

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

Case number: 4150/2021

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA

Applicant / Plaintiff

[Registration Number: 1[...]]

And

ALETTA MALESELA MOKOENA

Respondent/ Defendant

[Identity number: 6[...]]

HEARD ON:

15 SEPTEMBER 2022

JUDGMENT BY:

DANISO, J

DELIVERED ON:

This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 03 February 2023

[1] This opposed summary judgment application arises from a summons issued by the applicant (“plaintiff”) against the respondent “(defendant)” as surety for payment of R1 238 634.83 together with interest and costs.

[2] The opposing affidavit raises points *in limine* in terms of which the defendant essentially complains about the plaintiff’s lack of compliance with Uniform Rule 32.

[3] According to the defendant, the plaintiff’s supporting affidavit is fatally defective for want of compliance with subrule (2) (a) and (b) and regulations 2(1), 3(1) and 4(1) of the regulations governing the administering of oath or affirmation¹.

[4] It is the defendant’s case that in the affidavit, the deponent, Farhana Essop has declared that she is “...*an adult female*” whereas the commissioner of oaths’ certificate refers to the deponent as a “he”. Accordingly, no reliance can be placed on the commissioner of oaths certification. It cannot be confirmed whether the deponent was in fact the female Farhana Essop in whose name the affidavit was made and/or the affidavit was signed and sworn to in the presence of the commissioner of oaths. The defendant further states that the deponent was not party to the negotiations and/or conclusion of the alleged agreements between any of the parties therefore she has no personal knowledge of the facts contained in the said affidavit and the facts that the plaintiff will have to establish against the defendant to verily deny that the respondent has no bona fide defence to the plaintiff’s claim. Lastly, the supporting affidavit does not identify any point of law relied upon and the basis upon which the plaintiff contends the defence raised by the defendant does not raise any issue for trial.

[4] Regulation 4 (1) provides that:

“Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.”

¹ Government Notice R1258 dated 21 of July 1972 (as amended) promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act No, 16 of 1963.

[5] The commissioner of oaths certified the affidavit as follows:

*“I certify that the above signature is the true signature of **FARHANA ESSOP** and that he acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at my office at ALBERTON on this 12th day of **APRIL 2022** in accordance with the provisions of Regulation No. 1258 dated 21 July 1972 (as amended) and Government Notice Number R1648 dated 19th August 1977 as amended.”*

[6] The provisions of regulation 4(1) are directory not peremptory in that, failure to comply can be condoned at the discretion of the court where it is clear from other indications in and on the document that an oath was in fact administered.²

[7] *Ex facie* the affidavit it is evident that the deponent is a female.³ Except for the erroneous use of the pronoun “he” instead of “she” by the commissioner of oaths, the circumstances under which the affidavit was commissioned are clear namely, the date, place and also the details of the commissioner of oaths. I am satisfied that the error does not render the plaintiff’s affidavit fatally defective in the sense that the court would be unable to give effect to the presumption of regularity for the purposes of assuming that the oath was sworn to and signed in the presence of the commissioner of oaths. The defect is accordingly condoned.

[8] On the available facts, the plaintiff is a legal entity hence the supporting affidavit was deposed to by its authorised employee Ms Essop. Expectedly, Ms Essop would not possess first-hand knowledge of every fact relied upon by the plaintiff and having regard to the averments in her affidavit, Ms Essop has relied on the records in the plaintiff’s possession for the personal knowledge of the relevant facts. In her affidavit she states that:

“1.1. I am an adult female Head, Defended Legal, Credit Operations, Personal and Business Banking Credit, The Standard Bank of South Africa Limited (“the Plaintiff”)

² *Nkondo v Minister of Police and Another* 1980 (2) SA 362 (O) at 365C

³ In para 1.1. of the affidavit, the deponent states that: *“I am an adult female.”*

and employed as such at the Plaintiff's offices situated at [...] F[...], [...] S[...] Street, Johannesburg.

1.2. I have been duly authorised on behalf of the Plaintiff and represent the Plaintiff in these proceedings. My authority is derived from the letter of authority attached hereto marked **Annexure "SD1."**

1.3. The facts contained are, unless indicated to the contrary, within my own direct knowledge, and are to the best of my belief true and correct.

1.4 Where such facts do not, strictly speaking, fall within my own direct knowledge, they appear from files, documents, statements or account, contemporaneous notes, records of transactions and/or communications of the Plaintiff staff members. I submit that these transactions are electronically stored upon the Plaintiff's computer system which are data messages as defined in the Electronic Communications and Transactions Act no.25 of 2002 ("the ECT Act"). In the circumstances, I confirm that I am an officer of the Plaintiff in terms of the ECT Act.

1.5 Where records are relied upon below and have been stored electronically and constitute "data" or "data messages" within the meaning of the ECT Act, I certify such records in accordance with section 15 (4) thereof as being true and correct representations of such records, which have been stored by electronic means.

1.6 I have control over and have personal knowledge of the transactions relevant to the Plaintiff's dealings with the Defendant and I have familiarised myself with the content thereof during the normal course and scope of my duties with the Plaintiff.

1.7. I have also acquainted myself with the documents relating to the litigation between the Plaintiff and the Defendant.

1.8. I therefore positively verify the cause of action as set out in the particulars of claim. I thus verify the facts and allegations surrounding the cause of action, the

documents relied upon by the Plaintiff, the cause of action itself and the amount claimed (relief sought) by the Plaintiff.”

[9] In *Shackleton Credit Management (Pty) Ltd Microzone Trading 88 CC and Another*⁴ it was held that “*first-hand knowledge of every fact relied upon by the plaintiff in its claim is not required and that it is not peculiar for the deponent to rely on the records in the company’s possession for the personal knowledge of the relevant facts and actual ability to swear positively to such facts.*”

[10] Similarly, I do not agree with the defendant’s contention that the supporting affidavit must identify the point of law relied upon and the basis upon which the plaintiff contends the defence raised by the defendant does not raise any issue for trial. The grounds upon which the plaintiff contends that the defendant’s defences are bogus are succinctly set out at paras 9 to 14 of the plaintiff’s affidavit. The law is rite on this aspect. In *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd*,⁵ it was held that these words cannot be taken literally because:

“[21] The requirement that the plaintiff’s supporting affidavit should explain briefly why the pleaded defence ‘does not raise an issue for trial’ is of more interest. It cannot be taken literally, for a plea that did that would be excipiable, and there is no indication that the amended summary judgment procedure is intended as an alternative to the exception procedure. For the reasons given later with regard to the cases before me, I consider that the amended rule 32(2)(b) makes sense only if the word ‘genuinely’ is read in before the word ‘raise’ so that the pertinent phrase reads ‘explain briefly why the defence as pleaded does not genuinely raise any issue for trial’. In other words, the plaintiff is not required to explain that the plea is excipiable. It is required to explain why it is contended that the pleaded defence is a sham. That much is implicit in what the Task Team said in para. 8.3 of its Memorandum. The position would have been made clearer had the words ‘does not make out a bona fide defence’ been used. That would have made for a more clearly discernible connection between the respective requirements of subrules (2)(b) and

⁴ 2010 (5) SA 112 (KZP), para 7.

⁵ (3670/2019) [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC) (30 April 2020).

(3)(b). *That there be such a connection is necessary if the amended rule as a whole is to be workable.*”

“[23] *It seems to me, however, that the exercise is likely to be futile in all cases other than those in which the pleaded defence is a bald denial. This is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case. As the current applications illustrate, the exercise is likely therefore to conduce to argumentative affidavits, setting forth as averments assertions that could more appropriately be addressed as submissions by counsel from the bar. In other words, it is likely to lead to unnecessarily lengthy supporting affidavits, dealing more with matters for argument than matters of fact.*”

[11] Based on these reasons above, I am inclined to dismiss the defendant’s points *in limine in toto*.

[12] I now turn to consider whether the defences raised by the defendant raise issues deserving to be entertained at trial.

[13] The plaintiff’s claim is premised on a breach of a home loan agreement concluded between the plaintiff and Seriso 203 CC (“Seriso”) as the principal debtor on 4 June 2007. It is the plaintiff’s case that the agreement incorporated a suretyship agreement in terms of which the defendant and the deceased bound themselves as sureties and co-principal debtors for Seriso’s unpaid debts. Annexure “F” of the particulars of claim is a copy of the said suretyship agreement and Annexure “E” is the certificate of balance evidencing the computation of the capital amount due and the interest rate applicable.

[14] It is the plaintiff’s submission that the defendant’s opposing affidavit does not raise triable issues it merely alludes to unmeritorious technical defences and a bare denial of the plaintiff’s claim.

[15] On the other side, the plaintiff's claim is disputed on the basis that the plaintiff's *locus standi* to institute these proceedings against the defendant has not been established in that, in the particulars of claim it is alleged that the plaintiff is "a company duly incorporated according to the Company Laws of the Republic of South Africa" whereas the plaintiff is a bank and it can only be "registered in terms of the Banks Act, 94 of 1990 as amended." The defendant also denies having signed the suretyship agreement and that the plaintiff is entitled to the interest claimed viz: 8.5% per annum.

[16] On the facts germane to this matter it is not in dispute that the plaintiff's citation is erroneous. According to the plaintiff *locus standi* has nothing to do with a party's valid claim against another it merely refers to a party's capacity to litigate and the fact that the applicant has omitted to aver that it is a 'bank registered in terms of the Banking Act' can be rectified with an amendment of the particulars of claim. The amounts due including the interest rate have been set out in the certificate of balance which constitutes prima facie proof of the debt. There is also no merit to the defendant's contention that she was not party to the suretyship agreement, her signature appears above her personal details in the suretyship agreement.

[17] I do not agree with the defendant's contentions. Having regard to the defendants' plea and the opposing affidavit, the home loan and the suretyship agreements (except in relation to the defendant) including their essential terms are not disputed which means the plaintiff exists. A misdescription which involves the citation of a party is not an impediment to instituting legal proceedings. It can be cured with an amendment at any stage of the proceedings including after judgment.⁶

[18] With regard to the disputed signature, as much as the defendant is not expected to deal exhaustively with the facts and the evidence she relies upon to substantiate her defence she must at least disclose the grounds for her defence and the material facts upon which the defence is based with sufficient particularity and

⁶ *Mutsi v Santam Versekeringsmaatskappy Bpk en 'n Ander* 1963 (3) SA 11 (O); *Golden Harvest (Pty) Ltd v Zen-Don CC* 2002 (2) SA 653 (O); *Luxavia (Pty) Ltd v Gray Security Services (Pty) Ltd* 2001 (4) SA 211 (W); *Four Tower Investments (Pty) Ltd v Andre's Motors* 2005 (3) SA 39 (NPD).

completeness to enable the court to decide whether a bona fide defence which raises a triable issue has been disclosed.

[19] In *Breytenbach v Fiat SA (Edms) Bpk*⁷ it was held that a defendant “cannot approach the court with bold, vague and sketchy defences.” This was reiterated in *NPGS Protection & Services CC v First Rand Bank Ltd*⁸ where the Supreme Court of Appeal said:

“The ever increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general principles developed over many decades by our courts. See for example, the well-known judgment of this court in Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) where the proper approach to application of summary judgments are stated.”

[20] A Summary judgment procedure is intended to ensure that a defendant with a triable issue or a sustainable defence has her day in court and that recalcitrant debtors pay what is due to their creditors.⁹ The scant averments proffered by the defendant in this regard are nothing more than a bare denial. They essentially cast doubt on the defendants’ bona fides.

[21] Taking into consideration the facts of this matter, I am satisfied that the plaintiff’s claim against the defendant has been clearly established. I am not persuaded that the defendants’ defence as pleaded and also set out in the opposing affidavit discloses a bona fide defence that is good in law to result in a triable issue.

[22] In the circumstances, following order is granted:

1. Summary Judgment is granted against the defendant for;

1.1. Payment of the sum of R1 238 634.83;

⁷ 1976(2) SA 226 (T) at 229 F-H.

⁸ 2020 (1) SA 494 (SCA) AT 498I -499A.

⁹ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G-426E; *Joob Joob Investments v Stocks Mavundla Zek Joint Venture* [2009] All SA 407(SCA);

1.2. Interest on the said amount, at the rate of 8.5% per annum calculated from 27 June 2021 to date of final payment.

1.3. The defendant shall pay the costs on an attorney and client scale.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of the applicant:

Adv K.N Petersen.

Instructed by:

**NOORDMANS ATTORNEYS
BLOEMFONTEIN**

Counsel on behalf of the respondent:

Adv R. KRIEK

Instructed by:

**HILL MCHARDY HERBST
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