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THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

REPORTABLE

Date: 24 November 2006 **Case**

No: 27466/06

In the matter between:
Technological Pump Developments Cc t/a
Applicant
TPD Water Services
and

Irving 630 cc t/a B & M Pumps

First Respondent

Jan (Buks) van der Walt Second Respondent

Summary judgment - verifying statement by attorney and managing director of cc – such statements in accordance with Rule 32.

Van Rooyen AJ

[1] This is an application for a summary judgment against the respondents for R273,892.70 plus interest from the 19th May 2006. The first respondent was represented in the transaction by the second respondent. After having read the opposing affidavit of the respondents the applicant reduced its claim to R140 121.16 plus interest and costs. Leave to defend was granted to first respondent for the amount of R133 1771.54.Leave to defend was also granted to second respondent for the full claim. Costs would be costs in the cause.

Points in limine

[2] Mr. *Pieterse* for the respondents raised two points *in limine.* Firstly, that although Raphael Cohen, the managing director of applicant, stated in his verifying affidavit that he was authorized to represent applicant, he failed to prove that he was so authorized. He merely stated that he was the managing director of the applicant. This was not good enough to substantiate his authority to depose to the statement. Even in the Particulars of Claim it was not averred that the deponent represented the applicant. Secondly, the accounts attached also bore the name of an entity known as "TPD CC Water Services" - a name which did not accord with that of the applicant. There is also no averment in the applicant's particulars of claim that the applicant is entitled to rely on the attached invoices.

[3] Ms *Maritz*, on behalf of the applicant, argued cogently that it was permissible to have regard to all the documentation before the Court so as to establish authority. Cleaver J says the following in *Nedcor Bank Ltd v Behardien* 2001(1) SA 307(C) at 310:

" In my view, the averments in the affidavit are sufficient for the purposes of Rule 32(2) of the Uniform Rules of Court. See in this connection the judgment of Corbett JA, as he then was, in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) and in particular the passage which appears at 423B - E, namely:

'For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar Rule in the magistrates' courts), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated (see eg *Joel's Bargain Store v Shorkend Bros (Pty) Ltd* 1959 (4) SA 263 (E); *Misid Investments (Pty) Ltd v Leslie* 1960 (4) SA 473 (W); *Sand and Co Ltd v Kollias (supra) at J* 165 - 7); *Fischereigesellschaft v African Frozen Products A (supra at 109 - 10); Flamingo Knitting Mills (Pty) Ltd v Clemans* (*supra* at 694 - 5); *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515 - 16). The mere assertion by a deponent that he "can swear positively to the facts" (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words (see *African Frozen Products* case *supra* at 110; *Love's* case supra at 515). In my view, this is a salutary practice.'

In the present case the deponent, in addition to averring that the facts are within his personal knowledge, also positively swears to the facts and confirms the cause of action. Although the *deponent is a legal adviser, one must also bear in mind that, since it would appear that the claim against the respondent has been established by reference to the books of account and records of the applicant, the legal adviser is probably in as good a position as anyone else to swear to the facts of the case."* (emphasis added).

[4] Even if it is accepted that Mr. Cohen, as managing director, was not authorized formally by the close corporation to depose to the affidavit, it is not in dispute that he was

the managing director. Rule 32 provides that the verifying affidavit may be made "by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount".

In regard to the position of "any other person" Howard JP says the following in *Kurz v Ainhirn* 1995(2) SA 408(D) at 410:

"I have to be satisfied that the plaintiff can and does swear positively to the material facts, not that he has complied with a given formula. In this case he not only asserts that he can swear positively to the facts, he does so and indicates the reason why he is able to do so, namely that he is a liquidator of the close corporation, having been duly appointed as such some nine months ago. As such he clearly had both the opportunity and the duty to obtain knowledge of the relevant facts from, *inter alia*, the documentary records of the close corporation and interrogation of the defendant. It is inconceivable that the plaintiff, who is an officer of the Court, would have instituted this action, based on serious allegations of misappropriation and theft of moneys, without establishing the facts through examination of the documentary records under his control and exercising his statutory power to interrogate the defendant and others involved in the transactions in question. Evidence of this nature would be admissible against the defendant and the plaintiff would obviously be able to swear positively to the facts thus established. There are accordingly good grounds for believing that the plaintiff can swear positively to the relevant facts and fully appreciated the meaning of his assertion to that effect in the verifying affidavit."

The managing director would be the ideal person to depose to such an affidavit. What is more, his affidavit is supported by the affidavit of the close corporation's attorney, Mr. Glen. Cleaver J, in fact, supports the authority to depose to such an affidavit by an informed legal adviser in *Nedcor* (*supra*). It is true that at the hearing certain concessions were made as to the amount of the claim, but that does not detract from the professed knowledge which the two deponents had of the documentation in their possession. Although respondents would also seem to refer to other discrepancies, no such detail is put forward in the opposing affidavit. Full liability is, in any case, not denied. The first point *in limine* is, accordingly, rejected.

[5] As to the second point *in limine*, the reference to "TPD CC Water Services" on the invoices, does differ from the full name of the applicant, but the difference is minute and if a common sense approach is followed, as a Court should, then the point is not well-taken. No *mala fides* is alleged by the respondents and to attach any weight to this argument as to the name on the invoice, would amount to yielding substance to formality. This point is also rejected.

The Merits

[6] The first respondent denied that it owed the amount claimed. It was an explicit term of the purchase of *Franklin* motors bought by the respondent at the applicant that the respondent would be granted a 45% discount. Applicant had, however, omitted to take

this into consideration when billing the respondent. The total discount which should have been granted was R124 771.54. Applicants were informed of this omission. Furthermore credits were not given for goods sent back at a value of R9000.

[7] Second respondent denied that he ever accepted responsibility for the debts of the first respondent. He also denied that he had sent a sms, as averred by Mr. Cohen, accepting liability for the amount claimed. He also denied that he had accepted liability to Mr. Glen, from attorneys Stegmanns Inc. His defense amounts to a *bona fide* defense and should be ventilated in a trial.

[8] The applicant has rightly made certain concessions and has granted leave to defend to the second respondent for the full claim against him and leave to defend the balance of the claim, as disputed, to the first respondent. There is only a reference to a 45% discount on the pumps and R9000 for articles returned. Both these aspects are catered for in the reduction of the claim and the granting of leave to defend. No *bona fide* defense has been made out in regard to the reduced amount.

In the result I make the following order:

1. Summary judgment is granted to applicant for the amount of R140 121.16 plus interest as from 19 May 2006 to date of payment at a rate of 15,5% per annum.
2. Leave to defend is granted to first respondent for the amount of R133 771.54.
3. Leave to defend is granted to second respondent for the full claim.
4. Costs are costs in the cause.

JCW van Rooyen…… 24 November 2006
Acting Judge of the High Court

For the Applicant: Ms SM Maritz instructed by Stegmanns, Pretoria.

For the Respondent: Mr. A Pieterse instructed by HBL Klopper Attorneys. Pretoria