FORM A

FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN
JUDGMENT

PARTIES**:**

STANDARD BANK OF SA LTD Plaintiff/Applicant

And

DAVID FRANCOIS NAUDE First Defendant/ Respondent

CELESTE NAUDE Second Defendant/ Respondent

24 Registrar: **Case No.: 08/2009**

25 Magistrate:

26 High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD:

DATE DELIVERED: **24.03.2009**

JUDGE(S): **TSHIKI AJ:**

LEGAL REPRESENTATIVES –

Appearances:

1. for the Appellant(s): **Adv G J Gajjar**
2. for the Respondent(s): **Adv D. Smith**

Instructing attorneys:

Appellant(s): **Joubert Galpin Searle Inc**
Respondent(s): **J R Bester & Associates**

CASE INFORMATION -

6 *Nature of proceedings*: **Application for Summary Judgment**

[REPORTABLE]

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

Case No.: 08/2009

Date delivered: 24.03.2009

In the matter between:

STANDARD BANK OF SA LTD Plaintiff/ Applicant

and

DAVID FRANCOIS NAUDE First Defendant/ Respondent

CELESTE NAUDE Second Defendant/ Respondent

SUMMARY: Practice – Judgments and orders – Summary judgment – Verifying affidavit – Whether requisite verification occurring – Summons issued against two defendants – Verifying affidavit referring to ‘respondent’ instead of respondents – Defendants arguing *in limine* that it did not appear from plaintiff’s affidavit that requisite verification contemplated by Rule 32 of Uniform Rules of Court taken place and that plaintiff’s pleading not technically correct in that it referring to respondent when clearly two defendants referred to in mortgage bond which forms basis of summary judgment application – No prejudice caused to defendants – Reference to defendant clearly a typographical error which is not prejudicial to defendants and condonable – Point *in limine* dismissed – Summary judgment granted in respect of the balance of the claim not covered by counterclaim.

J U D G M E N T

<u>TSHIKI AJ</u>:

[1] This is an application for summary judgment. For the sake of convenience I shall refer to the parties as they are cited in the action. The plaintiff seeks payment of R3.296.653,61 plus interest and costs and other ancillary relief, its cause of action being founded on an alleged breach of a mortgage bond which was registered by the defendants in favour of the plaintiff as security for payment of a debt. Annexed to the application for summary judgment is a verifying affidavit filed in terms of Rule 32(2) deposed to by one Anthony Lorcan Kennedy who describes himself as the manager of the plaintiff's Legal, Personal and Business Banking Credit Department. The plaintiff's affidavit supporting the application for summary judgment reads as follows:

> "1. I am an adult male and the Manager of the Applicant's Legal, Personal and Business Banking Credit Department of the Standard Bank of South Africa Limited, Registration Number 1926/000738/06 and am duly authorised to depose to this affidavit on the Applicant's behalf.
>
> 2. I swear positively to the facts contained in the Applicant's Summons and:
>
> 2.1 verify the cause of action;
> 2.2 verify the correctness of all the allegations made in the Summons; and
> 2.3 verify the amount owing by the Respondents to the Applicant as stated in the Summons.
>
> 3. In my opinion the **Respondent** have no *bona fide* defence to the action instituted and Notice of Intention to Defend has been delivered solely for the purpose of delay.
>
> 4. I accordingly, on behalf of the Applicant, hereby ask that the above Honourable Court grant Summary Judgment against the Respondents as claimed in the Summons."

[2] In response to the plaintiff's application for summary judgment the defendants who are married to each other in community of property, filed an affidavit in terms of Rule 32(3)(b). In this affidavit deposed to by the first defendant and confirmed by the second defendant the deponent raised two points. The first point is a point *in limine* and the second point relates to the merits. The thrust of the point *in limine* is that the deponent to the plaintiff's affidavit refers to a respondent without indicating which of the two respondents before Court has not shown a bona fide defence to the action. The defendants' opposing affidavit reads as follows:

" IN LIMINE

3.

I submit that the Plaintiff's application does not comply with Rule 32 of the Uniform Rules of Court. In paragraph 3 of the opposing affidavit the Plaintiff only referred to one "Respondent" without indicating which Respondent it refers to. From the Plaintiff's affidavit it is therefore uncertain if the Plaintiff believes that myself <u>or</u> the Second Defendant does not have *a bona fide* defence.

4.

I submit that for this reason alone the Honourable Court should dismiss the Plaintiff's application with costs.

<u>MERIT</u> :

5.

5.1 I have a counterclaim against the Plaintiff. I am a property developer and during November 2007 I made an offer to purchase Erf 6103, also known as 22 See Palm Singel, Jeffreys Bay. The purchase price was R1.85 million.

5.2 I applied for a bond of R2.25 million with the Plaintiff which application was granted. I needed the funds to cover the transfer fees and to improve the property before I could sell it at a profit.

5.3 After all the suspensive conditions had been fulfilled and guarantees were delivered to the transferring attorneys and a day before the property were to be registered in my name and the bonds registered the Plaintiff withdrew the transaction and refused to honour the guarantees. The plaintiff then offered me a lesser bond for less than the initial purchase prise which made it impossible for me to proceed with the transaction.

5.4 As a result of the Plaintiff's conduct I lost R1.321.000,00 which would have put me in a position to honour my obligations towards the Plaintiff also with respect to the present action.

5.5 If the Plaintiff, which knew, that I am a property developer and need the money in order to sustain myself and to have an income to honour my

> obligation towards it, did not withdraw its finance to the project I would have been in a position to honour my obligations in terms of this present action. "

[3] On the merits the first defendant raises, in his affidavit, a counterclaim against the plaintiff in damages amounting to R1.321.000,00 (one million three hundred and twenty one thousand rand only).

[4] I will first deal with the point *in limine* which also was first argued by the parties during this application for summary judgment.

[5] *Mr Gajjar* appeared for the plaintiff and *Mr Smith* for the defendants.

[6] In regard to the point *in limine* the question is whether *ex facie* the affidavit the requisite verification in terms of Rule 32(2) has occurred. It was stated by Addleson J in **Charsley v AVBOB (Begrafnisdiens) Bpk**[1] as follows:

> ". . . if there is a material defect in any of the formalities required by the Rules of court, the court should not readily grant summary judgment. On the other hand, where it is clear that the Rules have substantially been complied with and there is no prejudice to the defendant, I think that the court should condone the failure to comply with a technical requirement of the Rules."

[7] The summary judgment procedure is a drastic, extraordinary and stringent remedy. It has a hallmark of a final judgment and closes the door to the defendant to ventilate his defence at the trial notwithstanding his intention to do so. (**Maharaj v Barclays National Bank Ltd**[2].) In the light of the above it is imperative that the plaintiff's affidavit should comply strictly with the provisions of Rule 32(2) of the Uniform Rules of this Court.

1 1975 (1) SA 891 (E) at 893C-D
2 1976 (1) SA 418 (A)

[8] In **Mowschenson and Mowschenson v Mercantile Acceptance Corporation of S.A. Ltd**[3] Marais J stated:

> ". . . the verifying affidavit goes to the question of the Court's jurisdiction. If the affidavit does not comply with the requirements of the Rule . . . the Court would have no jurisdiction to grant summary judgment."

[9] The above dictum fortifies the view that the affidavit of the plaintiff in support of the application for summary judgment should verify the cause of action in the strict sense required by the Rules. (**Maharaj v Barclays National Bank** case, *supra.*)

[10] In the summons the defendants are both cited as first and second defendants respectively thus making clear and without doubt that two people are being sued herein.

[11] Paragraph 4 of the plaintiff's verifying affidavit states clearly that judgment is sought against the defendants and not against one defendant though they are referred to as respondents.

[12] It is true that the parties and their legal representatives should be encouraged to become accurate and diligent in their observance of the Rules which are an important element in the machinery for the administration of justice. Such encouragement should be shown by the Court's reluctance to accept slovenly drafted court papers in disregard of the provisions of the Rules of the Court. But this does not mean that the court should refuse to grant orders sought by litigants merely on the stroke of technical objections raised by opponents which are not prejudicial to the other party's case. The

[3] 1959 (3) SA 362 (W) at 366C-D

above view was emphasized by Schreiner JA in **Trans-African Insurance Co. Ltd v Maluleka**[4] where the learned Judge of appeal stated:

> "No doubt parties and their Legal advisers should not be encouraged to become slack in their observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

[13] I have no doubt that the above statement by Schreiner JA finds application in the objections raised in the present case. The defendants should not have the slightest doubt that the application for summary judgment is sought against both of them as is clearly shown in paragraph 4 of the plaintiff's verifying affidavit as well as all the other documents in the file including the notice of application for summary judgment. In particular paragraph 2 of the plaintiff's verifying affidavit states:

> "2. I swear positively to the facts contained in the Applicant's Summons and:
>
> 2.1 verify the cause of action;
> 2.2 verify the correctness of all the allegations made in the Summons; and
> 2.3 verify the amount owing by the **Respondents** to the Applicant as stated in the Summons." [my emphasis]

[14] *Mr Smith* has strenuously submitted on behalf of the defendants that the plaintiff's affidavit does not comply with the provisions of Rule 32(2) of this Court's Rules in that it has created confusion by referring to respondent instead of respondents. In doing so he placed much reliance on the judgment of **ABSA Bank Ltd v Coventry**[5]. I will deal with the Coventry judgment in due course.

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[4] 1956 (2) SA 273(A) at 278F
[5] 1998(4) SA 351 (N)

[15] I have not been able to find any decision dealing with a similar point in this division.

[16] A similar objection has been raised in two decided cases in **ABSA Bank Ltd v Coventry** quoted *supra* and **Standard Bank of South Africa Ltd v Roestof**[6]. In the former case Meskin J upheld the point *in limine* and held[7]:

> "In my opinion, reading clause 3 in this way simply highlights its ambiguity: in the first part of the clause there is a reference to the fact that 'the defendants are indebted to the plaintiff' and thereafter there is a reference to one defendant only; at the level of interpretation, it is impossible to reconcile these *prima facie* contradictory allegations and moreover to give them a meaning consistent with the contents of prayer to the affidavit"

[17] It seems to me that the facts of Coventry's case are clearly distinguishable from those of the present case. In that case reference was made to defendants instead of defendant. It also appeared that the reference to defendants though there was only one defendant could have been a deliberate act on the part of the plaintiff and that the deponent could have been referring to a different case scenario altogether. **Meskin J** said as follows at page 353 G-H

> "*Ex facie* the affidavit Payne has purported to verify that 'the defendants are indebted to the plaintiff…. upon the grounds set out in the plaintiff's summons. The 'grounds set out in the summons' simply do not contain any *prima facie* indication of an alleged indebtedness to the plaintiff in a plurality of defendants. Thus, Payne has purported to verify alleged 'grounds set out in the plaintiff's summons' which in fact are non-existent and his affidavit contains no verification at all of any of the grounds in fact set out in the plaintiff's summons……."

[6] 2004 (2) SA 492 (W)
[7] 1998 (4) SA 351(N) at 354G-H

In my opinion the interpretation of the affidavit in the light of the contents of the summons leads to the conclusion that the affidavit is hopelessly ambiguous.

[18] I have no reason to believe that **Coventry's** case was wrongly decided. It is also the view of the learned judge in that case at page **354 para b-d** that the reference to contents of the plaintiff's prayer as well indicated that such reference to defendants were not merely erroneous but were deliberately made on the footing that in the summons the plaintiff sought, as Payne understood the matter, judgment against first and second defendants. Even the notice of summary judgment referred to the application for summary judgment against defendants.

[19] Blieden J in the **Standard Bank of South Africa v Roestof** *supra* dismissed a point *in limine* raised by defendant which was similar to the one under discussion and at page 496G-H he held as follows:

> "If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him."

[20] In our case there is only one reference to defendant instead of defendants a suggestion of a typographical error and nothing more. In establishing the intention of the plaintiff when he or she made the error with regard to whether reference is made to the defendant or defendants the court should look at all the papers relevant to the parties' action. Once that is done the court can be able to establish whether or not the error has really prejudiced the defendant(s). Where it is clear that the technicality of the error

is insignificant and cannot mislead the court in establishing to which defendant reference is made, there should be condonation of the error and that summary judgment should be granted unless the defendant(s) has complied with Rule 32(3)(b). Any contrary conclusion would be to protect dishonest defendants on the mere groundless allegation that the plaintiff's pleadings are less than perfect. Each case must be judged on its own facts. (**Standard Bank of South Africa Ltd v Roestof** *supra)*

[21] I am of the view that in the present case there is no substance in the point *in limine* raised by defendants and it should be and is hereby dismissed.

[22] I now come to the defence raised on the merits which is the defendants' counterclaim. It seems to be that Rule 22(4) is a guide to the approach that I should adopt in this matter. The Rule provides:

> "If by reason of any claim in reconvention, the defendant claims that on the giving of judgment on such claim, the plaintiff's claim will be extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of a claim or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the court, upon the application of any person interested, otherwise orders, but the court, if no other defence has been raised, may give judgment for such part of the claim as would not be extinguished, as if the defendant were in default of filing a plea in respect thereof, or may, on the application of either party, make such order as to it seems meet."

[23] It follows in my view that in the light of the provisions of the above Rule in an application for summary judgment where a counterclaim has been raised by the defendant, the Court, if satisfied that the counterclaim is a *bona*

fide defence to part of the plaintiff's claim, may grant summary judgment in respect of the portion of the plaintiff's claim in excess of the counterclaim. What is important is that before the court can do so it must first satisfy itself as to whether the defendant has complied with the provisions of Rule 32(3)(b) which requires a full disclosure of the nature and grounds of the counterclaim as well as the material facts upon which it relies.

[24] The first defendant says that their counterclaim against the plaintiff is a sum of R1.321.000,00 and has not disclosed any defence in respect of the plaintiff's balance of the claim which is R1,975,653.61.

[25] The defendant has not paid any money to court being the difference between the amount claimed by the plaintiff and his alleged counterclaim. In my view the defendant will only have a defence to the plaintiff's claim if he pays the difference in Court. See **Stassen v Stofberg**[8]. In **Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd**[9] Brand JA held as follows:

> "….I can, as a matter of principle, see no reason why a defendant should not be allowed to raise the same partial defence by means of a counterclaim for a lesser amount in summary judgment proceedings. A defendant who fails to pay the balance into Court runs the risk that summary judgment may be granted for the balance together with the costs resulting from the summary judgment application. In order to avoid this risk a defendant may therefore be well advised to follow the example of **Koornklip Beleggings (Edms) Bpk**[10] by paying the balance into Court."

[26] In the present case the defendants have raised a partial defence in that they have a counterclaim of damages against the plaintiff in the sum of R1.321.000,00. The defence, in my view, complies with the provisions of Rule 32(3)(b) of the Rules of this Court. However, the defence does not cover

8 1973 (3) SA 725 (C)
9 2004 (6) SA 29 (SCA) at 34F
10 1970 (1) SA 675 (C)

the whole of the plaintiff's claim because the counterclaim is less than the plaintiff's claim. There is therefore a difference of R1.975.653,61. No defence has been proffered by the defendants in respect of this balance and no money, by way of the difference referred to above, has been paid into Court. Rule 32(6) provides as follows:-

> "If on the hearing of an application made under this Rule it appears.
> (a) . . .
> (b) that the defendant is entitled to defend as to part of the claim; the Court shall –
> (i) . . .
> (ii) Give leave to defend to the defendant as to part of the claim and enter judgment against him as to the balance of the claim, unless such balance has been paid to the plaintiff."

The defendants herein have not paid any balance to either in Court or to the plaintiff. In terms of this Rule and in view of the circumstances of this case I am obliged to grant judgment for the plaintiff in respect of the balance. Notwithstanding leave to the defendants to defend the balance of the plaintiff's claim I will order that the property in question be declared executable for the reason that there is no relationship between the counterclaim and the claim in convention.

[27] I therefore make the following order:

3. Judgment for the plaintiff in the sum of R1.975.653,61 is hereby granted against both defendants jointly and severally the one paying the other to be absolved.

4. The defendants are given leave to defend the plaintiff's claim in respect of the balance of R1.321.000,00.

5. That the defendants are ordered to pay interest of the said sum of R1.975.653,61 *a tempore morae* to date of final payment.

6. The property being erf No 5537 Jeffreys Bay is hereby declared especially executable.

7. The defendants are ordered to pay costs occasioned by the application for summary judgment on the scale as between attorney and client and to pay such costs jointly and severally the one paying the other to be absolved.

P.W. TSHIKI
JUDGE OF THE HIGH COURT (ACTING)

Date case heard	-	3 March 2009
Date judgment delivered	-	24 March 2009
For the applicant	-	Adv G J Gajjar Instructed by Joubert Galpin Searle Inc 173 Cape Road, Greenacres Port Elizabeth
For the respondent	-	Adv D. Smith Instructed by J R Bester & Associates 70 Worraker Street Newton Park Port Elizabeth