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

Case No: 4057/2013

In the matter between:

ENGEN PETROLEUM LIMITED Plaintiff/Applicant
(Registration No. 1989/003754/06)

and

AAC AGRI FOODS CC First Defendant/Respondent
(Registration No. 2005/052381/23)

ADAM JOHANNES SWANEPOEL Second Defendant/Respondent
(Identity No. …….)

HEARD ON: 13 FEBRUARY 2014

JUDGMENT BY: MOTLOUNG, AJ

DELIVERED ON: 24 APRIL 2014

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[1] The plaintiff, Engen Petroleum Ltd, a company duly registered in South Africa, doing business as a wholesaler in petroleum and related products with principal address at Thibault Square, Cape Town, instituted action against the two defendants jointly and severally, claiming payment of the sum of R8 077 714,98 in

respect of sales delivered for the period October 2010 to January 2011.

[2] The defendant AAC Agri Foods CC was the co-principal debtor and Adam J. Swanepoel was sued in his capacity as surety. Notice of intention to defend was given by the defendants and the plaintiff thereupon applied for summary judgment. The application for summary judgment is opposed by the defendants.

[3] Rule 32 of the Uniform Rules regulate summary judgment. The respondents rely on non-compliance with Rule 32(2), which provides that:

> "The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with an affidavit made by himself 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 opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay."

[4] The respondents have taken point that the affidavit in support of the application for summary judgment does not comply with the sub-rule in that the deponent is not employed by the person they contracted with and can therefore not swear positively to the facts verifying the cause of action. The court will have to be satisfied that each of the requirements set out in the sub-rule

have been fulfilled before it can hold that there has been proper compliance with Rule 32.

See: **Fischereigesellschaft F Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd** 1967 (4) SA 105 (C);
Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A)

[5] It is trite law that a person can swear positively to the facts only if they are within his personal knowledge. There must be enough on the papers to satisfy the court that the deponent does indeed possess the requisite knowledge.

[6] The cause of action was set out in the summons as follows:-

(i)

"4. During the period October 2010 to January 2011:-

4.1 The First Defendant, duly represented by the Second Defendant, placed orders with Engen Lesotho (Pty) Limited, a Company registered and incorporated in terms of the laws of the Kingdom of Lesotho ['Engen Lesotho'] (Engen Lesotho was at all material times duly represented by authorised officials) for the delivery of illuminating paraffin and fuel products;

4.2 As such, Engen Lesotho sold and delivered the product as ordered by the First Defendant to First Defendant's premises:

4.3 Engen Lesotho debited the price in respect of each order against the amount owed by the First Defendant calculated at the prevailing list price of the product at the time of each delivery.

4.4 Payment in respect of each delivery became due, owing and payable upon the Plaintiff invoicing the First Defendant.

5. Full particulars in respect of the illuminating paraffin purchases appear in the schedules hereto being **'POC1.1'** to **'POC1.3'**.

6. Further, and during the period October 2010 to January 2011 the First Defendant ordered and purchased product from Engen Lesotho including, *inter alia*, dieseline, unleaded petroleum (ULP), lead replacement petroleum (LRP) and other products (jointly 'product') from the Plaintiff.

7. These products occurred on the dates, in the quantities and in the total amounts as reflected on the schedules hereto being **'POC1.4'** to **'POC1.9'**.

8. Engen Lesotho was duly represented by an authorised official and the First Defendant represented by the Second Defendant and/or a duly authorised official, in concluding each of the aforementioned agreements of sale.

9. The product so purchased was duly delivered by Engen Lesotho, as reflected by proof of delivery numbers (POD NOs) recorded on the schedules hereto.

10. The purchase price in respect of all the product thus sold and delivered was the prevailing list price of the product at the time of each delivery, Engen Lesotho having passed the necessary credits in terms of its usual rebates for any product supplied in bulk.

11. As at 2 March 2011 the First Defendant was indebted to Engen Lesotho in the amount of R8 077 714,98 then due and payable in respect of the product delivered for the period October 2010 to January 2011.

12. In breach of the agreement, the First Defendant has failed and/or refused to make payment to Engen Lesotho in respect of the amount of R8 977 714,98 which amount remains unpaid.

13. On or about 10 October 2013 Engen Lesotho sold its aforestated claim against the First Defendant to the Plaintiff, delivery of such claim taking place by way of a Cession of Rights of Action by Engen Lesotho in favour of the Plaintiff, a copy of the Sale Agreement and Cession of Rights of Action are annexed hereto as Annexes **'POC2.1'** and **'POC2.2'**.

14. As at date of Summons the First Defendant was therefore indebted to the Plaintiff in the amount of R8 077 714,98, together with interest on the aforesaid amount at the rate of 15.5% from 3 March 2011 to date of final payment, both days inclusive, together with legal fees and disbursements."

(ii)

"15. On or about 12 October 2005 and at Wepener, the Second Defendant executed a suretyship agreement in favour of the Plaintiff in respect of the indebtedness of the First Defendant. A copy of the written deed of suretyship is annexed hereto marked **'POC3'**.

16. The express written terms of the suretyship were *inter alia*:-

16.1 The Second Defendant bound himself jointly and severally with the First Defendant (or its successors in title and assigns) as surety for and co-principal debtor in *solidium* for the due and punctual payment and performance by the First Defendant of all debts and obligations of whatsoever nature and howsoever arising which the First Defendant may then or in the future owe to the Plaintiff. As part of the Second Defendant's obligations he bound himself to pay the amounts of any costs, charges, disbursement and expense of whatsoever nature including, without derogating from the generality of the aforesaid, legal costs, collection commissions as between attorney and client incurred by the Plaintiff in securing or endeavouring to secure fulfilment of the obligations of the First Defendant as well as any of the Second Defendant's obligations as surety). (clause 1)

16.2 The rights of the Plaintiff under the suretyship would not be affected or diminished if the Plaintiff at any

time obtained any additional suretyships, guarantees, securities or indemnities in connection with the obligation of the First Defendant. The suretyship would be and remain in full force and effect notwithstanding any fluctuation in and extension of any period whatsoever of the obligation… The Second Defendant would be bound by any admission or acknowledgement of any indebtedness made or given at any time by the First Defendant to the Plaintiff. (clause 2)

16.3 Should the First Defendant fail to discharge any of its obligations on due date, the Plaintiff would be entitled notwithstanding any contrary arrangement with the First Defendant to demand from the surety immediate performance of all obligations then owing by the First Defendant to the Plaintiff, whether the due date for the performance of all the obligations shall have arrived or not. (clause 8)

16.4 The Second Defendant renounced the legal exceptions of '*non causa debiti*', '*errore calculi*', 'excussion', division '*de duobus vel pluribus reis debendi*', no value received, cession of action and revision of account, with the meaning and effect of all of which the Second defendant declared himself to be fully acquainted. (clause 9)"

(iii)

"19. In the premise of the aforegoing, the First and Second Defendants are jointly and severally liable to the Plaintiff in the amount claimed.

WHEREFORE the Plaintiff prays for judgment as follows:-

a. As against the First and Second Defendants for payment of the amount of R8 077 714.98, jointly and severally with each other;
b. Interest on the aforesaid amount at the rate of 15.5% from 3 March 2011 to date of final payment, both days inclusive;
c. Costs of suit;
d. Further and/or alternative relief."

[7] The affidavit in support of the application for summary judgment by Theresa Wilkinson reads as follows:-

"2.

2.1 I am a Regional Credit Manager of the Applicant/Plaintiff, employed as such at its offices situate at 171 Rodger Sishi Road, Westville, Durban and I am duly authorised to depose to this affidavit on its behalf.

2.2 I am an Officer in the service of the Applicant/Plaintiff.

2.3 The facts referred to in paragraphs 3 and 4 below are electronically captured and stored in the Applicant/Plaintiff's records.

2.4 I am accordingly authorised to and have executed a certificate certifying the facts contained in such records to be correct.

2.5 On the basis thereof I am able to swear positively that the Applicant/Plaintiff will, having regard to the provisions of Section 154(4) of the Electronic Communications and Transactions Act (Act 25 of 2002), be able to prove the relevant facts at the trial of the action by providing the electronic records or an extract thereof.

3. I have personally dealt with and supervised the account of the Respondents/Defendants and the agreement executed relating to the Respondents/Defendants ('the Respondents') as detailed in the Applicant's Particulars of Claim; the books, documents and records containing all relevant information in regard thereto are in my possession and under my personal supervision.

4. I can and do swear positively to the facts as set out in the Summons and Particulars of Claim, and verify the cause of action and the amount claimed.

5. In my opinion, the Respondents do not have a *bona fide* defence to the Applicant's action and Notice of Intention to Defend has been delivered solely for the purposes of delay.

WHEREFORE the Applicant prays for an order in terms of the Notice of Motion to which this affidavit is annexed."

[8] The respondents challenge the summary judgment on two grounds, being:

- The deponent to the affidavit lacks the requisite personal knowledge of the facts.
- That no monies are owing to Lesotho Engen, if at all.

[9] What the court has to determine at this point is whether the affidavit of Wilkinson satisfies the requirement of Rule 32(2).

[10] Counsel for the applicant argued that the cause of action pleaded, was proper. He submitted that a total of 180 transactions occurred over a period of three months, detailing fuel sales in Lesotho with the first respondent. Proof of delivery is attached by the applicant. He argued that the respondent does not deny that the transactions took place. He submitted that the plea on which the respondent relies as proof that the amount owing has been settled, has not been substantiated by proof.

[11] He submitted that the Deed of Cession entered into between applicant and Engen Lesotho was valid and therefore binding. The applicant is therefore entitled to step into the shoes of the cedent. He argued further that the signature of the second respondent as surety on behalf of the first respondent makes him liable to the applicant.

[12] On the formalities of his application in relation to Rule 32(2) requirements, he argued that the deponent had personal knowledge of the facts as she had dealt with this account. On the strength that this is a cession, he could not obtain invoices from the deponent. He argued that this case should be distinguished from **Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & Another** 2010 (5) SA 112 (KZP) where the court held that an attorney was two degrees removed from the facts and was therefore taken not to have personal knowledge of facts. On the basis of the affidavit and a valid cession, the applicant is entitled to summary judgment.

[13] Advocate Pretorius, for the respondents, argued that payment set out in the particulars of claim is demanded by the wrong party. He said there were no monies due and payable to the applicant. In his contract with Engen Lesotho, the latter was represented by its officials. He argued that Engen Lesotho could not be represented by an employee of Engen South Africa, as she did not have personal knowledge of the facts. He said authorised employees of Engen Lesotho cannot be the same as those of Engen South Africa.

[14] He submitted that strict compliance with the rule should be applied. The application was defective and bad in law. It is hearsay about the facts of Engen Lesotho. He argued that the defendant only has to show a *prima facie* case to succeed against summary judgment. There was also no reference to

invoices by the applicant and therefore there is no proof of the amount owing. A proper defence has been made. The application should be dismissed with costs.

[15] It is common cause that the applicant for summary judgment has to comply with the three requirements set out in Rule 32(2) *viz*, the affidavit must therefore:-

(a) be made by the plaintiff himself or herself or by any person who can swear positively to the facts;
(b) contain a verification of the cause of action and the amount, if any claimed;
(c) contain a statement by the deponent that in his or her opinion there is no *bona fide* defence to the claim and that appearance to defend has been entered solely for the purpose of delay.

[16] It is the first of the requirements above that seem to be in issue. In **Maharaj v Barclays National Bank Ltd** 1976 (1) SA 418 (A), the court made it clear that personal or direct or first-hand knowledge of the salient facts is generally expected from the deponent to the supporting affidavit in summary judgment. In **Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd and Others** 1999 (4) SA 229 (C), the court, still following **Maharaj** case above, suggested the approach of looking at the papers as a whole to ascertain whether there is sufficient assurance to be derived therefrom that the deponent's averments that she is able to positively swear to the facts so as

to be able to verify the cause of action and profess the belief that the defendant has no *bona fide* defence is well-founded.

[17] The salient facts in this case are as follows:-

- The deponent in this matter is an employee of Engen SA, which obtained the right to sue by cession from Engen Lesotho.
- The contention is therefore that she is not an employee who dealt with this account in Lesotho and cannot swear positively about facts in Lesotho.
- There is no causal link between Engen Lesotho and Engen SA's accounts being dealt with interchangeably by the two entities. The fact that she says she dealt with that account could only infer that she perused it. This would not be sufficient personal knowledge.
- The fact that no invoices could be attached is indicative of the problem caused by the cession, as this became peripheral to the applicant. The computer print-outs indicate nothing more than a recordal of the transactions made. The certificate of balance is made by Engen SA, whereas the money captured in the print-outs was supposed to be in Lesotho currency and therefor no proper link between the two entities has been established. There is no basis to assume that Electronic Communications and Transactions Act 25 of 2002 is

applicable on transactions emanating from another country.

[18] In the result it follows on the construction of the sub-rule given in **Maharaj** that, unless it appears from consideration of the papers as a whole that the deponent has sufficient knowledge of the salient facts to be able to swear positively to them, 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.

See: **Absa Bank Ltd v Le Roux & Others** 2014 (1) SA 475 (WCC) at para [15].

[19] In the circumstances the application for summary judgment is dismissed for non-compliance with Rule 32(2) of the Uniform Rules.

[20] I do not award costs to the respondent as the object of the remedy is to discourage defendants who do not have a *bona fide* defence. I order the costs of the summary judgment application to be costs in the main action.

[21] The following orders are made:

1. Application for summary judgment is dismissed.
2. The defendants are given leave to defend the action.

3. The costs in the application for summary judgment shall be costs in the main action.

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S.E. MOTLOUNG, AJ

On behalf of applicant/plaintiff:	Adv C. van der Spuy
Instructed by:	McIntyre & Van der Post BLOEMFONTEIN (Ref. AAE056/Elene)
On behalf of defendants/respondents:	Adv B. Pretorius
Instructed by:	Christo Dippenaar Attorneys BLOEMFONTEIN (RefJJ van Zyl/jvdw/AJ0547)

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