

DELETE WHOEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES

(3) REVISED. ☒ YES

DATE: 28/9/2010

SIGNATURE: *[Signature]*



29/9/2010

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION)

CASE NO.: 37262/2010

In the matter between

FIRSTRAND BANK LIMITED

Applicant

and

BEYER, JAN

Respondent

CORAM EBERSOHN AJ.

DATE HEARD 21st September 2010

DATE JUDGMENT HANDED DOWN 29th September 2010

REPORTABLE:

High court.-Civil proceedings.-Summary judgment.-Strict compliance with Uniform Rule 32(2) required.-Affidavit in support of application.-Essentials of.

JUDGMENT

EBERSOHN AJ:

[1] The parties will be referred to in this judgment as plaintiff and defendant respectively.

[2] The plaintiff bank applied for summary judgment against the defendant in the amount of R763 043,39, an order declaring his fixed property executable, interest and costs.

[3] In the simple summons appears a paragraph with the heading "**A. Preamble:**" wherein it is stated that the plaintiff acts as "agent" of Saambou Bank Limited in the matter. That the plaintiff was acting as agent in instituting the matter was no mistake as it was reiterated in the next paragraph of the simple summons under the heading "**B. Locus standi:**" wherein the following is stated:

".....Firststrand Bank Limited therefore being entitled to act as agent for Saambou Bank Limited, in relation to the bond referred to in paragraph 1 herein below....."

[4] This court raised this issue with Mr. Botha, who appeared for the plaintiff, and requested him to address the court on whether the plaintiff was entitled to be before the court as plaintiff as it was clearly acting not as principal but as an agent of Saambou Bank Limited and there was nothing before the court that sanctioned Firststrand Bank Limited to institute the action in its own name and whether Saambou Bank Limited should not have instituted the action against the defendant and not Firststrand Bank Limited "as agent of Saambou Bank Limited". He submitted that in terms of a scheme sanctioned by another court in 2002 there was an arrangement in terms whereof Firststrand Bank Limited "obtained all the rightsof Saambou Bank Limited in relation to the bond....." as was also stated in the same paragraph with the heading "B. Locus standi".

[5] Neither the alleged scheme nor the alleged court order were attached to the simple summons and there was nothing before this court to the effect that the agent could in this matter in its own name act as principal. It must be pointed out that it was not alleged by the plaintiff that it took cession of the rights of Saambou Bank Limited, which, in that case, would have entitled Firststrand Bank Limited to sue in its own name as cessionary.

[6] Many other matters regarding the plaintiff's papers were also raised with Mr. Botha by this court. It is only necessary, however, to deal with one thereof namely the affidavit filed by the plaintiff in support of the application for summary judgment which affidavit was deposed to by one Sanette Johanita von Mohlman who stated that she was in the employ of Firststrand Bank Limited and in that capacity made the affidavit. It must be borne in mind that the transaction between Saambou Bank Limited and the defendant was entered into already in 1999 according to the bond in favour of Saambou Bank Limited which was attached to the simple summons. The affidavit reads as follows:

"I, the undersigned,

SANETTE JOHANITA VON MOHLMAN,

do hereby make oath and say:

1.

I am a major female in the employ of the Applicant as Manager Arrears-Legal. The facts contained herein fall within my personal knowledge, unless the context indicates otherwise and are to the best of my belief both true and correct. I am duly authorised to act on behalf of the Applicant and to attest to this affidavit.

2.

I have personal knowledge of the facts and records relating to this matter, the cause of action as well as the amount owing by the Respondent to the Applicant. I can and do swear positively to the facts, verify the cause of action and the amount claimed and confirm all such to be true and correct. I confirm that the respondent is currently in arrears with his monthly repayments in the amount of R100 411.37.

3.

I verify that the Respondent is indebted to the Applicant as set out in the summons. I verify the cause of action on which the Applicant's claim against the Respondent is based as set out in the summons.

4.

In my belief and opinion there is no bona fide defence to the claim as set out in the summons and appearance to defend has been delivered by the Respondent solely for the purpose of delaying the action."

[7] Uniform Court rule 32(2) reads as follows:

"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 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."

[8] It seems to me, from the many similarly worded affidavits filed in support of applications for summary judgment which come before this motion court, that plaintiffs nowadays apparently are of the opinion that an affidavit deposed to by anybody in the employ of a plaintiff firm, who mechanically goes through the motions and make an affidavit "verifying" the cause of action and amount owing, would suffice to obtain summary judgment. The tragedy is that such plaintiffs often get away with it and obtain summary judgments on the strength of such lacking affidavits.

[9] An analysis and consideration of Rule 32(2) clearly shows that the court must, from the facts set out in the affidavit itself, before it can grant summary judgment, be able to make a factual finding that the person who deposed to the affidavit, was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any, and was able to form the

opinion that there was no bona fide defence available to the defendant and that the notice of intention to defend was given solely for the purpose of delay.

[10] The affidavit deposed to by von Mohlman lacks the necessary evidential material from which the court could make a finding that it suffices as far as Rule 32(2) requires. Although she refers to her knowledge of "records" the records are not identified at all and one is left with doubt whether it is the records of Firstrand Bank Limited or Saambou Bank Limited and whether the records were complete or not.

[11] It is clear that strict compliance with the provisions of Rule 32(2) is required for a summary judgment becomes a final judgment unless reversed on appeal. A summary judgment is an extremely extraordinary and drastic remedy, often referred to as a draconian measure. It shuts the mouth of the defendant finally. A party who seeks to avail himself of this drastic remedy, must in my view, strictly comply with the requirements of the Rule.

[12] In **Joel's Bargain Store v Shorkend Bros (Pty) Ltd.** 1959 (4) SA 263 (E) De Villiers JP stated the following:

"I fully agree with the remarks of Marais J., in the case of Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd. 1959 (3) SA 362 (W). In that case the affidavit in support of the application for summary judgment was made by one Myers who stated in his affidavit:

'I am the plaintiff attorney in the above suit. The facts stated in the plaintiff's summons are positively within my own knowledge'.

In answer to this allegation a spokesman for the defendant company stated on affidavit inter alia:

'I furthermore deny that the said Myers has any personal knowledge of the facts deposed to and/or verified by him and further state that the defendant company has had no dealings with the said Myers in regard to the transactions on which the summons was based nor was the said Myers a party thereto. I submit that such information and knowledge as the said Myers may have can only be hearsay. . . .'

Marais J., first referred to the case, in the Court of Appeal, of Symon & Co v Palmer's Stores Ltd. 1912 (1) K.B. 259, (not 1921 as stated in the report) where it was pointed out that the verifying affidavit in an application for summary judgment goes to the question of the Court's jurisdiction. If the affidavit does not comply with the requirements of the Rule (which in England is substantially the same as here) the Court would have no jurisdiction to grant summary judgment; and if material allegations in the affidavit are hearsay, the affidavit is defective and the application bad.

The judgment of Marais J., then proceeds:

'It is, therefore, open to a respondent in summary judgment proceedings to attack the validity of the application on any aspect, including the admissibility of the evidence tendered in the verifying affidavit. The approach suggested by Mr. Goldsmid is not the proper one.

The proper approach appears to me to be the one which keeps the important fact in view that the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial. It closes the door of the Court to the defendant (see the case of Symon & Co., supra). That can only be done if there is no doubt but that the plaintiff has an unanswerable case. If it is reasonably possible that the plaintiff's application is defective or that the defendant has a good defence, the issue must, in my view, be decided in favour of the defendant.'

Two other cases may with advantage be considered. In *Raphael & Co v Standard Produce Co. (Pty.) Ltd.*, 1951 (4) SA 244 (C), Van Zyl J., held that it was not sufficient for a deponent, other than a plaintiff, to state that the facts are within his own knowledge, unless from the nature of his evidence this appears to be the case, but that he should state the circumstances so that the Court can satisfy itself that the facts are within the deponent's own knowledge. At p. 245 of the judgment the learned Judge is reported as follows:

'In this instance the affidavit is made by the attorney of record in Cape Town. There is nothing from the circumstances of his making this affidavit which can lead the Court to the conclusion that it is within his knowledge. The ordinary presumption would be that they are facts which have come within his knowledge through his acting for the plaintiffs in this matter. If the attorney of record wishes to make such an affidavit, he must either set out the circumstances from which the Court would be justified in coming to the conclusion that the facts are within his knowledge, or it must appear from the nature of his evidence that the facts are within his knowledge. The Court is not a rubber stamp for anybody who in summary judgment proceedings, merely states that the facts are within his knowledge. It is something which the Court has to be satisfied upon from the evidence tendered.'" (My underlining)."

[13] I am in respectful agreement with the authorities quoted in paragraph [12].

[14] I must, however, also refer to the judgment of Herbstein J., in *Wright v McGuinness*, 1956 (3) SA 184 (C), which some courts and practitioners described as an

"establishment" judgment, wherein Herbstein J. held that where a deponent states under oath that the facts alleged in the declaration on which the plaintiff's claim is based were within his own personal knowledge he need not go into any further details as to the source of his knowledge. This approach opened up all sorts of possibilities of malpractice and may seriously and irreparably prejudice defendants who are entitled to rely on the protection of the court and which approach tends to negative the safeguards of defendants built into the wording of Rule 32(2) and I am not in agreement with the judgment of Herbstein J.

[15] It must be noted, in any case, that Herbstein J. handed his judgment down more than half a century ago when everybody more or less knew everybody else, when there were no computers and where bookkeeping was done manually or by simplified bookkeeping machines. In those days there was no real danger of defendants being prejudiced. Since then, however, companies have proliferated and large companies like banks, have thousands of employees and manage literally millions of accounts on computers. The principles enunciated in the Wright case may have sufficed in those pre-modern times but are clearly outdated and should no longer be applied in the light of the stringent provisions of Rule 32(2).

[16] This court must lastly refer to the passage on page B-212(1) in Harms' Civil Procedure in the Superior Courts, which reads as follows:

"Although the application must formally fall squarely within the scope of the rule, any technicality that may be set up by way of objection ought not to succeed. Substantial compliance will suffice since the court has the power to condone non-compliance, especially where the objections are purely technical and the defendant is not prejudiced."

[17] It is so that the court has the power to condone mere technical non-compliance with the provisions of Uniform Rule 32(2), but cannot condone non-compliance with the safeguards built into Uniform Rule 32(2) for the benefit of defendants, for instance regarding hearsay evidence and the doing away with or the relaxation of the test to be applied by every court considering an application for summary judgment to, on the evidence adduced in the affidavit, be able to make a factual finding that the deponent was a qualified deponent, otherwise it would make a mockery of the said safeguards.

[18] This judgment must not be considered as the refashioning of the law. In **S. v Thebus and Another**, 2003 (2) SACR 319 (CC), Moseneke J (as he then was) at 340f in the second part of para. [31] stated the following:

"The Superior Courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of the Constitution."

and in [32] on p. 341a he also stated the following:

"...the Court itself is obliged to adapt or develop the common law in order to harmonise it with the constitutional norm."

This judgment in casu is rather viewing the stringent measures contained in Rule 32(2) in the light of the contents of the Constitution and the constitutional rights of defendants qua the provisions of Uniform Rule 32(2).

[19] Companies, firms and other legal personae, like the plaintiff, can only speak and act through a representative and therefore the deponent on behalf of such a company or legal persona has to state unequivocally that the facts were within his personal knowledge and furnish particulars as to how the knowledge was acquired by him so as to enable the court to assess the evidence put before it and to be able to make a factual finding regarding the acceptability of the supporting affidavit for summary judgment purposes.

[20] An employee of a bank, like Von Mohlman, will clearly not acquire personal knowledge of every one of millions of accounts with her employer bank and the supporting documents thereto, and would clearly not be able to testify with regard thereto in an open court. To argue, that her evidence becomes relevant and acceptable just because it is put before the court by way of an affidavit, would be a fallacy and unacceptable. It is thus incumbent upon the court to be strict with regard to summary judgments and to ensure that sufficient positive material, and not hearsay matter, appears ex facie the affidavit filed in support of an application for summary judgment to warrant a factual finding by the court to the effect that the deponent happens to be a competent deponent.

[21] If the necessary and required particulars were not provided in the affidavit the court is obliged to mero motu refuse the application for summary judgment whether it is opposed or not.

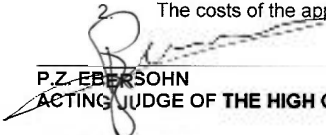
[22] Von Mohlman's affidavit did not impart any information regarding the transaction between Saambou Bank Limited and the defendant and there is nothing contained in her affidavit upon which this court can make a factual finding that she is a competent deponent.

[23] Furthermore, the defendant in his answering affidavit, in any case, raised as a defence the fact that he applied for debt counselling and that it was approved and was pending before the magistrate's court. Von Mohlman was clearly unaware thereof. This illustrates the care courts should take with applications for summary judgment.

[24] I am satisfied that the application is not in order and in any case it seems to me that the defences the defendant raised are bona fide defences and the matter must go on trial.

[25] I accordingly make the following order:

1. The application for summary judgment is refused and leave is granted to the defendant to defend the action.
2. The costs of the application will be costs in the cause.


P.Z. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

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