



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1256/2017

In the matter between:

**SMALL ENTERPRISE FINANCE AGENCY
(SOC) LIMITED**

Applicant

and

FURNERVE SIX CC

First Respondent

MANKOSI LEFUO

Second Respondent

GAUTA LAWRENCE LEFUO

Third Respondent

HEARD ON: 15 June 2017

DELIVERED ON: 22 June 2017

MHLAMBI, J

- [1] The applicant (plaintiff in the main action) applies for summary judgment against the respondent (defendants in the main action) for payment of R 2 391 720.01 with interest thereon at 16.10% calculated from 1 November 2016 to date of final payment and costs.
- [2] The applicant relies on a written Development Term Loan Agreement entered into between itself and the first respondent on 3 June 2015 in terms of which a capital amount of R 2 687 323.00 was advanced to the first respondent. The term of the loan was for a 3 months period reckoned from the date on which the loan amount or any part thereof was advanced to the first respondent. A certificate issued by an authorised signatory of the respondent shall be *prima facie* proof of the fact stated therein which shall include the amount owing, the interest payable, the date from which the interest shall be calculated and the cause of action. The first respondent shall be liable for the payment of any legal costs actually incurred by the applicant in any action arising from the loan agreement which shall include legal costs on an attorney and own client scale.
- [3] The second and third respondents executed deeds of suretyship in favour of the applicant for the due and punctual payment of all sums owed by the first respondent to the applicant.

- [4] On 30 August 2016 the applicant through its debt collection agent, Asili Risk Management, notified the first respondent of the breach and demanded payment in full of the balance of R 2 266 241.44 by 7 September 2016. The first respondent failed to remedy the breach and as at 31 October 2016, the balance owing was the amount of R 2 391 720.01. Similarly, the applicant alleged that both second and third respondent were in breach of the loan agreement in that they failed to fulfil their obligations in terms of the suretyship agreements.
- [5] The application is opposed and the respondents raised the following issues:
- 5.1 Whether the deponent to the founding affidavit, as an interim General Counsel, had the necessary personal knowledge as required by law;
 - 5.2 Whether the deponent to the applicant's affidavit verified the cause of action as required by law;
 - 5.3 Whether the founding affidavit was properly commissioned as the commissioner of oaths did not state his full names after signing the oath deposed to by the applicant's deponent;
 - 5.4 Whether the respondents had a *bona fide* defence and fully disclosed the nature and grounds as well as the material facts of the defence relied on.
 - 5.5 Whether the respondents entered the notice of intention to defend solely for the purpose of delaying the action.

[6] The question that arises is whether the application as it stands is technically in order and complies with the requirements of Uniform Rule 32(2)¹. That brings one to the first preliminary point raised by the respondents. I was referred to Shackleton, *supra* where the attorney's "personal knowledge" of the facts giving rise to the applicant's cause of action was derived from documents he inspected and that constituted his investigation of the claim. His affidavit, the court found, was entirely hearsay when he purported to verify the facts giving rise to the claim and the amount of that claim². It was contended on behalf of the respondent that the deponent clearly relied on hearsay evidence based on an unexplained and illogical job description, namely "Interim General Counsel³". A counsel would refer to an advocate, it was contended, who represented a party in a court of law and his description clearly did not comply with the requirement of the relevant Rule.

[7] The deponent to the affidavit in support of summary judgment stated:

- "1. *I am an adult male and Interim General Counsel of the Applicant, and employed as such at [...] E. F., Block D Eco Park, [...] T. C. (off Witch Hazel Avenue), Centurion, Gauteng Province.*
2. *I am authorised to depose to this affidavit in my aforesaid capacity, and the facts deposed to herein are, save where the contexts(sic) indicates otherwise, within my personal knowledge and both true and correct.*

¹ Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP) paras 5, 24-26

² Shackleton, *supra* para 11

³ Paras 3.5 & 3.6 of respondents' heads of argument

3. *I am fully acquainted with the Defendant's account held with the Plaintiff to which the indebtedness relates, as I have an oversight role over the legal adviser who handles this matter.*
4. *I confirm that the Respondents are indebted to the Plaintiff in the sum of **R 2 391 720.01 (Two Million Three Hundred and Ninety One Thousand Seven Hundred and Twenty Rand, One Cent)**, excluding interest on the aforesaid sum at **16.10%** (sixteen point one zero per cent) per annum calculated from 1 November 2016, to date of final payment both days inclusive, for their breach of the Development Term Loan Agreement and Suretyship Agreements respectively, as more full set out in the Combined Summons.*
5. *The Respondents have delivered Notice of Intention to defend the action on 31 March 2017.*
6. *I verily believe that the Respondents do not have a bona fide defence to the action, and that they have delivered Notice of Intention to Defend solely for the purpose of delay."*

[8] In **Rees v Investec Bank**⁴, the bank had proceeded on the suretyship agreements against the appellants and the suretyships provided for a certificate of balance to be issued which would serve as a liquid document or constitute *prima facie* proof of the sureties' indebtedness. It was against that backdrop that the deponent's affidavit must be viewed. The dependent in that case, Mrs Ackerman, relied on the information at her disposal which she obtained in the course of her duties as the bank's recoveries officer to swear positively to the contents of her affidavit. She had, prior to the institution of the action, corresponded with the applicant's attorney in regard to the principal debtors' delinquent accounts and

⁴ 2014 (4) SA 220 (SCA)

had also addressed letters of demand to them, received letters of response which canvassed the appellants' defences. *"She could thus 'swear positively to the facts', 'verify the cause of action and the amount claimed' and 'assert that in her opinion the appellants did not have a bona fide defence to the action' and had entered an appearance to defend 'solely for the purpose of delay'. These factors show that the requirements set out in Maharaj are met"*⁵. Similarly, paragraphs 3 and 4 in casu are descriptive of the deponent being seized with the matter seen more especially in the light of the exchanged e-mails referred to in the respondents' opposing affidavits relating to the demand of the unpaid capital amount.

[9] In **Buttertum Property (Pty) Ltd v Dihlabeng Municipality and Others**⁶ it was stated:

"Firstly, the respondent's deponent elected to use the word "confirm" instead of "verify".....there can be no doubt that "verify" has, generally speaking, a much stronger meaning than the word "confirm".....However if this was respondent's only obstacle, I would probably be inclined to find that the mistake could be condoned". In Maharaj⁷ it was stated that "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..... 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

⁵ Rees, supra, paras B-C p. 226 Barclays v Love 1975 (2) SA 514 at 516 H-517A

⁶ A260/2015) [2016] ZAFSHC 159 (8 September 2016) at para 43

⁷ Maharaj v Barclays National Bank LTD 1976 (1) SA 418 A

summary judgment the court looks at the matter “at the end of the day” on all documents that are properly before it.”⁸

- [10] The commissioner of oaths who commissioned the affidavit, instead of writing his full name, was content to use his stamp with the following particulars “*T Soqaka 7187101-2*”. His signature, the South African Police Service date stamp, full address and the office held by him, appear thereunder. Only his initials and not his full name appear on the attestation. I am satisfied that the commissioner substantially complied with regulation 4(2)(b) of the regulations promulgated in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 61 of 1963. The objection raised is purely technical, does not prejudice the respondent and the non-compliance is therefore condoned⁹.
- [11] During oral address, it was conceded on behalf of the applicant that the amount of R 150 000.00 referred to and of which the proof of payment was annexed to the respondent’s opposing affidavit, was indeed paid on 13 October 2015. An additional payment of R 100 000.00 was made on 14 December 2015. It was contended on the applicant’s behalf that these amounts be subtracted from the capital claim and the Court was requested to grant summary judgment in the reduced amount of R 2 140 720.01.
- [12] The first respondent admitted being indebted to the applicant in a certain amount but denied the correctness of the amount claimed.

⁸ Maharaj, *supra*, paras E-F p. 423

⁹ *Cape Sheet Metal Workers (Pty) LTD v JJ Calitz Builder (Pty) LTD* 1981 (1) SA 697 (O) at 699 A-C; *Bank van die Oranje-Vrystaat BPK v OVS Kleiwerke (Edms) BPK* 1976 (3) SA 804 at 807 B-C.

The first respondent contended that though he could only provide proof to the court of only R150 000.00 paid, various other payments would be brought to the attention of the Court at the hearing of the trial or if proof of such payments were located in time, by way of a supplementary affidavit in these proceedings.¹⁰ Furthermore, “throughout the loan agreement” first and third respondents communicated with the applicant as regards the payments to be made¹¹ with Asili Risk Management in respect of the outstanding loan amount as evidenced by the e-mails exchanged between the third Respondent and Asili Risk Management. The late payment was made by the first respondent and accepted by Asili Risk Management on behalf of the applicant.¹² The emails referred to do not indicate an acceptance of the offer by the applicant but a threat of legal action by the applicant as against the respondents, whereupon the third respondent responded by putting the blame on the Department of Human Settlement for failing to pay the respondents’ invoices.

- [13] The agreements and respondents’ indebtedness to the applicant were conceded on their behalf by their counsel during oral argument *albeit* for an unknown amount. It was contended on their behalf that should summary judgment be granted against them, a reasonable possibility existed that an injustice might be done and in this regard I was referred to **Jili v Firstrand Bank.**¹³

¹⁰ Para 9.2: Opposing affidavit

¹¹ Para 10.1: Opposing affidavit

¹² Para 10.3: Opposing affidavit

¹³ 2015 (3) SA 586

- [14] The applicant contended that the respondents placed no evidence before the court in relation to the other payments that would have been made and failed to comply with the requirements of Rule 32 to establish a defence capable of resisting summary judgment. The parties had agreed that the agreements entered into constituted the whole agreement and that no indulgence granted by the applicant would prejudice the applicant's rights as contained in the agreement. The respondents' resistance of the summary judgment was solely for the purposes of delay. I agree with this submission. A defendant in summary judgment proceedings *"cannot sit back supinely and justifiably say: I don't know whether I owe you any money. I might, I might not, but don't give summary judgment against me because when it comes to trial I might be able to find in the documents that you provide some basis for saying that I don't owe you any money anyway. That is not good enough if one has to demonstrate bona fides as the rule requires, nor is it good enough if one has to set out one's defence fully by way of facts as opposed to speculative propositions¹⁴."*
- [15] In *Jili, supra*, it was stated that the precaution for the court to exercise a discretion against granting an order for summary judgment, applied in situations where the court is not persuaded that the plaintiff has an unanswerable case.¹⁵ The discretion should also not be exercised against a plaintiff on the basis of mere conjecture or speculation. The consequences of refusing summary judgment in this case are speculative.

¹⁴ *Nedperm Bank Ltd v Verbri Projects CC* 1993 (3) SA 214 at 223 B-C (W); *Jacobsen v.d. Berg S.A. Ltd v Triton Yachting Supplies* 1974 (2) 584 (O) at 587 E-F.

¹⁵ *Jili, supra*, paras A-B on p 591.

[16] Having regard to the nature, grounds and facts whereupon the respondent's defence is founded, I am not persuaded that a *bona fide* defence has been disclosed. I am therefore of the view that the application for summary judgment, in the reduced amount as prayed for, must succeed.

[17] The following order is therefore made:

Order

- 1. Summary judgment in the minus petitio amount of R2 140 720.01 is granted with costs on a scale as between attorney and client.**

MHLAMBI, J

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