



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 14508/2016

In the matter between:

ABSA BANK LIMITED

Applicant

and

GREGORY CHARLES SMITH

Respondent

Heard: 18 October 2016

Delivered: 21 October 2016

JUDGMENT

SHER AJ:

- [1] Plaintiff makes application for summary judgment against the defendant, in the amount of R918 776, 54 together with *mora* interest thereon at the rate of 8.9% per annum from 20 June 2015 to date of payment, such interest to be capitalised monthly in arrears. Plaintiff also prays for an order declaring certain immovable property to wit Erf [...] Cape Town, especially executable.
- [2] In the *locus classicus* *Maharaj v Barclays National Bank Limited*¹ Corbett JA (as he then was) pointed out that the ‘*extraordinary and drastic nature*’ of summary judgment was ‘*based upon the supposition that the plaintiff’s claim is unimpeachable and that the defendant’s defence is bogus or bad in law*’. To this end, it was therefore important that the affidavit made in support of an application for summary judgment should be made by a person who had “personal” knowledge of the facts. It has been held subsequently that it will suffice if someone who has ‘*first-hand*’ and not necessarily “personal” knowledge of the facts, and can thus verify the cause of action, deposes to such affidavit.
- [3] It has also come to be acceptable that any trivial defects in the affidavit may be held to be cured by reference to other documents which are properly before the court, and to this end the court must consider the matter holistically on the basis of all the material which is before it.
- [4] A mere assertion by the deponent in the verifying affidavit that he can “swear positively to the facts” (which is merely a reproduction of the exact words in the rule in question) will not suffice, unless there are ‘*good grounds*’ for believing that such

¹ 1976 (1) SA 418 (A) at 423G.

assertion is validly made². The court must also remember that adequate compliance with the provisions of the sub-rule is a '*juristic prerequisite to a court's ability to entertain an application*' for summary judgment, as the supporting affidavit is '*after all, the evidence adduced by the plaintiff in support of its case*'³.

- [5] In the circumstances, a defendant can resist an application for summary judgment both on the basis that it does not comply with the formalities and requirements of sub-rule 32(2) and is thus formally defective, as well as on the basis that the affidavit he has filed in response thereto has properly set out a *bona fide* defence to the plaintiff's claim⁴. In *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC*⁵ Wallis J (as he then was) held that the '*proper starting point*' is the application itself. If it is materially defective then that is the end of the matter.
- [6] Recently in *Stamford Sales and Distribution (Pty) Ltd v Metraclark (Pty) Ltd*⁶ the Supreme Court of Appeal held that ultimately, when considering the contents of the verifying affidavit and the other documents which are before the court, the object is to decide whether the deponent's positive affirmation of the underlying facts which form the basis for the cause of action are '*sufficiently reliable*' to justify the grant of summary judgment. The court reiterated that whilst '*undue formalism*' is to be eschewed it was nonetheless important that in summary judgment applications the

² *Id* at 423D-E.

³ Binns-Ward J in *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd and Ors* (WCD 20266/2015 delivered on 12 September 2016), at para [23].

⁴ In terms of rule 32(3)(b).

⁵ 2010 (5) SA 112 (KZP) at para [25].

⁶ [2014] ZASCA 79 (29 May 2014).

plaintiff must be found to have done substantially what was required of him or her by the rule⁷.

[7] The deponent to the verifying affidavit in this application is the Assistant Vice President of the Home Loans Recovery Division of the plaintiff, which division is apparently situated in Auckland Park, Gauteng. He declares that '*all the data and records relating to the applicant's action against the defendant*' are under his '*control*' and that he has '*acquainted*' himself therewith. As is further required he then proceeds to state that the facts contained in his affidavit are within his '*personal knowledge*' and that he is duly authorised to make the affidavit, before stating that he has read the summons and the annexed particulars of claim, and that he verifies the cause of action and the indebtedness of the defendant in the amounts and on the grounds stated in the summons. Thus he states, in his opinion there is no *bona fide* defence to the action and appearance to defend has been entered solely for the purpose of delay.

[8] The contents of the verifying affidavit are almost identical to the affidavit which was before Binns-Ward J in *Absa Bank Ltd v Le Roux*⁸ and which the learned Judge found in that matter to be inadequate for the purposes of rule 32(2). As the learned Judge further pointed out in the subsequent matter of *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd and Ors*⁹ the same plaintiff features in all of

⁷ *Id* at para [11].

⁸ 2014 (1) SA 475 (WCC).

⁹ WCD (20266/2015) decided on 12 September 2016 at para [18].

these matters and it appears it has yet to take notice of what was said by the courts in those matters¹⁰.

- [9] Whereas the verifying affidavit was deposed to in Boksburg, Gauteng, it is apparent that the alleged transactions which underlie the action all took place in the Western Cape. There is nothing to indicate, from the contents of the affidavit itself, which of *'all the data and records'* pertaining to the action the deponent considered to be relevant to the action at hand and presumably, any such *'data and records'* which the deponent has had access to and which he may have considered (given his location) consist of electronically captured records. As Binns-Ward J pointed out in *Future Indefinite*¹¹ in the circumstances

'One might assume that the captured data concerns the transactional history of the loan account, but the opacity of the entirely generic references by the deponent to the material that (he) had regard to means that making that assumption requires educated guesswork rather than reliance on evidence adduced. That is unsatisfactory.'

- [10] Be that as it may, it is when one considers the averments made by the deponent to the verifying affidavit, in the light of the available documents which are before the court that the true unreliability thereof is vividly illustrated. In this regard the basis for the plaintiff's action is set out in paragraphs 2 – 5 of the simple summons. It is alleged therein that, at the "special instance and request" of the defendant, plaintiff agreed to advance certain monies to him, subject to the registration of mortgage

¹⁰ *Id* at para [18].

¹¹ At para [14].

bonds in favour of the plaintiff over the defendant's immovable property as referred to above '*and the terms and conditions as provided for in such mortgage bonds*'.

[11] It is averred that this underlying loan agreement was in writing, and was concluded on or about 30 August 2007. The plaintiff states that all attempts to locate the original documents evidencing this agreement, as well as any copies thereof, have failed¹². A copy of the plaintiff's alleged standard term agreement was however said to be annexed to the particulars of claim, but it must immediately be pointed out that the plaintiff does not aver that the agreement it concluded with the defendant in 2007 and documentary proof of which it cannot locate, was concluded on the same basis and terms as such standard term agreement. In the circumstances the reader is left entirely in the dark as to what the alleged terms and conditions of the underlying loan agreement between the parties were.

[12] And, to compound the difficulties I have with the documents which are before me, the verifying affidavit proceeds to allege that *pursuant* to the aforesaid agreement (which as I have already pointed out it is alleged was concluded on or about 30 August 2007) the defendant caused three mortgage bonds to be registered over the defendant's property, copies of which are attached to the summons. However from a reading of the averments in paragraph [5] of the summons, and the bonds themselves it is apparent that at least two of these bonds *predate* the alleged underlying loan agreement, in that they were registered on 27 August 1996 (Bond B66627/96) and on 11 June 2004 (Bond B49882/2004) respectively, and contrary to

¹² Although various searches were concluded at '*Docufile, Metrofile, and the applicant's own storage facilities as well as on the applicant's computer systems where the documents are usually stored*' despite which '*all copies thereof*' could not be traced.

the aforesaid averments they could thus not have been registered '*pursuant*' to the aforesaid agreement.

[13] Given the circumstances I am as much at a loss as the defendant declared himself to be, to understand on what basis the deponent to the verifying affidavit was thus able to state that he had read the summons and annexed particulars of claim and could verify the cause of action and the indebtedness of the defendant to the applicant in the amount and on the grounds stated in the summons, and the available documentary material to hand does not support such an averment. In the circumstances, given the plaintiff's own averment that it has been unable to locate even a copy of the alleged original underlying loan agreement which was entered into with the defendant on 30 August 2007, and in the absence of even an allegation that such agreement was entered into on the basis of the specimen agreement which was annexed to the particulars of claim, I am surely unable to find that the deponent's positive affirmation of the facts underlying the basis of the cause of action in the verifying affidavit, is in the words of Swain AJA in *Stamford* '*sufficiently reliable*' to justify the grant of summary judgment¹³.

[14] In my view this is effectively the end of the matter as far as the plaintiff is concerned, as the application is defective for want of compliance with the formal requirements of rule 32(2) insofar as the verifying affidavit is concerned. It is thus not necessary to consider the contents of the affidavit which the defendant has lodged, resisting summary judgment. And although I heard argument on the merits of the defendant's defence as set out in such opposing affidavit I too am of the view,

¹³ *Stamford Sales* in n5 at para [11]. Cited with approval in *Future Indefinite Investments* at para [15].

as Binns-Ward J was in *Future Indefinite*¹⁴ that it would be inappropriate to say anything about the defendant's defence which might influence the determination of the matter at the trial. It will suffice to point out that in his affidavit the defendant denies that he entered into an agreement with the plaintiff as alleged in 2007, or an agreement in terms of the specimen standard agreement as annexed, and he says that he simply recalls applying for a loan with the applicant 'around' 1996.

[15] Although it is trite that when considering the affidavit which is filed in order to resist an application for summary judgment one must appreciate that it does not have to be formalised with the same standard of precision required of a pleading¹⁵ it is nonetheless still required to be of sufficient substance to enable one to find that it adequately sets out a *bona fide* defence to the plaintiff's claim. However, given the deficiencies in the verifying affidavit, and the general unreliability thereof as I have outlined above, it is in my view not necessary for me to consider whether the defendant's affidavit is sufficient for the purposes of resisting summary judgment as far as the defences which are set out therein is concerned, and in my view the application must fail on the basis of non-compliance with the provisions of rule 32(2).

[16] **In the result I make the following order:**

- 1. The application for summary judgment is refused.**
- 2. The costs of the application shall be costs in the cause.**

¹⁴ N9 at para [25].

¹⁵ Erasmus: Superior Court Practice D1-382 fnote 1 and the authorities cited therein.

SHER AJ