IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION-MTHATHA]

CASE NO. CA&R 59/2013

Date heard: 20 November 2015

Date delivered: 24 November 2015

In the matter between:

NTOMBIZANELE FLORENCE MAKINANA Appellant

and

JAMES MATANZIMA Respondent

JUDGMENT

BROOKS AJ

[1] On 7 December 2012, after consideration of the content of the affidavits filed on behalf of both parties in an opposed application for summary judgment brought by the respondent against the appellant in terms of the provisions of Rule 14 of the Magistrates' Court Rules of Court, the magistrate in the Magistrate's Court for the District of Butterworth granted summary judgment against the appellant.

[2] The present appeal is directed against the correctness of the magistrate's decision to grant summary judgment. The appeal is unopposed. In essence, two issues arise for determination:

(a) Firstly, whether or not it was sufficient for the respondent to rely upon an affidavit deposed to by his attorney for the purposes of Rule 14 (2) of the Magistrates' Court Rules of Court; and

(b) secondly, whether it was competent for the magistrate to have regard to a document which was neither annexed to the respondent's summons nor annexed to the founding affidavit filed in support of the application for summary judgment when considering the evidence placed before him in that application.

[3] The relevant portion of Rule 14 of the Magistrates' Court Rules of Court reads as follows:

"**Summary judgment**

(1) Where the defendant has served notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-

(a) on a liquid document;
(b) for a liquidated amount in money;
(c) for delivery of specified movable property; or
(d) for ejectment,

together with any claim for interest and costs.

(2)(a) The plaintiff shall within 15 days after the date of service of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by plaintiff 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 or her opinion there is no bona fide defence to the action and that notice of intention to defend had been served solely for the purposes of delay.

(b) A copy of the served notice of intention to defend must be annexed to such affidavit.

(c) If the claim is founded on a liquid document a copy of the document must be annexed to such affidavit.

(d) The notice of application for summary judgment must state that the application will be set down for hearing on a stated day not being less than 10 days from date of delivery thereof."

[4] It is a well established principle[1]that generally speaking, before a person can swear positively to the facts in an affidavit filed in support of an application for summary judgment, he or she should state, at least, that the facts are within his or her personal knowledge. Where the deponent is a person other than the plaintiff, he or she should state that the facts are within his or her personal knowledge, unless such knowledge appears from the facts stated. The mere assertion by a person that he or she can swear positively to the facts (merely reproducing the wording of the sub-rule) is not sufficient unless there are good grounds for believing that the deponent fully appreciated the meaning of these words.

[5] Allied to the principle set out in the preceding paragraph is the principle that "information and belief" on the part of a deponent is insufficient to ground an order for summary judgment.[2]

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[1] MAHARAJ v BARCLAYS NATIONAL BANK LTD 1976 (1) SA 418 (A) 423 A-B.

[2] SHACKLETON CREDIT MANAGEMENT (PTY) LTD v MICROZONE TRADING 88 CC 2010 (5) SA 112 (KZP) 115 E-F; FISCHEREIGESELLSCHAFT F BUSSE & CO KG v AFRICAN FROZEN PRODUCTS (PTY) LTD 1967 (4) SA 105 (C).

[6] The requirements of Rule 14 (2) of the Magistrates' Court Rules of Court are stringent requirements which operate as important safeguards for the protection of the defendant faced with an application for summary judgment. These requirements are mirrored in the provisions of Rule 32 (2) of the Uniform Rules of Court and the following principle expressed in respect of that rule is of equal application to Rule 14 (2) of the Magistrates' Court Rules of Court. It has been held[3] that although a court has the power to condone mere technical non-compliance with the provisions of Rule 32 (2) of the Uniform Rules of Court, it cannot condone non-compliance with the safeguards built into that sub-rule for the benefit of defendants, for instance regarding hearsay evidence and the doing away with it or the relaxation of the test to be applied by every court considering an application for summary judgment to be able, on the evidence adduced in the affidavit supporting such application, to make a factual finding that the deponent was a qualified deponent.

[7] I turn now to a consideration of the application for summary judgment brought by the respondent against the background of the wording of Rule 14 (2) of the Magistrates' Court Rules of Court and the applicable legal principles set out above.

[8] In the summons, the respondent claimed:

(a) an amount of R15 195, 12 in respect of unpaid rental due by the appellant arising out of her lease of certain immovable property;

[3] FIRSTRAND BANK LTD v BEYER 2011 (1) SA 196 (GNP) 202 D-F.

(b) an order ejecting the appellant from the immovable property;

(b) leave to apply for judgment on the cost of repair for any damage to the immovable property; and

(d) costs of suit.

[9] In the summons it is alleged that the respondent is the owner of the immovable property and that the appellant took occupation of the immovable property during August 2003 pursuant to the conclusion of an oral lease agreement with the respondent during the same month. The material terms of the oral lease agreement are pleaded, as are the particulars of the appellant's alleged breach thereof and the damages which the respondent claimed arose therefrom.

[10] Somewhat surprisingly, the affidavit filed on behalf of the respondent in support of the application for summary judgment was deposed to by his attorney. The relevant portions thereof are dealt with hereafter.

[11] In my view, several difficulties arise from the affidavit deposed to by the respondent's attorney within the context of the allegations made in the summons:

(a) Firstly, the allegations in the summons indicate clearly that the respondent relies upon an oral agreement of lease. In the absence of any allegation to the contrary, it is reasonable to presume that the respondent was involved personally in the conclusion of that agreement. It follows as a matter of logic that only the respondent has personal knowledge of the circumstances pertaining to the negotiation of the lease agreement and its terms and conditions. The same considerations must apply to the allegations relating to the appellant's occupation of the immovable property and her alleged breach of contract upon which the respondent relied in the institution of proceedings against her. In these circumstances one would have expected the respondent to be the deponent to any affidavit filed in support of an application for summary judgment. No reason is given in the affidavit deposed to by his attorney for his failure to do so. All that is presented is the somewhat ambiguous opening statement in the affidavit in the following terms:

"I am an attorney of record of the abovementioned plaintiff, and I am duly authorised to depose to this affidavit since I am conversant with the facts herein." Closer scrutiny reveals the following difficulties inherent in this statement:

(i) The claim of personal knowledge is confined to "the facts herein" i.e. the facts set out in the affidavit as opposed to the facts pleaded in the summons. This limited claim is repeated in paragraphs 3 and 5 of the affidavit.

(ii) The basis alleged by the attorney for authority to depose to the affidavit filed in support of the application for summary judgment is that the attorney is "conversant" with the facts (in the affidavit).

"Conversant" is an adjective which may carry one of five possible meanings[4]:

1. "living or passing time habitually or frequently in or in a specified place";
2. "associating regularly with; on familiar terms with";
3. "occupied or engaged with, having to do with";
4. "well versed or experienced in, familiar with, (a subject)"; and
5. "of a thing; well known, familiar".

The various definitions of the meaning of the word "conversant" are self-explanatory. None of them can be equated to the concept of having "personal knowledge of a fact".

(b) Paragraph 3 of the affidavit contains the following statement:

"I have in my possession and under any control the files and records of the plaintiff pertaining to this matter, the contents of which I have familiarised myself with during the course of the plaintiff's dealings with the defendant and for purposes of this matter."(sic)

Given that the respondent relies upon an oral lease agreement in the summons, one can only conclude (in the absence of specific allegations to the contrary) that no written recordal of the terms and conditions of the oral agreement of lease exists and forms part of the files and records of the

[4] SHORTER OXFORD ENGLISH DICTIONARY, Sixth edition 2007, Oxford University Press.

respondent. In the circumstances it seems highly unlikely that those files and records could be the source of personal knowledge on the part of the perusing attorney which is a prerequisite for qualification as an appropriate deponent to an affidavit filed in support of an application for summary judgment. Moreover, the statement is only made in the affidavit to explain the basis upon which the attorney claims to have personal knowledge "of the facts deposed to by me herein" (the sentence which follows in paragraph 3 of the affidavit) i.e. the affidavit as opposed to the summons.

(c) The affidavit concludes with the assertion by the attorney that:

"I verily believe that the defendant does not have a good and *bona fide* defence to the plaintiff's claim and that an appearance to defend has been entered solely for the purposes of delay". It has been held[5]that the expression "I verily believe" is insufficient to ground an order for summary judgment and that the wording of the rule which requires the statement "in my opinion" must be adhered to. Whilst it has also been held[6]that to draw a distinction between the two expressions is over technical, in my view an adoption of the apparently more flexible approach towards this requirement of the sub-rule carries the potential for a subtle importation of reliance upon an assertion which may well be born of "information and belief", rather than an opinion which is expressed as a product of a careful analysis of facts of which the deponent has "personal knowledge". It has already been

[5] AFCOL MANUFACTURING LTD v PILLAY: AFCOL MANUFACTURING LTD v BUO [1996] 1 ALL SA 426 (SE) 432d.
[6] WONDER FLOORING v NORTHWEST DEVELOPMENT CORPORATION LTD 1997 (1) SA476 (BSC) 478 D-E;
H K GOKAL (PTY) LTD v MUTHAMBI 1967 (3) SA 89 (T) 90D-G.

stated[7] that the former would be insufficient to ground an order for summary judgment. In my view the more flexible approach constitutes an erosion of the stringent requirements of the rule which are intended to operate as important safeguards for the protection of a defendant faced with an application for summary judgment. No practical reason exists why the wording required by the sub-rule cannot be strictly adhered to. In my view, the deviation from the prescribed wording by the attorney in the affidavit is indicative of the paucity of his personal knowledge of the facts set out in the summons, for it follows as a matter of logic that one cannot form an opinion upon facts about which one has no personal knowledge, whereas one may be able to express a belief which is based purely upon information received in respect of those facts. The latter is insufficient to ground an order for summary judgment.[8]

[12] The *dicta* of BINNS-WARD J in a recent judgment[9] are equally applicable to the circumstances in this matter:

"The supporting affidavit falls materially short of what the sub-rule requires… It is inherently improbable on the information before the court that the deponent has direct knowledge of the salient facts. Indeed, all that he expressly professes personal knowledge of is "the facts deposed to by me herein" i.e. the facts described in the supporting affidavit… The deponent must have direct knowledge of most, if

[7] NOTE (2) supra.
[8] NOTE 2 (supra).
[9] ABSA BANK LTD v LE ROUX AND OTHERS 2014 (1) SA 475 (WCC) 479 B-H;482A;482E-F.

not all, of the facts that the plaintiff will have to prove to establish its claim in the action…. Unless it appears from a consideration of the papers as a whole that the deponent to the supporting affidavit probably did have sufficient direct knowledge of the salient facts to be able to swear positively to them and verify the cause of action, the application for summary judgment is fatally defective and the court will not even reach the question whether the defendant has made out a *bona fide* defence."

[13] Accordingly, I am of the view that reliance by the respondent upon an affidavit deposed to by the attorney instructed to institute the action is insufficient in the circumstances of this matter to ground an order for summary judgment.

[14] The affidavit used in support of the application for summary judgment was deposed to on 14 May 2012. It makes no reference to an annexure, nor is an annexure attached thereto. It was filed of record on 22 May 2012. On 29 May 2012, under cover of a "notice of filing" dated 22 May 2012 and demonstrating proof of delivery to the appellant's attorneys on the same day, the respondent filed a copy of a deed of transfer. The content of the "notice of filing" states that the deed of transfer is filed in support of the summary judgment application.

[15] It is evident from the written reasons furnished by the magistrate for the purposes of this appeal that he had regard to the deed of transfer in reaching a decision on the

application for summary judgment. In my view this was a misdirection. The document formed no part of the summons or the affidavit filed in support of the application for summary judgment, nor was any reference made to it in either. No provision exists in Rule 14 of the Magistrates' Court Rules of Court for the filing of additional documentation in support of an application for summary judgment in the manner accomplished by the respondent. In the absence of agreement between the parties that he may do so, the magistrate ought not to have had regard to the deed of transfer.

[16] It follows that for the reasons given I am of the view that the application for summary judgment ought not to have been granted and that the appeal must be successful.

[17] The following order will issue:

"1. The appeal succeeds with costs.

2. The summary judgment granted against the appellant by the magistrate on 7 December 2012 is hereby set aside and replaced with the following order:

(a) The application for summary judgment is dismissed.

(b) The defendant is granted leave to defend the action.

(c) The plaintiff is directed to pay the costs of the application for summary judgment."

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RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

DAWOOD J

I agree

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FBA DAWOOD

JUDGE OF THE HIGH COURT

Appearances:

For the appellant: ADV JL HOBBS instructed by
ROSS G.M. SOGONI & COMPANY,
Butterworth,
c/o JS SIKUNGO ATTORNEYS,
MTHATHA

For the respondent: NO APPEARANCE