

SOUTH AFRICA / JUDGMENT

Firststrand Bank Ltd v Louw and Another (1386/2011) [2011]

ZAKZDHC 77 (25 August 2011)

[2011] ZAKZDHC 77

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Ploos van Amstel

CASE / FILE NUMBER

1386/2011

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 1386/2011

In the matter between:

FIRSTSTRAND BANK LIMITEDPlaintiff

and

CASPER FANIE LOUW1st Defendant

HOT GOSSIP TRADING (PTY) LTD2nd Defendant

ORDER Date: 25 August 2011

The application for summary judgment is dismissed with costs. The defendants are given leave to defend the action.

Judgment Date: August 2011

Ploos van Amstel, J

[1] This is an application for summary judgment. The main issue (there are others) is whether the affidavit which accompanies the application complies with the requirements of rule 32(2) of the Uniform Rules.

- [2] In *Maharaj v Barclays National Bank Ltd*¹ Corbett, J.A. (as he then was) emphasised the extraordinary and drastic nature of the remedy of summary judgment. He said that while undue formalism in procedural matters is always to be eschewed, it is important in such applications that, in substance, the plaintiff should do what is required of him by rule 32(2).
- [3] The plaintiff in this matter sues on two suretyships in terms of which the defendants bound themselves as sureties and co-principal debtors in respect of monies owing to the plaintiff by a company known as Busy Bag And Belt (Pty) Ltd ('the company').
- [4] The claims against the company arise out of three loan agreements, respectively for the sums of R1 m, R440 000 and R1 206 000. The company went into liquidation on 4 December 2009, which triggered an acceleration clause in each of the agreements. The amount of the claim in the particulars of claim is the sum of R2 747 838.37, together with interest and costs. At the hearing I was informed by counsel for the plaintiff that the plaintiff had received the proceeds of the sale of a property which was owned by the company, the result of which is that the amount owing was reduced to the sum of R 117 188,40. That is the amount for which the plaintiff now seeks summary judgment, together with interest and costs.
- [5] The affidavit in support of the application for summary judgment was deposed to by one Barend Johannes de Beer, who described himself as 'the legal manager of the plaintiff and a non-practising attorney.' He further stated as follows: '... the facts deposed to herein are true and correct and are within my personal knowledge save where the contents indicate the contrary, in which event they are to the best of my belief both true and correct... (I am) presently administering and therefore have personal knowledge of and insight into the records of the plaintiff relating to the first and second defendants. I hereby swear positively to the facts verifying the cause of action and amount claimed by the plaintiff against the first and second defendants and I state that in my opinion, the first and second defendants do not have a bona fide defence to the action and that a notice of intention to defend has been delivered solely for the purposes of delay.'
- [6] Counsel for the defendant submitted that this does not comply with the requirement in rule 32(2) that the affidavit must be made by the plaintiff or by any other person who can swear positively to the facts and verify the cause of action and the amount claimed, if any. He relied in this regard on the judgment of Wallis J (as he then was) in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC And Another*².
- [7] The facts in *Shackleton* were different. In that case the plaintiff sued as a cessionary of claims which Absa Bank had against the defendant arising out of lease agreements concluded between them in respect of various motor vehicles. It alleged that the defendant breached the agreements by failing to pay instalments timeously, that Absa cancelled the agreements, retook possession of the vehicles and caused them to be sold. In respect of each claim the plaintiff sought to recover an amount by way of damages, calculated as the difference between the balance outstanding under the lease agreement at the date of cancellation, less unearned finance charges, and the proceeds of the sale of the vehicle. The

affidavit in support of the application for summary judgment was deposed to by the plaintiff's attorney of record, who familiarised himself with the facts by perusing the files which the plaintiff had obtained from Absa. It is not difficult to see why the court concluded that the affidavit consisted of hearsay evidence and did not comply with rule 32(2).

- [8] In the present case the affidavit was deposed to by an employee of the plaintiff who said that he (was) 'presently administering and therefor have personal knowledge of and insight into the records of the plaintiff relating to the first and second defendants.' It seems to me that two issues arise. The first relates to the question whether the deponent had the required knowledge and the second to what he actually swore to and verified.
- [9] In *Barclays National Bank Ltd v Love*³ it was alleged in the summons that the amount claimed was due and payable and was in respect of money lent and advanced on overdraft by the plaintiff to the defendant, the rate of interest having been agreed. The affidavit in support of the application for summary judgment was made by the manager of the plaintiff's Stanger branch, where the defendant had his bank account. All he said was that he was the manager of the branch and that he verified that the defendant was indebted to the plaintiff in the sum claimed on the grounds set out in the summons. He then stated that in his opinion the defendant had no bona fide defence to the action and that the notice of intention to defend had been delivered solely for the purpose of delay. Miller J (as he then was) said at 515 H that a deponent's ability to swear positively to the facts is a *sine qua non* to the effectiveness, for the purpose of summary judgment, of any deposition he may make. Whether the deponent is a person able to swear positively to the facts will depend largely upon what he says in the affidavit but the *ipse dixit* of the deponent will not necessarily be sufficient to establish the necessary qualification. At 516 A-B he said that although it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his own knowledge he should, where he is not the plaintiff himself, at least give some indication of his office or capacity which would show an opportunity to have acquired personal knowledge of the facts to which he deposes.
- [10] He went on to say at 516 C-D: 'What emerges from the affidavit made by Williams, read with the summons which is referred to therein, is that he is the manager of the Stanger branch of the plaintiff bank, that the overdraft facilities were afforded the defendant by that branch and that the amounts claimed by plaintiff in the summons are due and owing in respect of the grant by the bank of such facilities. Those are the facts which he verifies ...'. At 516 H-517 A: 'We are concerned here with an affidavit made by the manager of the branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's

ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of

circumstances in which a bank could ever obtain summary judgment. It goes without saying that a manager of a bank who claims to have personal knowledge to the extent to which a client has overdrawn his account must needs rely upon the bank records which show the amounts paid into his account and the amounts withdrawn by the client. When such a manager says that he knows or believes that the client is indebted to the bank in a specified sum of money, it is implicit in what he says that he has had regard to the bank records and that he accepts that they give a true reflection of the state of the clients account’.

- [11] In *Sand and Co Ltd v Kollias* 4 the deponent said that he was a director of the plaintiff, that the facts in the affidavit were within his knowledge, that the defendant was truly and lawfully indebted to the plaintiff in the sum claimed and on the grounds stated in the summons, and that he did not believe that the defendant had a bona fide defence. Trollop J (as he then was) rejected a challenge to the adequacy of the affidavit. He said *ex facie* the affidavit there was nothing to cast any doubt upon the ability of the deponent to swear positively to the facts, and the defendant in his opposing affidavit did not dispute his ability to do so. He held that it was not necessary for the deponent to set out the means or sources of his knowledge. He thought it advisable for a deponent to use words such as ‘own’, ‘personal’, or ‘direct’ to emphasise that he ‘can swear positively to the facts’ as required by the rule. He added that the omission of such a word of emphasis does not necessarily render the affidavit defective if it appears from the affidavit as a whole or from all the documents relating to the proceedings that he ‘can swear positively to the facts’. He held that the affidavit by the director complied with the rule.
- [12] In *Misid Investments (Pty) Ltd v Leslie* 5 Munnik A.J. (as he then was) said at 474 G that the affidavit, if not made by the plaintiff himself, must be deposed to by a deponent who belongs to a particular class of persons, namely, persons who can swear positively to the facts.
- [13] In *Maharaj* 6 Corbett JA said that the court entertaining the application for summary judgment must be satisfied, *prima facie*, that the deponent is a person who is able to swear positively to the facts. Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted of requiring

that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect) unless such direct knowledge appears from other facts stated. The mere assertion by a deponent that he can ‘swear positively to the facts’ (an assertion which merely reproduces the wording of the rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words.

- [14] In *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd*⁷ Van Heerden AJ (as she then was) said at 235 A – B that first-hand knowledge of every fact which goes to make up the plaintiff's cause of action is not required and that, where the plaintiff is a corporate entity, the deponent may well legitimately rely for his or her personal knowledge of at least certain of the relevant facts and his or her ability to swear positively to such facts, on records in the company's possession. But Wallis J said in *Shackleton*⁸ that he did not understand any of the cases as going so far as to say that the deponent to an affidavit in support of an application for summary judgment can have no personal knowledge whatsoever of the facts giving rise to the claim, and rely exclusively on the perusal of records and documents in order to verify the cause of action and the facts giving rise to it.
- [15] Returning to the affidavit in the present matter, the deponent says: '...the facts deposed to herein are true and correct and are within my personal knowledge save where the contents indicate the contrary...'. But the 'contents' do indicate the contrary. There is no unequivocal statement that he has personal knowledge of the facts. He is a legal manager in the employment of the plaintiff and probably concerned with recoveries. His name does not appear on the contractual documents which are annexed to the particulars of claim. There is nothing to indicate that he falls within a class of persons who have the required knowledge. Every indication is that he relied solely on the plaintiff's records. And he says he did so 'relating to the first and second defendants'. He says nothing about his knowledge with regard to the liability of the principal debtor, which in turn determines the liability of the defendants as sureties.
- [16] In the circumstances I am not satisfied that the affidavit complies with rule 32(2). It follows that the application for summary judgment is defective and cannot succeed.
- [17] There is a further matter with regard to the affidavit which I should mention. The deponent says: 'I swear positively to the facts verifying the cause of action...'. The facts do not verify the cause of action. It is the deponent who must verify the cause of action. In *Fischereigesellschaft F Busse & Co Kommanditgesellschaft v African Frozen products (Pty) Ltd*⁹ Theron J said that rule 32(2) should be read as if a comma had been inserted after the word 'facts'. In other words, the affidavit must be made by the plaintiff or by any other person who can swear positively to the facts, and verify the cause of action and the amount, if any. This was confirmed by Corbett JA in *Maharaj vs Barclays National Bank Ltd*.¹⁰
- [18] The application is dismissed with costs and the defendants are granted leave to defend the action.

PLOOS VAN AMSTEL J

1 1976

(1) SA 418 AD at 423 E-F

2 2010

(5) SA 112 KZP

3 1975

(2) SA 514 D

4 1962

(2) SA 162 W

5 1960

(4) SA 473 WLD

6Supra, at 423 A-B

7 1999

(4) SA 229 C

8Supra, at 118 E

9 1967

(4) SA 105 C

10Supra, fn 1, at 422

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