

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

CASE NO: 4486/2012

In the matter between:

FIRSTRAND BANK LIMITED

Applicant

and

YUVRAJ JAIRAJ SINGH

Respondent

JUDGMENT

GORVEN J

[1] This application is for summary judgment. It arises from a deed of suretyship executed by the defendant in favour of the plaintiff. The principal debtor defaulted on its debt to the plaintiff. An agreement, signed by the principal debtor, the defendant and another surety on the one part and by the plaintiff on the other, was thereafter concluded in which the defendant and the others acknowledged indebtedness in the sum of R1 815 696.92 and a further R385 837.93 along with interest on those sums. It provided for the liquidation of the agreed indebtedness by instalments and that a failure to pay any one instalment would entitle the plaintiff to declare the full amount outstanding to be due, owing and payable. The agreement provided that the plaintiff could prove the amount due by way of a certificate signed by any manager of the plaintiff. It is

alleged in the particulars of claim that such default occurred and amounts are due. Certificates by Barend Johannes De Beer were annexed. He is described in them as the Commercial Recoveries Manager of the plaintiff.

[2] The defendant entered an appearance to defend and summary judgment was applied for. The defendant has put up an affidavit opposing summary judgment. The first point taken in it need not detain me because it was, correctly in my view, abandoned by the defendant's counsel during argument. That is to the effect that the agreement sued upon is subject to the National Credit Act 34 of 2005. This is clearly not the case. The second point taken on the affidavit is that the indebtedness is disputed. The defendant goes on to say that he caused his attorney to enquire as to the settlement amount for the indebtedness and an email was received from the plaintiff's attorney setting out this amount. The defendant then says that he has provided a guarantee for this amount 'issued for the purposes of resisting the summary judgment applied for by the Plaintiff.' He says he annexes a copy. Counsel for the defendant candidly conceded that no such copy was annexed to the papers and handed up a copy of a guarantee during argument. It is for an amount less than is claimed by the plaintiff.

[3] Two matters were argued on behalf of the defendant at the hearing. First, it was submitted that the deponent to the plaintiff's affidavit in support of summary judgment did not qualify as someone who had personal knowledge of the facts and could therefore not 'swear positively to the facts' or verify the cause of action and the amount claimed. The deponent is the person who issued the certificates, Barend Johannes De Beer. He says he is 'presently administering the records of the Plaintiff relating to the Defendant and therefore have personal knowledge of and insight into it. Additionally I have been personally dealing with the

Defendant with regard to the recovery of the Plaintiff's claim against him.' He goes on to make the necessary averments required in Rule 32.

[4] Artificial persons such as banks cannot themselves depose to affidavits in support of summary judgment. A natural person in their employ generally does so. It has long been accepted that, particularly in banks dealing as they do with clients over a long period of time and relating to a potentially wide range of matters, such a person, 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, at least in part, on documents kept by the bank relating to the dealings in question.¹ The defendant, in argument, submitted that, because in the leading case of *Maharaj v Barclays National Bank Ltd*² an assistant branch bank manager who deposed to an affidavit only just passed muster, the averments of the deponent in the present application are not sufficient.

[5] In *Maharaj*, the court had 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 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:

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

² 1976 (1) SA 418(A)

‘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

[6] In the present matter, the deponent has gone further than in *Maharaj*. He claims personal knowledge and details that the records in question are under his control. In addition, he says that he has had personal dealings with the defendant for the recovery of the debt. None of this is denied by the defendant. He does not even challenge in his affidavit the capacity of the deponent to depose to such an affidavit as was done in *Maharaj*. In addition, he is the person who issued the certificates of balance in the two amounts claimed and is a manager, albeit not of a branch of the plaintiff. I am satisfied that he has the capacity and sufficient knowledge of the matter to depose to the affidavit in question. The formal requirements for summary judgment are clearly met.

[7] The second point argued was that the defendant had found security, in terms of Rule 32(3)(a), and that summary judgment should therefore be refused. As an alternative it was submitted that, if it was held that the guarantee did not pass muster under that rule, the matter should be

³ At 516H-517A.

adjourned for the registrar to indicate whether the guarantee was acceptable security or not. In the first place, the opposing affidavit was attested on 29 or 30 June 2012. It purported to annex the guarantee but did not do so. No such guarantee formed part of the papers. Even if the guarantee handed up at the hearing is considered, there are major difficulties with the submissions. First, the guarantee is dated 2 July 2012 and was sent under cover of a letter of 3 July 2012. This means that it was not in existence when the defendant's affidavit was deposed to. More to the point, however, is that it does not constitute 'security...to the satisfaction of the registrar as is required by the Rule'. When, in argument, I enquired why the guarantee had not been furnished to the registrar for the registrar to indicate whether it was satisfactory or not, the defendant's counsel could not provide a reason. Nearly four months has elapsed since the guarantee was issued. The plaintiff's counsel informed me that he had invited the defendant's counsel to accompany him to the Registrar while the matter was standing down but that the invitation was declined on the basis that the defendant's counsel had no instruction to do so. The defendant has simply not brought himself within the ambit of the rule and nor has he provided any basis for the indulgence of an adjournment so that he can attempt to do so. In any event, the guarantee is not for the amount claimed in the summons and is therefore not sufficient for that additional reason.⁴ I should also say that I would be surprised if the guarantee satisfied the Registrar. Among other worrying factors are that it is conditional on the transfer of a property taking place and can be withdrawn by the bank in certain circumstances. The guarantee is issued by Standard Bank of South Africa Ltd in favour of Firstrand Bank Ltd, Credit Account: Ladysmith Wastetech and Scrap Metal Dealers CC. This is the principal debtor.

⁴ *Mervis Brothers v Schmidt t/a Programmed Language Course* 1991 (1) SA 313 (W) at 315A-E.

[8] The defendant did not suggest any further reason why I should exercise my discretion against granting summary judgment. I can also not think of any.

In the result, summary judgment is granted against the defendant for:

- (a) payment of the amount of R1 667 040.04;
- (b) interest on that amount at the Plaintiff's prime rate of interest from time to time plus 0.5% per annum, calculated daily and compounded monthly in arrears from 8 March 2012 to date of payment;
- (c) payment of the amount of R316 650.48;
- (d) interest on that amount at the Plaintiff's prime rate of interest from time to time plus 0.5% per annum, calculated daily and compounded monthly in arrears from 1 April 2012 to date of payment;
- (e) costs of suit on the scale as between attorney and client.

DATE OF HEARING: 30 October 2012

DATE OF JUDGMENT: 2 November 2012

FOR THE PLAINTIFF: PD Quinlan, instructed by Maharaj
Attorneys.

FOR THE DEFENDANT: RM van Rooyen, instructed by TG
BOSCH-BADENHORST, locally
represented by BERKOWITZ COHEN
WARTSKI.