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NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT,

PRETORIA REPUBLIC OF SOUTH AFRICA

CASE NO: 23054/2011

DATE:01/08/2011

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

KROONHOEK BOERDERY CC

First Respondent

ANDRE NORTJE

Second Respondent

ANDRIES JOHANNES BURGER

Third Respondent

JUDGMENT

Tuchten J:

1. The applicant applies for summary judgment against the respondents for R1 075 700.

interest and certain ancillary relief. Its claims are based on a loan agreement with the first respondent ("Kroonhoek"), which the applicant says was varied in writing on two subsequent occasions, and on suretyships executed by the second and third respondents, Mr Nortje and Mr Burger respectively. The loan was secured by a mortgage bond.

2. The application for summary judgment was supported by an affidavit sworn by Ms Harripersad, in which she said the following:¹

1. I am employed at The Standard Bank of South Africa Limited as Manager, Business recoveries, Personal and Business Banking Credit. Johannesburg, and the facts herein stated are within my personal knowledge and I am duly authorised to make this Affidavit.

2. I confirm that all files, documents and records pertaining to this matter are in my possession and under my control.

3. I can swear positively to the facts herein and state that the First, Second and Third Respondents/Defendants are indebted to the Applicant/Plaintiff on the grounds stated in the Summons and I confirm the content and correctness of the averments contained in the Summons and hereby verify the facts, cause of action and the amount claimed.

4. In my opinion the First, Second and Third Respondents/Defendants do not have a bona fide defence to the action and a Notice of Intention to Defend has been delivered solely for the purpose of delay.

¹ Emphasis and capital letters are those of the deponent.

3. The applicant's claim is set out in a statement of claim attached to the summons. It recites firstly the parties and their descriptions (paragraphs 1 to 4), and the loan agreement, its terms and the two variations alleged by the plaintiff and their alleged terms (paragraphs 5 to 8). Then there is an allegation to the effect that the applicant has complied with all its contractual obligations towards the respondents, that the first respondent has failed to make payment of interest and capital and that the full amount owed has become due for payment (paragraph 9) as a result of which the applicant converted the loan into one payable on written demand, which it says it has given (paragraph 10). But despite proper demand, says the applicant, the first respondent has failed to pay its indebtedness, which a manager of the applicant has certified in writing is due, owing and payable (paragraphs 11 and 12). The statement of claim then continues to allege the agreement to pass a mortgage bond, the properties to be bonded, the registration of the bond, a description of the properties so hypothecated and the terms of the bond (paragraphs 13 to 17). The summons proceeds to repeat the allegations of indebtedness and certification thereof by a manager of the applicant (paragraphs 18 to 19). Then the statement of claim alleges an intention on the part of the Mr Burger and Mr Nortje to stand surety for the obligations of Kroonhoek toward the applicant, the fact that they executed deeds of suretyship and the terms of the suretyships (paragraphs 20 to 22).

Then the applicant yet again alleges that the respondents are indebted to it and that the indebtedness has been certified as described (paragraphs 23 to 25). The factual allegations in the statement of claim conclude with the allegation that neither the loan agreement nor the suretyships are hit by the National Credit Act, 34 of 2005 (paragraphs 26 to 27). Copies of all the documents referred to in the statement of claim were attached to it.

4. I have set all this out because counsel for the respondents has submitted, with reference to recent authority in this Division, that the affidavit of Ms Harripersad does not pass the muster of the provisions of rule 32(2). which to the extent relevant to counsel's argument 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.

This defence was not raised in the respondents' affidavit resisting summary judgment but was advanced by counsel from the bar without objection from his opponent.

5. Counsel's first submission in this regard is that on an analysis of the affidavit, Ms Harripersad did not in fact purport to swear positively to the facts verifying the cause of action and verify the amount claimed. I disagree. She did.

6. The second submission has more to it and is that although Ms Harripersad purported to swear positively to the facts verifying the cause of action, she could not competently do so because she lacked the necessary personal knowledge required by the rule. Counsel referred to *Firststrand Bank Limited v Beyer* 2011 1 SA 196 GNP. Counsel built his argument around paragraphs 9, 19 and 20 of the judgment of Ebersohn AJ, which I quote below:

[9] An analysis and consideration of rule 32(2) clearly show 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 be 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. [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.

7. And then counsel referred to an unreported judgment of Southwood J in *Standard bank of South Africa v Han-Rit Boerdery CC and Others* (GNP case no. 32371/2010; judgment delivered on 22 July 2011). The learned judge emphasised the extraordinary nature of the summary judgment procedure and the fact that the deponent to the bank's affidavit in support of the application for summary judgment in that case

... does not allege that she had any discussions or dealings with the defendants in connection with their accounts and the amounts claimed.

8. The leading case on the point is *Maharaj v Barclays National Bank Limited* 1976 1 SA 418 A. At 423A-424D. Corbett CJ said the following:²

Concentrating more particularly on requirement (a) above,³-I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person 'who can swear positively to the facts'. In the latter event, such other person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the Court entertaining the application therefor must be satisfied, *prima facie*, that the deponent is such a person. 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, both in regard to the present Rule 32 and in regard to some of its

² I omit the references to authority.

³ That the affidavit should be made by the plaintiff himself or by any other person who can swear positively to the facts.

provincial predecessors (and the similar rule in the magistrates' courts), 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 In my view, this is a salutary practice. While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts. Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court.... The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it

... . It remains to apply these principles to the facts of the present case. Ex facie the summons plaintiff's cause of action is founded upon moneys disbursed on defendant's behalf in terms of

an oral agreement of overdraft The relevant facts would, therefore, be the conclusion of the contract, and the terms thereof, the deposits in, and withdrawals from, defendant's current account at the Stanger branch of the plaintiff bank and the interest debits resulting in the debit balance as at the date alleged in the summons, viz. 24 October 1974, and the making of a demand for payment. In regard to certain of these facts, it would be difficult, if not impossible, for any one person to have first-hand knowledge of every fact that goes to make up the plaintiffs cause of action. In this connection I am in full agreement with the following remarks of MILLER, J., in Barclays National Bank Ltd v Love [1975 2 SA 514 D] at pp516-7, made with reference to an affidavit made by the manager of a branch of the plaintiff bank ...:

'We are concerned here with an affidavit made by the manager of the very 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 his 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 of 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.'

9. At para 9 of the judgment in Hen-Rit, Southwood J comes to the conclusion, with reference to Beyer (paras 9, 10, 19, 20 and 21) and Shackleton Credit Management (Pty) Ltd

v Microzone Trading 88 CC and Another 2110 5 SA 112 KZP (paras 7 and 13) that a deponent who acquires his knowledge solely from documents to which he has access ... cannot swear positively to the facts.

Southwood J found support for his conclusion in Beyer, para 20, where it was found that a bank employee in the position of the deponent in that case ...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.

10. In my respectful view, this proposition may be too widely stated. The question, I suggest, is not the general one whether the deponent can competently testify to all the documents with her employer bank but whether she can competently testify to those relevant to the case in question. In the present case, Ms Harripersad is the official within the applicant at the head of the department responsible for the recovery of amounts which the applicant regards as being in arrears. She had the means to acquire personal knowledge of the contents of the documents attached to the statement of claim and she says, in effect, that she did so.

11. Furthermore, the passage from Maharaj which I have quoted makes it quite plain (at 423H) that the principle is that in deciding whether or not to grant summary judgment, the court looks at the matter "at the end of the day", on all the documents that are properly before it.

12. The enquiry is thus ultimately fact driven. It cannot be disputed that, as was pointed out in Beyer, para 17. certain safeguards are built into rule 32(2) for the protection of defendants. But to my mind, no safeguard is required in relation to an allegation made by an applicant

when the very allegation is admitted by a respondent in summary judgment proceedings. And as has been made plain by the SCA in , the "drastic nature" of summary judgment proceedings should not be over-emphasised: as was held in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 5 SA 1 SCA para 33:

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the Maharaj case at 425G – 426E.

13. It is true that in the present case Ms Harripersad probably was not present when the transactions giving rise to the applicant's cause of action were concluded and probably did not have any discussions with the representatives of the first respondent about the current state of the first respondent's account. (Compare Maharaj at 424F-G) But these should not be elevated to essential requirements, the absence of which would be fatal to the applicant's case

14. It is further not necessary for me to express any final view on the question whether, as was found in *Hen-Rit*, with reference to *Shackleton*, para 12, possession of the relevant documents alone is insufficient to establish the required personal knowledge for the purposes of summary judgment. As was found in *Maharajas* well as in *Shackleton*, para 15, each case must depend on its own facts.

15. I have set out the allegations made by the plaintiff at great, even tedious, length because I want to make the point that there is no factual allegation in the plaintiff's statement of claim in the present case in respect of which the deponent Ms Harripersad would not be able to testify in open court. (Compare Beyer para 20). She would have been able competently in her official capacity, by virtue of her custody thereof, to produce in evidence all the documents supporting the allegations in the statement of claim and testify as to their contents. Counsel for the respondents was unable to point to a single allegation in the statement of claim to which Ms Harripersad could not have testified by reference to the documents under her control,

16. To my mind there is a consideration of importance in addition to the evidence of the documents themselves: the respondents admit the allegations made by the plaintiff in its statement of claim. The respondents' case, made in the affidavit put up to resist the application for summary judgment, is that there was a third variation which, although agreed to between Mr Malatji, the manager of the applicant's Centurion branch and Mr Nortje, was not reduced to writing and was subsequently repudiated by Mr Malatji. They do not dispute that the applicant is entitled to succeed against Kroonhoek if the case is to be decided on the allegations made by the applicant, ie that (i) there was an agreement of loan, (ii) which was varied twice, not three times, (iii) that the properties alleged were hypothecated as security for the loan, (iv) that Kroonhoek is in arrears in regard to the loan agreement as varied by the first and second variations and (v) that the applicant has demanded payment of the full balance of the loan, thus rendering the amount claimed due. In these circumstances, in my judgment, it would in the present case be entirely artificial and in conflict with the principle in Maharaj to which I have referred to non-suit the applicant on any supposed defect in its affidavit in support of the summary judgment application.

17. The defence of an oral third variation may be dealt with shortly. It cannot succeed. This is because clause 2.7 of the general terms and conditions applicable to loan terms, which admittedly governed the agreement of loan in this case provides:

... no variation of any of these terms and conditions and any other terms and conditions relating to the loan, will be of any force or effect unless it is recorded in writing and signed by the borrower, any surety for the loan and the bank.

18. I mention in passing that to my mind the conclusion to which I have come eliminates the consequence, which I think would be absurd and inimical to the interests of justice, that "unmeritorious defendants" (Han-Rit para 7) found to be so on the merits after a full consideration of the defence raised by those defendants in a procedural framework most advantageous to them, would be entitled to a place on the trial roll in due course to the potential prejudice of other litigants with genuine issues to be tried who are waiting in the queue to be heard.

19. In regard to the allegations that Mr Nortje and Mr Burger executed deeds of suretyship in favour of the applicant, the opposing affidavit says only this:

At the time when the loan agreement was concluded, was the Deeds of Suretyship not made known, nor explained, to myself and the 3rd Defendant.

Mr Burger and Mr Nortje executed a single deed of suretyship, headed Suretyship,

which contained a multitude of references to the suretyship and the sureties. It is a lucid 6 page document printed in a relatively large font and with relatively wide line spacing. At the foot of the document, at the places provided for signature by Mr Burger and Mr Nortje respectively, there is reference in bold type to Surety No 1 and Surety No 2. They are both businessmen. It is impossible to conceive of any bona fide defence based on this rather cryptic allegation and counsel did not attempt to persuade me otherwise.

20. I therefore conclude that the respondents have failed to demonstrate a bona fide defence or any other reason for non-suiting the applicant. Counsel for the applicant handed up a draft order which I intend to embody in this judgment.

21. I accordingly make an order for summary judgment for the applicant against the first, second and third respondents in terms of the draft which I have marked "X", initialled and dated for purposes of identification and attached to this judgment.

NB Tuchen

Judge of the High Court

28 July 2011

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APPEARANCE ON BEHALF OF PLAINTIFF:ADV RJ GROENEWALD

APPEARANCE ON BEHALF OF DEFENDANT:ADV CJS KOK

NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

On this the 26th day of July 2011

Before the Honourable Tuchten J

CASE NO. 23054/2011

In the matter between :

THE STANDARD BANK OF SOUTH AFRICA LIMITED

APPLICANT/PLAINTIFF

and

KROONHOEK BOERDERY CC

FIRST RESPONDENT/DEFENDANT

(REG NO. CK2005/013461/23)

ANDRE NORTJE

SECOND RESPONDENT/DEFENDANT

(ID NO.)

ANDRIES JOHANNES BURGER

THIRD RESPONDENT/DEFENDANT

(ID NO.)

DRAFT ORDER

After perusal of the papers filed of record and hearing submissions by counsel on behalf of the parties, summary judgment is granted in favour of the Plaintiff against the First, Second and Third Defendants, jointly and severally, the one paying the other to be absolved as

follows:

IT IS ORDERED THAT:

1. Payment of the sum of R1,075,700.00;

2. Interest thereon at the rate of 12% per annum, calculated daily and compounded monthly in arrears, from 25 November 2010 to date of final payment, both dates inclusive;

3. Cost of suit as between attorney and own client;

AND AGAINST the First Defendant for:

4. An Order declaring the properties described as (and hereafter referred to as "the Properties"):

(1) THE FARM KROONHOEK NO. 1591, DISTRICT BETHLEHEM,
FREE STATE PROVINCE,
MEASURING 420,4145 (FOUR HUNDRED AND TWENTY COMMA FOUR
ONE FOUR FIVE) HECTARES;

HELD BY DEED OF TRANSFER T.....;

(2) REMAINING EXTENT OF THE FARM SCHEEPERSDRAAI NO.
1194,

DISTRICT BETHLEHEM, FREE STATE PROVINCE, MEASURING 308,2873
(THREE HUNDRED AND EIGHT COMMA TWO EIGHT SEVEN THREE)
HECTARES;

HELD BY DEED OF TRANSFER T.....;

(3) PORTION 1 OF THE FARM SCHEEPERSDRAAI NO. 1194,
DISTRICT BETHLEHEM, FREE STATE PROVINCE,
MEASURING 42,8266 (FORTY TWO COMMA EIGHT TWO SIX
SIX) HECTARES;

HELD BY DEED OF TRANSFER T.....;

(4) PORTION 10F THE FARM RIETFontein NO. 8,
DISTRICT BETHLEHEM, FREE STATE PROVINCE,
MEASURING 93,7394 (NINETY THREE COMMA SEVEN
THREE NINE FOUR) HECTARES:

HELD BY DEED OF TRANSFER T.....;

(5) PORTION 2 OF THE FARM RIETFontein NO. 8,
DISTRICT BETHLEHEM, FREE STATE PROVINCE,

MEASURING 93,7366 (NINETY THREE COMMA SEVEN
THREE SIX SIX) HECTARES;

HELD BY DEED OF TRANSFER T.....;

(6) REMAINING EXTENT OF THE FARM RIETFontein NO. 8,
DISTRICT BETHLEHEM, FREE STATE PROVINCE.

MEASURING 232,9377 (TWO HUNDRED AND THIRTY TWO
COMMA NINE THREE SEVEN SEVEN) HECTARES;

HELD BY DEED OF TRANSFER T.....:

executable.

5. Authorising Warrants of Execution, relating to the Properties, in terms of Rule 46(1)(a)
(ii) of the Uniform Rules of Court.

BY ORDER,

REGISTRAR OF THE COURT