter is, accordingly, distinguishable from the situation in *Nedcor Bank Ltd v Lisinfo Trading*,²² where the Court condoned the plaintiff's failure to attach a copy of the liquid document to the plaintiff's verifying

affidavit because it had already been attached to the summons, and the plaintiff had verified the cause of action in its verifying

affidavit. Thus to again attach a copy of the liquid document to the verifying affidavit would have been superfluous and a duplication.²³

[17] In the circumstances, I find that the application for summary judgment constitutes an irregular proceeding, which falls to be set aside on the grounds that the plaintiff's verifying affidavit is not an affidavit. In the result, I make the following order:

The plaintiff's application for summary judgment under case number 39228/2012 is set aside as an irregular proceeding in terms of Rule 30 of the Uniform Rules of Court.

The plaintiff is ordered to pay the costs of the application for summary judgement as well as the costs of this application.

F KATHREE-SETILOANE

JUDGE OF THE NORTH GAUTENG

HIGH COURT, PRETORIA

Counsel for the Plaintiff/Applicant: BP Geach SC

Attorneys for the Plaintiff/Applicant: GP Venter Attorneys

Counsel for the Defendant/Respondent: J Janse Van Rensburg

Attorneys for the Defendant/Respondent: Tim du Toit & Co Incorporated

Date of Hearing: 14 My 2013

Date of Judgment: 7 June 2013

1 Own emphasis

2 Arend v Astra Furnishers (Pty) Ltd 1974

(1) SA 298 (C)

3 Arend v Astra Furnishers (Pty) Ltd (above) ; Beresford Land Plan (PVT) LTD v Urquhart 1975 (3) SA 619 (RA); Juntgen t/a Paul Juntgen Real Estate v Nottbusch 1989 (4) SA 490 (W)

4 Fourlamel (Pty) Ltd v Maddison 1977 (1) SA 333 (A) 347H

5 Promulgated in Government Gazzette 3619, Government Notice R1258 of 21 July 1972 as amended by Government Notice R1648 of 19 August 1977, Government Notice R1428 of 11 July 1980 and Government Notice R774 of 23 April 1983

6 Regulations 1(1) and 1(2)

7 Regulation 2(1)

8 If the deponent merely confirms the contents of his or her declaration, but objects to taking the oath or does not consider the oath to be binding on his or her conscience, the commissioner of oaths administers the affirmation.

9 Regulation 3(1)

10 This is subject to the proviso that, should the commissioner of oaths have any doubt as to the deponent's inability to write, he should require that such inability be certified at the foot of the declaration by some other trustworthy person.

11 acts are presumed to have been lawfully done until proof to the contrary is produced

12 Engineering Requisites (Pty) Ltd v Adam 1972 (SA) 175 (OPD) at 178 A-B

13 Engineering Requisites at 178 D-E

14 Regulation 3(1)

15 Oxford Complete Wordfinder p 927: "manageress... a woman manager..."

16 Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 276F-H; Cosani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH 1991(1) SA 823 (T) at 842G-H

17 1999 (2) SA 599 (T) at 611D-F

18 Caltex Oil (SA) Ltd v Crescent Express (Pty) Ltd and Others 1967 (1) SA 466 (D)

19 Credcor Bank Ltd v Thomson 1975 (3) SA 916 (D)

20 Van Niekerk, Geyer and Mundell Summary Judgement: A Practical Guide, Issue 5, para 3.2, p 3-3; Nedcor Bank Ltd v Lisinfo 61 Trading (Pty) Ltd 2005 (2) SA 432 (C) at 434D-E

21 Nedcor Bank Ltd v Lisinfo 61 Trading (above)

22 Nedcor Bank v Lisinfo 61 Trading (above) at 434D

23 Nedcor Bank v Lisinfo 61 Trading (above) at 434D

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