

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 6791/2011

In the matter between:

FIRSTRAND BANK LIMITED t/a WESBANK

Applicant

and

PRAGASEN GOVENDER

Respondent

JUDGMENT

GORVEN J

[1] This is an application for summary judgment. The applicant instituted action against the respondent and two other defendants during July 2011. The claim is for the return of a Mitsubishi Fuso vehicle (the vehicle) sold under an agreement (the agreement) by the applicant to the first defendant and costs on an attorney and client scale. The respondent and the third defendant had stood as sureties and co-principal debtors for, inter alia, the obligations of the first defendant under the agreement. The summons claims that the first defendant defaulted under the agreement, that as at 5 July 2011 the arrears under the agreement amounted to R204 659.39 and that the agreement was cancelled. There is no challenge to these averments. On 19 August 2011 default judgment was granted against the other two defendants, who did not defend the action, for the

identical relief as that sought against the respondent. The respondent entered an appearance to defend and the application for summary judgment was launched timeously.

[2] In his affidavit opposing summary judgement the respondent has, in essence, raised two defences. The first is that the application for summary judgement is fatally defective in that the deponent to the supporting affidavit has not set out sufficient averments to show that she has personal knowledge of the facts relied upon by the applicant. The second is that it had been agreed between the applicant and the respondent that the vehicle would be sold to a third party for R 530 000 and that the respondent would make good any shortfall outstanding to the applicant.

[3] The material parts of the affidavit in support of summary judgement are paragraphs 1 and 2 which read as follows:

‘1. I am the Legal Manager of the Applicant Company in this matter and therefore duly authorised to attest to this affidavit on the Applicant's behalf. I state that I have had personal control over the books and accounts relating to this matter and I positively verify that the facts herein contained are, except where otherwise stated, within my own personal knowledge and belief, and are both true and correct.

2. I am aware of the facts stated in the Summons issued on the behalf of the Applicant/Plaintiff against the First, Second and Third Respondents/Defendants as well as the Particulars of Claim endorsed thereon. I confirm and verify that the First and/or Second and/or Third Respondents/Defendants are in possession of the Applicant/Plaintiff's goods as set out in 3.1 hereunder and verify the cause of action on the grounds set out in the Applicant/Plaintiff's Particulars of Claim.’

[4] Mr *Moola SC*, who appeared for the respondent, submitted that it did not appear from the affidavit why the deponent claimed to be a person able to swear positively to the facts. In this regard, he submitted, the

transaction was concluded in Newcastle, the deponent signed her affidavit in Johannesburg and never dealt with the respondent. Although she states that she has personal control over the books and accounts relating to the matter, she does not state that she has in fact read or had regard to these. Finally, he submitted, the averment confirming that the first defendant and/or second defendant and/or third defendant is in possession of the goods is contradictory and mutually destructive and leads to the inescapable conclusion that she is unable to verify the facts which she purports to verify.

[5] It has long been accepted that artificial persons such as banks cannot themselves depose to affidavits in support of summary judgment. A natural person in their employ does so. It has also long been accepted that such a person, particularly in banks dealing as they do with clients over a long period of time and relating to a potentially wide range of matters, is unlikely to have personal knowledge of each aspect of the dealings of the bank with a client. As such, it has long been accepted that an employee deposing to an affidavit in support of summary judgment will perforce rely on documents kept by the bank relating to the dealings in question.¹ Each case will turn on the facts of that matter.²

[6] In *Maharaj*, there was no other averment than that the deponent was the assistant branch manager and claimed to be able to swear positively to the affidavit. He did not claim personal knowledge of the facts concerning the overdraft. The court took into account that the opposing affidavit in no way challenged the current state of the defendant's account. Nor did it allege that the deponent was not present when the

¹ *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515H-517A.

² *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at

arrangements for the overdraft were made or could not have acquired the knowledge in the course of his duties. The real challenge was to the amount outstanding. Significantly, the court in *Maharaj* quoted with approval the dictum of Miller J in *Love* to the following effect:

‘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.’³

[7] There is a long line of cases dealing with the essential averments in an affidavit made in support of summary judgement by a natural person purporting to represent an artificial person such as the applicant. In a recent judgement in this division, it was recognized that:

‘...where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company’s possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts.’⁴

As was stated in *Shackleton*, however, none of the cases goes:

‘so far as to say that the deponent to an affidavit in support of an application for summary judgment can have no personal knowledge whatsoever of the facts giving rise to the claim, and rely exclusively on the perusal of records and documents in order to verify the cause of action and the facts giving rise to it.’⁵

[8] The present deponent is a legal manager. She states that she is aware of the facts stated in the summons and particulars of claim. She

³ At 516H-517A.

⁴ Per Wallis J in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & another* 2010 (5) SA 112 (KZP) para 13.

⁵ Ibid.

states further that she confirms and verifies the cause of action on the grounds set out in the particulars of claim. She has personal control over the books and accounts relating to this matter. This is a far cry from a person who has no personal knowledge of the necessary facts. Although she does not say that she concluded the agreement on behalf of the applicant, this does not disqualify her. A person testifying on behalf of a bank is not expected to be someone who has dealt at every stage and in every detail with the matter. She is entitled to rely on the applicant's records in regard to those matters in which she was not personally involved.⁶ No attack was launched by the respondent on any of the averments made by her. He could not do so since he states that he sold his interest in the first defendant Close Corporation early in 2010 and has had no dealings with it since then. He would therefore not know of the deponent's dealings with the first defendant. The respondent satisfies himself with asserting that the application is defective since the deponent is not in a position to verify the applicant's cause of action, claiming that her averments do not meet the requirements of Uniform rule 32.

[9] The respondent relies, in particular, on the case of *Firststrand Bank Ltd v Beyer*⁷, claiming that in that matter the present applicant was deprived of summary judgement on similar grounds. However, in that matter, the deponent was an employee of the plaintiff which, it was stated, was entitled to act as an agent of another bank which had concluded the agreement with the defendant. No indication was given in the affidavit in support of summary judgement why she would have knowledge of facts relating to a transaction between a different entity and the defendant. In the present case, the transaction is between the applicant and the first

⁶ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423H-424H.

⁷ 2011 (1) SA 196 (GNP)

defendant and the deed of suretyship was executed by the respondent in favour of the applicant. They are thus direct parties to the agreements sued upon.

[10] As indicated above, it was also submitted that the deponent confirms conflicting factual situations as regards the person in possession of the vehicle. This is not a necessary averment in the action against the three defendants. The averment was made in the summons that the vehicle had been delivered to the first defendant. Sureties undertake to ensure that the obligations of the principal debtor to the creditor are met. It is therefore competent to seek summary judgement against them for delivery of movable property even when they are not themselves in possession of that property. The present averments are therefore entirely distinguishable from those in *Three Ball Construction (Pty) Ltd v Lipschitz*⁸ relied on by the respondent.

[11] In the present matter, accordingly, the deponent has claimed personal knowledge of facts relating to the matter and access to records of the applicant which relate to the matter. No factual challenge was raised by the respondent to these claims. The first basis relied upon by the respondent to resist summary judgement is accordingly without merit.

[12] The second basis raised concerns an agreement which the respondent claims was concluded with the applicant relating to the sale of the vehicle to a third party. The defence can be summarised as follows. The respondent had been the member of the first defendant but sold his members' interest at the beginning of 2010 and thereafter had no personal knowledge of the activities of this defendant. He became aware in March

⁸ 1987 (2) SA 663 (W)

2011 that the first defendant had fallen into arrears under the agreement. He contacted the legal department of the applicant and agreed with a person there that the most convenient and realistic way of resolving the problem was for him to find a buyer for the vehicle and to take responsibility for any shortfall which would still be owed to the applicant after the purchase price had been paid. This he did. The applicant had accepted that this would take place and accepted that the third party, Country Meat, would purchase the vehicle for R530 000. Despite this, action was instituted.

[13] There are a number of difficulties with this defence. In the first place, it is not averred that the respondent was authorised to represent the first defendant. It was not averred that this gave rise to a variation to the agreement. It is not averred that this gave rise to an agreement on the part of the applicant not to cancel the principal agreement which it says without challenge, has been cancelled. As such, the action is vindictory in nature. The defence does not show that any of the defendants has a right to possession of the vehicle. If anything, the defence requires repossession by the applicant in order for delivery to take place to the purchaser. It is not averred that agreement was reached that the applicant would not institute action against the two defendants and himself if this deal was struck. It is clear that what is set out in the affidavit would, in any event, not have bound the applicant since it is not reduced to writing and signed by both parties which a variation to the agreement sued upon requires. The respondent says he was required to send a signed letter of consent by himself. All that he says thereafter is that he 'e-mailed Jabulani Mbatha my consent' and attaches a copy of the email. It does not indicate that any attachment was sent with it. It is not signed and, even if his signed consent had been scanned and attached, this does not meet the requirement set by

the applicant for the conclusion of the agreement relied upon by the respondent. In addition, even if the agreement contended for was concluded, there appears to be nothing preventing such an agreement being put into effect once the applicant obtains possession of the vehicle pursuant to the default judgments and if summary judgment is granted against the respondent. It is my view, accordingly, that no defence is raised in the affidavit.

[14] It is so that a court nevertheless has a discretion to refuse summary judgement. Counsel for the respondent was unable to make any submissions as to why this discretion should be exercised in favour of the respondent in the present instance. I can think of no basis for exercising this discretion. In the first place, default judgements have already been granted and, for all I know, the vehicle may already have been delivered into the possession of the applicant. If there is an agreement that the vehicle will be sold to the third party mentioned by the respondent, and if the applicant breaches that agreement, the respondent or third party may, in any event, have an action for damages against the applicant. I put it no higher than that and nothing in this judgment must be construed as any finding in that regard.

[15] After this matter was argued on 8 December 2011, the parties requested an opportunity to resolve the matter. I indicated that, if they were unable to do so, I would prepare and hand down a judgment. On 8 November 2012 the registrar of this court received a letter requesting a judgment because the matter had not been settled.

In the result summary judgment is granted in terms of prayers 1 and 2 on pages 31 and 32 of the indexed papers, such judgment is to be joint and

several with the default judgment granted against the first and third defendants.

DATE OF HEARING: 8 December 2011

DATE OF JUDGMENT: 21 November 2012

FOR THE APPLICANT: S FRANKE, instructed by VENN,
NEMETH & HART INC.

FOR THE RESPONDENT: FM MOOLA SC, instructed by OSSIE
LAKHI & ASSOCIATES, locally
represented by YASHICA CHETTY
ATTORNEYS.