REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 12/24068

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

5/3/2015
DATE

SIGNATURE

In the matter between:

INVESTEC BANK LIMITED Applicant

and

DEAN GILLIAN REES First Respondent

EDWARD CHRISTOPHER JOWITT Second Respondent

In re

INVESTEC BANK LIMITED Plaintiff

and

DEAN GILLIAN REES	First Defendant
BENJAMIN HENRY JOWITT N.O.	Second Defendant
EDWARD CHRISTOPHER JOWITT	Third Defendant
DOMINIQUE REES N.O.	Fourth Defendant

J U D G M E N T

HUTTON AJ:

[1] During June 2012 the plaintiff ('Investec") launched an action, by way of a combined summons, against the first defendant ("Mr Rees"), the second defendant ("Benjamin Jowitt") in his capacity as the trustee of the Aljebami Trust ("the trust") and the third defendant ("Edward Jowitt").

[2] The combined summons is a work of epic proportions. The particulars of claim run to some 250 pages. Fourteen discreet claims are made out, referred to in the particulars of claim as claim "**A**" through to claim "**N**". These claims are supported by annexures which run to a further 770 pages. The annexures consist of various loan agreements, mortgage bonds,

deeds of suretyship, certificates of balance and the like. The aggregate of the claims, excluding interest, is R34 050 118.

[3] Each of the fourteen claims is based on the existence of an agreement between Investec and a principal debtor. There are twelve such principal debtors, each of which is a company. Two of the principal debtors feature in two claims each.

[4] In all but one of the claims[1] the alleged principal indebtedness arises from one or more loan agreements entered into between Investec and the principal debtor, secured by a mortgage bond. In the remaining claim[2] there is simply an agreement of loan in existence between Investec and the principal debtor.

[5] In the particulars of claim it is pleaded either that a judgment by default had been taken against the relevant principal debtor or that the principal debtor has been wound up.

[6] Mr Rees and the trust are alleged to be sureties for the indebtedness of the principal debtor in each of the claims. Edward Jowitt is alleged to be a surety in respect of claims "**E**" and "**J**" only.

[7] On 13 July 2012 the defendants gave notice of their intention to defend the action. On 1 August 2012 Investec launched the present summary

[1] Claims "**A**", "**B**", "**C**", "**D**", "**E**", "**F**", "**H**", "**I**", "**J**", "**K**", "**L**", "**M**" and "**N**"
[2] Claim "**G**"

judgment application against Mr Rees and Edward Jowitt.

[8] The absence of the second defendant from the summary judgment application resulted from the fact that the trust had not been properly cited in the particulars of claim. It appears that Benjamin Jowitt is not its only trustee. An application was subsequently granted, joining the remaining trustee to the action, but the present application for summary judgment does not concern the trust at all.

[9] The affidavit in support of the application for summary judgment was deposed to by one Mirielle Ackermann ("Ms Ackermann").

[10] Ms Ackermann's affidavit became the subject of a great deal of argument in the hearing of the application for summary judgment and I think it best to quote it in full:

> "1. I am an adult female Recoveries Officer employed as such by the applicant at 100 Grayston Drive, Sandton.
>
> 2. I am duly authorised to bring this application and depose to this affidavit on behalf of the applicant. I refer in this regard to the resolution of the applicant annexed hereto "A".
>
> 3. In my capacity as Recoveries Officer, I have in my possession and under my control all of the applicant's records, accounts and other documents relevant to the claims forming the subject matter of the action instituted against the respondents under the above case number ("the action").

4. In the ordinary course of my duties as Recoveries Officer and having regard to the applicant's records, accounts and other relevant documents in my possession and under my control, I have acquired personal knowledge of the respondents' financial standing with the applicant and I can swear positively to the facts alleged and the amounts claimed in the applicant's particulars of claim.

5. I hereby verify:

   5.1 the causes of action set out in the applicant's particulars of claim;

   5.2 that, on the grounds set out therein, the Respondents are indebted to the applicant in the amounts claimed by it.

6. In my opinion, the respondents –

   6.1 do not have a *bona fide* defence to the action; and

   6.2 they have delivered a notice of intention to defend the action solely for purpose of delay."

[11] Mr Rees deposed to an affidavit opposing the grant of summary judgment on 27 August 2012. Edward Jowitt deposed to a brief confirmatory affidavit on 29 August 2012. In Mr Rees' affidavit he squarely challenges Ms Ackermann's ability to depose properly to an affidavit in support of the grant of summary judgment. In this regard, he states the following:

"5. In her affidavit filed in support of the application for summary judgment, Ms Mirielle Ackermann has described herself as a Recoveries Officer employed by the Applicant.

6. Ms Ackermann states further that by virtue of her position as aforesaid, she has in her

possession and control all of the Applicant's records, accounts and other documents relevant to the claims forming the subject matter of this action.

7. She states further that she has acquired personal knowledge of the Respondents' financial standing with the Applicant and can swear positively to the amounts claimed in the Applicant's Particulars of Claim.

8. It is clear from the affidavit in support of summary judgment that Ms Ackermann derives her knowledge of the case solely from files, books of account and other documents in her possession.

9. I am advised and accept the advice that it has been held that where a deponent acquires her knowledge solely from documents to which she had access, she cannot swear positively to the facts.

10. I deny that Ms Ackermann has personal knowledge of the financial standing of the Respondents with the Applicant.

11. I submit further that Ms Ackermann did not, during any of the times when the various suretyships in this matter were concluded, have any dealings with the Respondents.

12. Ms Ackermann also did not sign any of the certificates of indebtedness upon which the Applicant bases its claims.

13. Having regard to the case law on this issue, I am advised and submit that the Applicant has failed to comply with the requirements of Rule 32(2) of the Uniform Rules of Court as the deponent to the affidavit in support of the application for summary judgment does not have personal knowledge of the facts of the matter and cannot verify the causes of action and the amounts claimed.

14. Importantly, Ms Ackermann is also unable to affirm that the Respondents have no *bona fide* defence to the action.

> 15. For these reasons alone I submit that the application for summary judgment ought to be dismissed with costs and the Respondents granted leave to enter into the merits of the action."

[12] Rule 32(2) to which Mr Rees has referred provides that the plaintiff's notice of application for summary judgment shall be accompanied by:

> "... 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."

[13] In **Maharaj v Barclays National Bank Limited**[3] the then Appellate Division, *per* Corbett JA, considered the requirement that the affidavit should be made by the plaintiff himself "*or by any other person who can swear positively to the facts*" as follows:

> "Concentrating more particularly on requirement (a) above, I would point out that it contemplates the affidavit being made by the plaintiff himself or by some other person 'who can swear positively to the facts'. In the latter event, such other person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the Court entertaining the application therefore must be satisfied, *prima facie*, that the deponent is such a person. Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been

[3] 1976 (1) SA 418 (A)

> 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' court), of requiring that a deponent to an affidavit in support of summary judgment, other than that 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 ... 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 ... In my view, this is a salutary practice. While undue formalism in procedural matters is always to be eschewed, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised ... The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to by either the plaintiff himself or by someone who has personal knowledge of the facts.
>
> Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court ... The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it ..."[4]

[14] Applying those principles to the facts of the matter in **Maharaj**, Corbett JA found as follows:

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[4] At 423 A – H. I have omitted the authorities to which the Court has had reference in the passage quoted.

"*Ex facie* the summons, plaintiff's cause of action is founded upon moneys disbursed on defendant's behalf in terms of an oral agreement of overdraft. The relevant facts would, therefore, be the conclusion of the contract, and the terms thereof, the deposits in, and withdrawal from, defendant's current account at the Stanger branch of the plaintiff bank and the interest debits resulting in the debit balance as at the date alleged in the summons, viz 24 October 1974, and the making of a demand for payment. In regard to certain of these facts, it would be difficult, if not impossible, for any one person to have firsthand knowledge of every fact that goes to make up the plaintiff's cause of action. In this connection I am in full agreement with the following remarks of Miller J, in *Barclays National Bank Limited v Love*,[5] made with reference to an affidavit made by the manager of a branch of the plaintiff bank (oddly enough also the Stanger branch):

> "We are concerned here with an affidavit made by the manager of the very branch at 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 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

[5] 1975 (2) SA 514 (D) at 516 - 7

the amounts paid into his account and
the amounts withdrawn by the client.'

In this case the deponent, Mr Mason, does not specifically state that he has personal knowledge of the overdraft arrangements made by the defendant with the manager of the Stanger branch of the bank and that state of defendant's current account at the relative time. On the other hand, he does say, in para 1 of his affidavit, that he is the assistant to the branch manager of the Stanger branch. It is not clear what duties or status of the assistant are but, if one reads his averment together with the statement in para 2 that the deponent swears positively that the defendant is liable to plaintiff on the claim and for the amount as detailed in the summons and upon the cause of action as set out therein, there is perhaps enough to justify the conclusion that in the course of his duties Mr Mason would have acquired a personal knowledge of the defendant's financial standing with the bank and the state of his current account. This is to some extent reinforced by the fact that in para 4 of his opposing affidavit (quoted above) the defendant merely puts in issue the deponent's ability to depose to the oral agreement of overdraft entered into with the manager, Mr Rees: he does not deny the deponent's ability to speak of the current state of his (the defendant's) account. Moreover, the affidavit does not specifically allege that Mr Mason who was not present when the arrangements were made or that he could not have acquired firsthand knowledge of the arrangement in the in the course of his duties, eg, from discussions with the defendant himself. Finally, it appears from the rest of defendant's affidavit that the real dispute relates not to the fact that overdraft facilities were granted to him but to the amount, if any, actually owed by him on overdraft.

Viewing the matter 'at the end of the day', I consider that, although this is a borderline case, there is just sufficient to enable the affidavit to pass muster. At any rate, I am not prepared to hold that the Judge *a quo* erred in overruling the point *in limine*."[6]

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[6] At 423 H to 424 H

[15] There are many subsequent judgments which grapple with the crucial factual question of whether or not a particular affidavit in support of an application for summary judgment passes muster "*at the end of the day*".

[16] In **Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd**[7] Van Heerden AJ considered the affidavit of the manager of the Cape Town Region of the credit department of the plaintiff in that matter and held at follows:

> "I agree with Mr Fitzgerald that Mr Green's position in the plaintiff bank, his conduct in giving the certificates of balance referred to above and his presence at the discussions held between the parties in November 1998 do support the reasonable inference that Mr Green had the requisite personal knowledge of the facts upon which the plaintiff's claims are based. It is clear from the case law that first-hand knowledge of every fact which goes to make up the plaintiff's cause of action is not required and that, where the plaintiff is a corporate entity, the deponent may well legitimately rely for his or personal knowledge of at least certain of the relevant facts and his or her ability to swear positively to such facts, on records in the company's possession."[8]

[17] In **Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another**[9] Wallis J dealt with a summary judgment application where the applicant had taken cession of a number of claims from ABSA Bank. The deponent to the affidavit in support of the summary judgment application had stated the following:

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[7] 1999 (4) SA 229 (C)
[8] At 234 J to 235 B
[9] 2010 (5) SA 115 (KZP)

> "I can swear positively to the facts giving rise to the applicant's cause of action, my personal knowledge having been derived from me having personally inspected the file of Absa Bank Limited (Absa) in relation to the claim against the respondent, which came to be in the applicant's possession by virtue of the cession referred to in the particulars of claim. In the course of my employment at Lynn & Main Inc, the exclusive attorneys for the applicant, the files were, in turn, placed in my possession. I have personally inspected the source documents, computer generated data, memoranda and correspondence contained in these files, and have thus personally investigated the indebtedness of the respondent to the applicant."

[18] Wallis J was unimpressed with this affidavit holding that:

> "It is apparent from this that Mr Lombard has no direct or personal knowledge in relation to these claims. All that he has done is to inspect the documents obtained from Absa Bank in relation to the claims. He is not even in a position to state that these are all the relevant documents. He states unequivocally that his 'personal knowledge' of the facts giving rise to the applicant's cause of action is derived from the documents he has inspected and that this constitutes his investigation of the claim. In other words, his affidavit is entirely hearsay when he purports to verify the facts giving rise to the claim and the amount of that claim. He is in no different position from any other attorney who has been given instructions by their client and furnished with documents in support of those instructions. Any resultant affidavit, then, is nothing more than an affidavit of information and belief. On the authorities referred to above, his affidavit does not comply with the requirements of the rule, and the application is defective because he is not a person who can swear positively to the facts."[10]

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[10] At para [11] p117

[19] Wallis J went on to refer to the decision in **Maharaj** *supra* and the approach in **Barclays National Bank Limited v Love**, which was approved in **Maharaj**, and stated as follows:

> "It may be that the effect of cases such as these, is as Van Heerden AJ said in *Standard Bank of SA v Secatsa Investments (Pty) Ltd and Others*, that firsthand knowledge of every fact which goes to make up the applicant's cause of action is not required and 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. However, I do not understand any of the cases as going so far as to say 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. Mr Lombard's affidavit would have been more accurate if he had not claimed personal knowledge of the facts but had said that according to the documents obtained from Absa Bank, the claims in the present action are well-founded. The facts relied upon by him emerge solely from those documents. However, the moment that is recognised it must also be recognised that the substantive contents of the affidavit consist entirely of hearsay.
>
> There is a further problem confronting Mr Lombard. In the banking cases to which I have referred, the deponent was an employee of the plaintiff and claims knowledge acquired in the course of their duties as such. That at least foreshadows that they could in the ordinary course of their duties have access to, and need to work with the records of the business. Equally, it is possible that in seeking to recover on the debt, they would have had dealings with the debtor in regard to the contents of those records, and would have had the opportunity to confirm their correctness. Mr Lombard is not only the attorney, but his client's claim is not a direct claim. It is a claim required by way of cession. Accordingly Mr Lombard stands at

two removes from the claim itself."[11]

[20] In **FirstRand Bank Limited v Beyer**[12] Ebersohn AJ dealt with a summary judgment application brought by First Rand Bank which stated that it acted as "*agent*" on behalf of Saambou Bank Limited in relation to a mortgage bond granted by the defendant in favour of the latter bank.[13] The deponent to the affidavit in support of the application for summary judgment in that case, one Von Mohlman, described herself as "*Manager Arrears – Legal in the employ of FirstRand Bank*". Her affidavit stated the following:

> "I have personal knowledge of the facts and records relating to this matter, the cause of action as well as the amount owing by the respondent to the applicant. I can and do swear positively to the facts, verify the cause of action and the amount claimed and confirm all such to be true and correct. I confirm that the respondent is currently in arrears with his monthly repayments in the amount of R100 411,37.
>
> I verify that the respondent is indebted to the applicant as set out in the summons. I verify the cause of action on which the applicant's claim against the respondent is based as set out in the summons."[14]

[21] Ebersohn J had the following to say:

> "It seems to me from the many similarly worded affidavits filed in support of applications for summary judgment which come before this motion court that plaintiffs nowadays apparently are of the opinion that an affidavit deposed to by anybody in the employ of a

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[11] Paragraphs [13] and [14], pp 118 to 119
[12] 2011 (1) SA 196 (GNP)
[13] The judgment reveals that the circumstances in which FirstRand Bank came to be acting as an agent for Saambou Bank were not properly ventilated before the court.
[14] Paragraph [6] at p100

> plaintiff firm, who mechanically goes through the motions and makes an affidavit 'verifying' the cause of action and the amount owing, would suffice to obtain summary judgment. The tragedy is that such plaintiffs often get away with it and obtain summary judgments on the strength of such lacking affidavits.
>
> An analysis and consideration of rule 32(2) clearly show that the court must, from the facts set out in the affidavit itself, before it can grant summary judgment, be able to make a factual finding that the person who deposed the affidavit was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any, and be able to form the opinion that there was no *bona fide* defence available to the defendant, and that the notice of intention to defend was given solely for the purpose of delay.
>
> The affidavit deposed to by Von Mohlman lacks the necessary evidential material from which the court could make a finding that it suffices as far as rule 32(2) requires. Although she refers to her knowledge of 'records', the records are not identified at all and one is left with doubt whether it is the records of FirstRand Bank Ltd or Saambou Bank Ltd, and whether the records were complete or not.
>
> It is clear that strict compliance with the provisions of Rule 32(2) is required, for a summary judgment is a final judgment unless reversed on appeal. A summary judgment is an extremely extraordinary and drastic remedy, often referred to as a draconian measure. It shuts the mouth of the defendant finally. A party who seeks to avail himself of this drastic remedy must, in my view, comply strictly with the requirements of the rule."[15]

[22] Later in the judgment, Ebersohn AJ stated the following:

> "Companies, firms and other legal *personae*, like the plaintiff, can only speak and act through a representative, and therefore the deponent on behalf of such company or legal *personae* has to state

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[15] Paragraphs [8] to [11] at pp199 to 200

> unequivocally that the facts were within his personal knowledge and furnish particulars as to how the knowledge was acquired by him so as to enable the court to assess the evidence put before it, and to be able to make a factual finding regarding the acceptability of the supporting affidavit for summary judgment purposes.
>
> An employee of a bank like Von Mohlman will clearly not acquire personal knowledge of every one of millions of accounts with her employer bank, and the supporting documents thereto, and would clearly not be able to testify with regard thereto in an open court. To argue that her evidence becomes relevant and acceptable just because it is put before the court by way of an affidavit would be a fallacy and unacceptable. It is thus incumbent upon the court to be strict with regard to summary judgments and to ensure that sufficient positive material, and not hear-say matter, appears *ex facie* the affidavit filed in support of an application for summary judgment, to warrant a factual finding by the court to the effect that the deponent happens to be a competent deponent.
>
> If the necessary and required particulars were not provided in the affidavit the court is obliged *mero motu* to refuse the application for summary judgment, whether it is opposed or not." [16]

[23] In **Standard Bank of South Africa and Han-Rit Boerdery CC and Others**[17] Southwood J considered the affidavit of one Govender, described as the "*Manager, Legal, Customer Debt Management, Personal and Business Banking Credit*" of the plaintiff in that matter. She stated in her affidavit that:

> "It is my function within the plaintiff to deal with arrear accounts of clients of the plaintiff. I have full access to all the plaintiff's ledgers, books of account and files pertaining to these and all other accounts. I am able to establish the exact outstanding amount and interest in respect of any account referred to me. I can therefore in the circumstances state that the facts

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[16] Paragraphs [19] to [22] at p203
[17] Unreported judgment of the North Gauteng High Court dated 22 July 2011

herein contained fall within my personal knowledge. I am duly authorised to make this affidavit and can swear positively to facts contained herein. Unless otherwise stated, all facts herein stated are within my own personal knowledge."

[24] Southwood J held at follows:

"It is clear from the *Maharaj* and *Secatsa* judgments that the courts did not deviate from the requirement that the deponent must be able to swear positively to the facts and that they found in the particular circumstances of the cases that the deponents were such persons. In the *Maharaj* case, the deponent was an assistant to the Branch Manager at the branch where the defendant's account was kept and in the *Secatsa* case the deponent was a Regional Manager of the bank credit department who had discussions with the defendant. In both cases it was clear that the deponent did not derive his knowledge of the case solely from the files, books of account and ledgers in his possession or to which he had access. It is significant that after considering all the documents filed the court in the *Maharaj* case regarded it as 'a border-line case'. In the present case it is clear that Ms Govender's knowledge is derived entirely from the applicant's ledgers, books of account and files pertaining to the defendant's accounts. She does not allege that she had any discussions or dealings with the defendants in connection with their accounts and the amounts claimed.

In both the *Shackleton* case (para 7 and 13) and the *Beyer* case (paras 9, 10, 19, 20 and 21) the court found that a deponent who acquires his knowledge from documents to which he has access cannot swear positively to the facts. In both cases the courts reviewed the relevant case law and the principles laid down over the years and I respectfully agree with the reasoning of the courts and the conclusion reached.

While I share the concern of the court in the *Shackleton* case (para 26) that insistence on strict compliance with the requirements of the Rule by a plaintiff may lead to unmeritorious defendants raising a multitude of technical objections to applications for

> summary judgment I am mindful of the extraordinary nature of the procedure. The requirements of Rule 32(2) are straightforward and can easily be complied with. Difficulties arise only where plaintiffs attempt to bend the rules and take short-cuts. If granted, summary judgment is final and closes the door on a defendant. Accordingly, summary judgment should be granted only if the plaintiff's affidavit complies with Rule 32(2) and it appears that the deponent has personal knowledge of the facts and can verify the cause of action and the amount, if any, claimed, and can express an opinion that the defendant has no *bona fide* defence to the action and has delivered a notice of intention to defend solely for the purpose of delay.
>
> The defendants' point *in limine* must therefore be upheld and the application for summary refused and leave granted to the defendants to defend."

[25] Shortly after the delivery of the judgment in **Han-Rit Boerdery**, Tuchten J delivered a judgment in **Standard Bank of South Africa Limited v Kroonhoek Boerdery CC and Others**.[18] In that matter there was an affidavit supporting an application for summary judgment deposed to by a Ms Harripersad. Her affidavit read as follows:

> "1. I am employed at The Standard Bank of South Africa Limited as Manager, Business recoveries, Personal and Business Banking Credit, Johannesburg, and the facts herein stated are within my personal knowledge and I am duly authorised to make this Affidavit.
>
> 2. I confirm that all files, documents and records pertaining to this matter are in my possession and under my control.
>
> 3. I can swear positively to the facts herein and state

[18] Unreported judgment of the North Gauteng High Court dated 1 August 2011

> that the First, Second and Third Respondents/Defendants are indebted to the Applicant/Plaintiff on the grounds stated in the Summons and I confirm the content and correctness of the averments contained in the Summons and hereby verify the facts, cause of action and the amount claimed.
>
> 4. In my opinion the First, Second and Third Respondents/Defendants do not have a bona fide defence to the action and Notice of Intention to Defend has been delivered solely for the purpose of delay."

[26] The cause of action in **Kroonhoek Boerdery** related to a single claim for the repayment of a loan, secured by a mortgage bond, for which the second and third respondents had stood surety. No challenge was taken in the affidavit resisting summary judgment to the ability of Ms Harripersad to depose to an affidavit that would pass muster. A challenge, however, was raised in argument. Tuchten J dealt with the argument as follows:

> "Counsel's first submission in this regard is that on an analysis of the affidavit, Ms Harripersad did not in fact purport to swear positively to the facts verifying the cause of action and verify the amount claimed. I disagree. She did.
>
> The second submission has more to it and is that although Ms Harripersad purported to swear positively to the facts verifying the cause of action, she could not competently do so because she lacked the necessary personal knowledge required by the rule. Counsel referred to *FirstRand Bank Limited v Beyer* 2011 1 SA 196 GNP. Counsel built his argument around paragraphs 9, 19 and 20 of the judgment of Ebersohn AJ, which I quote below:
>
> ...[19]

[19] The relevant quotations from the **Beyer** judgment are to be found in paragraphs 21 and 22 above.

And then counsel referred to an unreported judgment of Southwood J in *Standard Bank of South Africa v Han-Rit Boerdery CC and Others* ... The learned judge emphasised the extraordinary nature of the summary judgment procedure and the fact that the deponent to the bank's affidavit in support of the application for summary judgment in that case

> ... does not allege that she had any discussions or dealings with the defendants in connection with their accounts and the amounts claimed.

The leading case on the point is *Maharaj v Barclays National Bank Limited* ... Corbett CJ said the following:

...[20]

At para 9 of the judgment in *Han-Rit*, Southwood J comes to the conclusion, with reference to Beyer (paras 9, 10, 19, 20 and 21) and *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* ... that a deponent who acquires his knowledge solely from documents to which he has access ... cannot swear positively to the facts.

Southwood J found support for his conclusion in *Beyer*, para 20, where it was found that a bank employee in the position of the deponent in that case ... would clearly not acquire personal knowledge of every one of millions of accounts with her employer bank, and the supporting documents thereto, and would clearly not be able to testify with regard thereto in an open court.

In my respectful view, this proposition may be too widely stated. The question, I suggest, is not the general one whether the deponent can competently testify to all the documents with her employer bank but whether she can competently testify to those relevant to the case in question. In the present case, Ms Harripersad is the official within the applicant at the head of the department responsible for the recovery of amounts which the applicant regards as being in arrears. She had the means to acquire personal knowledge of the contents of the documents

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[20] The relevant quotations from **Maharaj** are set out in paragraphs 13 and 14 above

attached to the statement of claim and she says, in effect, that she did so.

Furthermore, the passage from *Maharaj* which I have quoted makes it quite plain ... that the principle is that in deciding whether or not to grant summary judgment, the court looks at the matter 'at the end of the day' on all the documents that are properly before it.

The enquiry is thus ultimately fact driven. It cannot be disputed that, as was pointed out in *Beyer* ... certain safeguards are built into rule 32(2) for the protection of defendants. But to my mind, no safeguard is required in relation to an allegation made by an applicant when the very allegation is admitted by a respondent in summary judgment proceedings. And as has been made plain by the SCA, the 'drastic nature' of summary judgment proceedings should not be over-emphasised: as was held in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 5 SA 1 SCA para 33:

> Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G – 426E.

It is true that in the present case Ms Harripersad probably was not present when the transactions giving rise to the applicant's cause of action were concluded and probably did not have any discussions with the representatives of the first respondent about the current state of the first respondent's account. (Compare in *Maharaj* at 424F-G) But these should not be elevated to essential requirements, the absence of which would be fatal to the applicant's case.

It is further not necessary for me to express any final view on the question whether, as was found in *Han-Rit*, with reference to *Shackleton*, para 12, possession of the relevant documents alone is

> insufficient to establish the required personal knowledge for the purposes of summary judgment. As was found in *Maharaj*, as well as in *Shackleton*, para 15, each case must depend on its own facts.
>
> I have set out the allegations made by the plaintiff at great, even tedious, length because I want to make the point that there is no factual allegation in the plaintiff's statement of claim in the present case in respect of which the deponent Ms Harripersad would not be able to testify in open court. (Compare *Beyer* para 20). She would have been able competently in her official capacity, by virtue of her custody thereof, to produce in evidence all the documents supporting the allegations in the statement of claim and testify as to their contents. Counsel for the respondents was unable to point to a single allegation in the statement of claim to which Ms Harripersad could not have testified by reference to the documents under her control."

[27] The most recent judgment in the post-**Maharaj** period is the judgment of Davis J in **FirstRand Bank v Huganel Trust**[21] where the deponent to the affidavit supporting summary judgment described himself as a person employed by the plaintiff as a "*litigation administrator*". After stating that he had knowledge of the facts set out in summons and in the particulars of claim, he went on to say the following:

> "3.1 All the records, documentation and files are under my control.
>
> 3.2 I have studied and examined all the aforesaid documentation and have personal knowledge of the contents thereof.
>
> 3.3 The aforesaid matters were allocated to me by the applicant/plaintiff by virtue that I am personally in control thereof."

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[21] 2012 (3) SA 167 (WCC)

[28] Davis J considered a variety of authorities, including most of those I have referred to above, and analysed the position as follows:

> "What is one to make of these conflicting judgments which all followed from that of *Maharaj*? It appears to me that there are at least three important points that should be emphasised.
>
> 1. While summary judgment is an order which will prevent a defendant from having his day in court, there are many cases where the plaintiff is entitled to relief on the basis that *ex facie* the papers that had been filed, there is no justification for concluding that opposition can be regarded as anything other than a delaying tactic.
> 2. As Corbett JA emphasised in *Maharaj*, excessive formalism should be eschewed. Hence the substance of the dispute, together with the purpose of summary judgment, needs to be taken into account during the evaluation of the papers which had been placed before the court in order to determine whether the summary form of relief should be justified.
> 3. While a measure of commercial pragmatism needs to be taken into account, in that many of the summary judgment applications are brought by large corporations and, accordingly, it may well be that first-hand knowledge of every fact cannot and should not be required, each case must be assessed on the facts which were placed before the court. It follows therefore that the nature of the defence becomes the starting point. For example, in *Maharaj*'s case Corbett JA found that it was a borderline case but one which fell on the right side of the border insofar as the plaintiff/applicant was concerned. On an evaluation of both the claim and the defence, it could be concluded with justification that the deponent had sufficient knowledge to depose to the affidavit, which formed the basis of the factual matrix to sustain an application for summary judgment.
>
> By contrast, there will be cases where, given the defence raised, some further knowledge is required beyond an examination of the documentation. In other words, knowledge of a personal nature may be

required if it is relevant to the contractual relationship as alleged by the defendant and, if the defendant's version is proved, could constitute an adequate defence to the claim."[22]

[29] Davis J went on to find as follows:

"With those broad principles in mind I turn to the present case. In the present case the defence is raised in the opposing affidavit. Mr *Dickerson* submits that, even if the document relied by the defendant on 26 October 2010 is taken into account, no payments had been made by the defendant, even if the special condition is taken into account ...

The plaintiff's argument is, even if one reads this clause into the factual matrix, no payment has been made and accordingly there is no defence against the application for summary judgment.

By contrast the defendant informs the court in his affidavit:

> 'To the contrary, with the full co-operation of another arm of applicant represented by Steenkamp, a different procedure was put in place in order for the debt to be reduced by means of the sale of properties as opposed to the conversion of the debt into a mortgage loan facility and the Trust kept to this procedure.'

On the basis of the *Maharaj* case and the consequences which follow my interpretation thereof, plaintiff would have been required to have Mr Steenkamp depose to an affidavit justifying summary judgment, or Mr Botha informing the court of his awareness of defendant's averments regarding variations to the contractual arrangements which had been agreed to by a duly appointed representative of the plaintiff, Mr Steenkamp.

Mr Botha's averment of sufficient knowledge, in my view, falls short of the requirements of rule 32(2). On the *Maharaj* line of reasoning, the defendant has

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[22] At 176 I to 177 E

> averred that there was a variation to that which was contained in the documents relied upon by Mr Botha. These variations were agreed to by Mr Steenkamp, who duly represented the plaintiff. To the argument of Mr *Dickerson* that there was a non-variation clause and accordingly any variation had to be reduced to writing, clause 4.1 of the agreement indicates that there was the possibility of a variation sufficient to justify the line of defence taken by defendant.
>
> What is required by defendant is to put up a defence which, if properly proved at trial, could be justified as a defence against the claim. It is precisely because Mr Botha is unable to inform the court as to the validity of the allegations relating to Mr Steenkamp, and his relationship on behalf of plaintiff with the defendant, that Mr Botha's affidavit falls beyond the borderline of that which must be accepted for the purposes of summary judgment."[23]

[30] I am firmly of the view that the "*three important points*" that Davis J distilled from his careful consideration of the **Maharaj** decision and the judgments that have followed in its wake cannot be faulted. I accordingly intend to apply those principles to the present matter. I will consider the nature of the defence put up by Mr Rees in his opposing affidavit as a suitable starting point in assessing whether or not Ms Ackermann's affidavit passes muster.

[31] The gravamen of Mr Rees' defences, as they appear in his affidavit opposing summary judgment, can be distilled as follows:

1. He and Edward Jowitt are "*removed*" sureties and require "*the opportunity to seek and obtain proper discovery and further*

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[23] At 177 F to 178 E

particulars" which, if granted, will place them "*in a better position to raise all the defence available to them against the applicant*".

2. Investec caused Mr Rees' bank accounts "*together with those of the entities in which* [he] *was involved to be frozen and access to the records of account prohibited*". Mr Rees contends that the freezing of these bank accounts "*caused prejudice to the sureties who have been sued in this action as such freezing was not authorised by any law and secondly constituted a breach of the applicant's duties in terms of the loan agreements and suretyships*". In essence, Mr Rees accuses Investec of "*having manipulated the principal debtors and respondents into defaulting in terms of the loan agreements by unlawfully freezing their accounts*".

3. Mr Rees goes on to accuse Investec of having a "*collusive relationship with* [his] *former business partner, Christopher Harris, who in most instances is a co-surety in respect of the principal debtors referred to in the summons, either personally and/or on behalf of one or more of his trusts*". He states that in late 2009 he became aware that "*Christopher Harris was engaged in discussions and negotiations with the applicant relative to the principal debtors' defaults and had been largely successful in securing his position vis a vis the applicant to the respondents' detriment*".

4. The majority of the principal debtors were placed under winding-up on Mr Rees' own application. Mr Rees contends that Investec has colluded with the liquidator of those companies and with auctioneers who were appointed to sell the immovable property of the companies under winding-up to sell certain of the properties for prices below their true value. He also contends that Investec has not properly accounted for either the proceeds of the sales or the dividends received in the computation of some of its claims.

[32] What emerges from a consideration of Mr Rees' affidavit as whole is that he has little to say in it about the entering into of the plethora of loan agreements between the principal debtors and Investec, the passing of the mortgage bonds, the execution of the many deeds of suretyship and the fact that each of the principal debtors has defaulted on its obligations to Investec. It is clear that the defences he relies on, in the main, relate to the circumstances in which the defaults occurred, what the legal consequences of those circumstances are and whether or not Investec has properly accounted for the proceeds of the sales of the mortgaged properties in calculating its claims.

[33] In his affidavit, Mr Rees makes reference to certain correspondence that passed between Investec and his attorney. It emerges that Ms Ackermann was the author and a signatory to various letters of demand. It

also appears that Mr Rees' attorney responded to certain of the letters of demand and had placed Mr Rees' liability in dispute. The broad nature of Mr Rees' defences, in particular his contention that his position as a surety had been prejudiced by the freezing of the accounts, was addressed in those letters.

[34] I am satisfied, looking at the matter "*at the end of the day*" as the **Maharaj** judgment requires me to do, of the following:

1. Although Ms Ackermann's knowledge of the conclusion of the myriad agreements upon which Investec's fourteen claims are based most likely arises from a reference by her to the documents under her control, the existence, as a matter of fact, of those agreements is not the subject of any serious challenge by Mr Rees.

2. Inasmuch as the defences raised by Mr Rees relate to the circumstances in which the various principal debtors defaulted on their obligations I can properly infer that Ms Ackermann has obtained personal knowledge of the nature of these defences as a consequence of her position as Investec's Recoveries Officer. This is particularly so where she specifically states on oath that she has acquired personal knowledge, in the first place, in the ordinary course of her duties as Recoveries Officer. This assertion on her part is clearly supported by the fact that she has

written letters of demand to Mr Rees in that very capacity and has received letters in response which canvass his defences.

3. Insofar as Mr Rees raises accusations relating to Investec's lack of probity and diligence in dealing with the proceeds of the sale of the various immovable properties, that, in my view, would be a matter falling directly within the scope of Ms Ackermann's duties. She is, after all, a Recoveries Officer and I must infer that she has kept abreast of the amounts recovered and the circumstances in which they have been recovered. When Ms Ackermann states on oath that she has "*acquired personal knowledge of the respondents' financial standing with the applicant*" there is nothing, apart from Mr Rees' bare denial, to suggest that she is not being truthful.

[35] I accordingly find, on the basis of what is set out by Ms Ackermann in her affidavit in support of summary judgment, together with what emerges from Mr Rees' affidavit opposing summary judgment, that Ms Ackermann is a person with the requisite knowledge required by Rule 32(2). This, in my view, is not a borderline case and the affidavit of Ms Ackermann in support of the application for summary judgment passes muster by a comfortable margin. In this respect the present matter is distinguishable, on its facts, from the circumstances that prevailed in the **Beyer**, **Han-Rit Boerdery**, **Shackelton** and **Hugenel** decisions. The first line of defence put up by the respondents must accordingly fail.

[36] I now turn to a consideration of whether or not the respondents have demonstrated the existence of a *bona fide* defence to Investec's various claims.

[37] As far as claim "**D**" is concerned, the suretyship that Investec relies upon in claiming against Mr Rees, which is annexed to the particulars' of claim as annexure '**P20.2**", is clearly not signed by Mr Rees. Counsel for Investec immediately conceded that Mr Rees was entitled to leave to defend on this claim.

[38] Counsel for Investec also informed me at the outset of the hearing that Investec would not seek summary judgment in respect of its various prayers for penalty interest and that leave to defend should be granted in that respect.

[39] I have set out earlier the gravamen of the defences that Mr Rees has raised in his affidavit opposing summary judgment. His contentions regarding the conduct of Investec, which he alleges has prejudiced the sureties and therefore must release them from their obligations, are put up against all of Investec's claims. His contention that the sureties are "*removed sureties*" and thus require the advantages of discovery and further particulars in order to properly raise their defences, appears to be limited to claims "**A**", "**G**", "**H**", "**I**", "**J**", "**K**", "**L**", "**M**" and "**N**". Mr Rees' complaints about the quantification of the claims relates to claims "**A**", "**B**", "**C**", "**E**", "**G**", "**H**", "**I**", "**J**", "**K**" and "**L**".

[40] Before turning to the detail of Mr Rees' assertions, I believe it is instructive to refer to the decision in **Breytenbach v Fiat SA (Edms) Bpk**[24] where a Full Bench of this Court, *per* Colman J, held that:

> "Another provision of the sub-rule which causes difficulty, is the requirement that in the defendant's affidavit the nature and the grounds of his defence, and the material facts relied upon therefor, are to be disclosed 'fully'. A literal reading of that requirement would impose upon a defendant the duty of setting out in his affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree, subject to one addition, with a suggestion by Miller J in *Shepstone v Shepstone* 1974 (2) SA 462 (N) at pp.466-467, that the word "*fully*" should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement on material facts be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides*."
>
> (My emphasis).

[41] I have carefully considered Mr Rees' contentions and I find myself in agreement with the submission made by Investec's counsel that what is strikingly lacking from Mr Rees' affidavit is any allegation that the principal debtors would, but for Investec's alleged breach of the banker-customer relationship, have been in a position to discharge their indebtedness to Investec. Mr Rees, however, has chosen to keep the Court in the dark in

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[24] 1976 (2) SA 226 (TPD) at 228 C - F

Investec. Mr Rees, however, has chosen to keep the Court in the dark in regard to the extent of his involvement in the affairs of the principal debtors. What I can, however, glean from his affidavit is that as soon as his personal bank accounts were frozen the principal debtors were unable to pay the monthly instalments due on their mortgage loans to Investec. From this I can infer that he funded the principal debtors, either wholly or in part. Then there is his somewhat hedged statement in his affidavit that he had "*a direct or indirect interest*" in the principal debtors. The manner in which Mr Rees has put up his contentions in this regard seems to me to be the work of a man attempting, as best as possible, to expose himself on as narrow a front as possible.

[42] The further allegations made by Mr Rees accusing Investec of collusion with his co-surety, the liquidator of those of the principal debtors who have been placed into winding-up by Mr Rees, are devoid of any detail whatsoever. Sweeping assertions of misconduct are made in Mr Rees' affidavit, but are not backed up with anything of substance. Once again, an extremely narrow front is put up.

[43] In these circumstances, I find that the manner in which the defence of prejudice has been averred to be needlessly bald, vague and sketchy. I cannot, in these circumstances, find that the defence of prejudice has been *bona fide* raised.

allegation that the sureties in this matter are "*removed sureties*". Counsel for the respondents argued that the present matter ought to be judged in light of the decision in **Gruhn v M Pupkewitz & Sons (Pty) Ltd**[25] where the Appellate Division, as it then was, *per* Rumpff JA, held as follows:

> "Die probleem wat ontstaan by 'n dergelike formulering van so 'n skuldoorsaak, selfs in die geval van 'n aksie onder die ou Reëls van 'n Hooggeregshof, word aldus beskryf in hierdie Hof in *Trans-African Insurance Co Limited v Maluleka*:[26]
>
> > 'The defendant is given no information as to place or time or who were the persons directly concerned in the sale of goods, and the like. Where claims of this vague type are included in the summons the defendant can hardly gather any information which would help him shape his conduct, unless, as will commonly be the case, he already knows what the action is about.'
>
> Dat 'n koper teenoor 'n verkoper gewoonlik weet waaroor die saak gaan, moet aanvaar word, maar dit is nie noodwendig dat 'n borg, wat instaan vir die prys van goedere verkoop en gelewer aan 'n koper, weet waaroor die saak gaan nie. Sy probleem kan dus, *a fortiori*, groter wees. In die onderhawige saak moet die bewering van die verweerder dat hy rede het om te glo dat die bedrag in the skulderkenning genoem, nl. R22 871,35, nie die regte prys van die goedere verteenwoordig nie, m.i. gelees word, nie as 'n alleenstaande bewering nie, maar in saamhang met die feite wat hy onder eed uiteensit. Hy verklaar dat voorheen 'n dagvaarding teen hom uitgereik is op dieselfde borgakte, vir 'n bedrag van R34 131,74 en dat die aksie teen hom teruggetrek is nadat hy 'n aansoek gedoen het om nadere besonderhede. Hierdie bewering kan m.i. nie as irrelevant beskou word nie want die afleiding kan gedoen word dat die eiser nie behoorlik nadere besonderhere kon of wou verskaf nie en as gevolg daarvan 'n nuwe aksie ingestel het waarin hy die skulderkenning as

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[25] 1973 (3) SA 49 (AD)
[26] 1956 (2) SA 273 (AD) at 227

> skuldoorsaak wou voorstoot en daardeur wou probeer verhinder dat hy gedwing kon word om nadere besonderhede te gee. Terselfdertyd is die bedrag wat geëis word verminder van R34 131,74 na R22 871,35, waarvan afgelei kan word dat 'n verweer teen die eerste eise wel kon bestaan het ten opsigte van ten minste die verskil tussen die twee bedrae. Die verweerder verklaar verder dat ondanks herhaaldelike versoeke die eiser nog nie instaat was om besonderhede aan hom te verskaf van die goedere wat na bewering aan die koper gelewer is nie."[27]

[45] In my view, it is plain that the sureties in the present matter are not in the same position as the surety in **Gruhn** *supra*. In the first place, the particulars of claim in the present matter are very detailed and there is little if any scope for further particularity. Second, I can infer, despite Mr Rees' attempts to put up a narrow front in this regard, that he played a central role in the affairs of the principal debtors. In this regard, I refer to what I have stated earlier at paragraph 41 above. Third, it emerges from Mr Rees' affidavit opposing summary judgment that there has been considerable correspondence between his attorney and Investec, in which a variety of documents, including but not limited to bank statements for the various principal debtors, was requested. It also emerges from the correspondence attached to Mr Rees' affidavit that, at the very least, all the relevant bank statements were provided by Investec in response to these requests.

[46] In these circumstances, I find the contention that the respondents are "*removed sureties*" who need discovery and further particulars to be provided

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[27] At 57G-58C

in order for them to be in a position to formulate their defences, to be wholly unconvincing. In my view no *bona fide* defence has been disclosed on this score.

[47] I now turn to the contentions raised which go to the quantification of Investec's various claims. In assessing this defence, I take into account the fact that Mr Rees has at his disposal all of the relevant bank statements and furthermore, that he has had every opportunity to inform himself properly as to the amounts that had been received from the sales of the various mortgaged properties that are the subject of the present claims.

[48] Mr Rees has raised several instances in his affidavit where he queries the amounts shown in the bank statements as having been received by Investec from the sales of properties or as dividends received. In some instances he states that the amount credited to a particular account is less than what the property, according to him and without reference to any document, was sold for. In other cases he states that dividends due to Investec from certain of the principal debtors under winding up have not yet been credited. These contentions, save in respect of claim "**J**" which I will return to shortly, are raised in general terms without any meaningful attempts at particularity. It seems to me that Mr Rees does not raise anything of substance that requires determination by a trial court in this regard. The amounts that Investec can lawfully recover from any surety must obviously take account ultimately of what it receives from the principal debtor and any other surety. The present respondents are not, however, entitled to demand

the excussion of the principal debtors as the suretyships specifically exclude that right. I am further of the view that the allegations that Mr Rees has made in relation to the quantification of the claims, save for claim "**J**", are not set out with sufficient particularity to defeat what is *prima facie* established by the certificates of indebtedness which Investec relies on in proof of its various claims. Accordingly, I do not believe that any *bona fide* defence has been raised in this regard.

[49] Mr Rees is more specific about claim "**J**". This claim is for the sum of R6 959 231.54. Mr Rees states that the property owned by the principal debtor was first sold by the liquidator for a desultory amount of R8.5 million. The sale was then cancelled and a second sale took place when the property was sold for R30 million. Mr Rees states that Investec received a dividend of R26 649 422 in the winding-up but has only credited the account of the principal debtor with R25 million. The circumstances that Mr Rees describes in his affidavit seem to me to raise a question of some substance over the quantification of the claim. Investec's counsel conceded in argument that the respondents should be given leave to defend in respect of the sum of R1 649 442 being the difference between the dividend of R26 649 442 allegedly received and the credit of R25 million given. It seems to me that this will adequately address the concerns that Mr Rees has articulated in his affidavit.

[50] Finally, Mr Rees has raised a general observation that he would like to have documents that Investec relies on subjected to "*handwriting analysis of*

the signatures thereto". Apart from one document, he does not particularize which documents he would presumably seek to impugn as forgeries. The suretyship relied on by Investec in claim "**F**" is a very poor quality copy[28]. Investec pleads that it is the only copy in its possession. Mr Rees has seized on this and states that this is one of the documents he would wish to have analysed by a handwriting expert. He also denies that he signed the suretyship. The document attached to the particulars of claim is certainly of a poor quality but it is not so illegible that the essential requirements of a valid suretyship cannot be easily ascertained from it. The names of the creditor and the principal debtor as well as the limitation of the surety's liability to R5 million can be discerned without great difficulty. It appears to me, in the circumstances that Mr Rees' denial that he bound himself as a surety in this instance is an opportunistic one which is not worthy of credit.

[50] In the circumstances I conclude that, save in the respects specifically conceded by Investec's counsel, the respondents have failed to demonstrate the existence of a *bona fide* defence.

[51] Counsel for the respondents argued that I should nevertheless exercise my discretion to refuse summary judgment. I have given this request due consideration but I cannot find a proper basis for the exercise of my discretion in favour of the respondents. In this regard I am fortified by the

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[28] Annexure "P34.2"

views expressed by the Supreme Court of Appeal, *per* Navsa JA, in **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture**[29] that:

> "[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G - 426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.
>
> [33] Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G - 426E.

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[29] 2009 (5) SA 1 (SCA)

> [34] In the present case, as demonstrated above, there is no discernible sustainable defence put up by JJ. ... Such 'defences' as were proffered are cast in the most dubious terms. Judgment for Stocks in the court below was fully justified and Gorven AJ correctly refused to exercise his discretion in favour of JJ."

[52] The application for summary judgment was a complex one, which was argued over two days before me, and the amounts involved are considerable. At the hearing Investec was represented by senior and junior counsel as were Messrs Rees and Edward Jowitt. I would add that each counsel argued an aspect of the matter. In my view, Investec, as the overwhelmingly successful party is entitled to its costs on the attorney and client scale, as agreed to in the suretyships, including the costs occasioned by the employment of two counsel.

[53] I accordingly grant judgment as follows:

Claim A

1 Summary judgment is granted in favour of the applicant against the first respondent for payment of the sum of R796,665.24 plus interest thereon at the rate equal to the applicant's mortgage bond rate less 1.25%, calculated daily and debited monthly in arrears, from 17 March 2010 to date of payment (both days inclusive).

2 The liability of the first respondent to the applicant in terms of the judgment referred to in paragraph 1 above shall be joint and several with the liability of the second defendant to the applicant in terms of

any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

3 Leave to defend is granted to the first respondent in respect of the applicant's claim for penalty interest.

4 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim B

5 Summary judgment is granted in favour of the applicant against the first respondent for payment of the sum of R1,500,000.00 plus *mora* interest thereon at the rate of 15.5% per annum calculated from 17 March 2010 to the date of payment (both days inclusive).

6 The liability of the first respondent to the applicant in terms of the judgment referred to in paragraph 5 above shall be joint and several with the liability of the second defendant to the applicant in terms of any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

7 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim C

8 Summary judgment is granted in favour of the applicant against the first respondent for payment of the sum of R4,000,000.00 plus *mora* interest thereon at the rate of 15.5% per annum calculated from 24 December 2009 to the date of payment (both days inclusive).

9 The liability of the first respondent to the applicant in terms of the judgment referred to in paragraph 8 above shall be joint and several with the liability of the second defendant to the applicant in terms of any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

10 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim D

11 Leave to defend is granted to the first respondent in respect of this claim.

12 Costs of suit, including the costs attendant upon the employment of two counsel, are to be costs in the cause.

Claim E

13 Summary judgment is granted in favour of the applicant against the first and second respondents, jointly and severally, the one paying the other to be absolved, for payment of the sum of R1,200,000.00 plus *mora*

interest thereon at the rate of 15.5% per annum calculated from 23 July 2010 to the date of payment (both days inclusive).

14 The liability of the first and second respondents to the applicant in terms of the judgment referred to in paragraph 13 above shall be joint and several with the liability of the second defendant to the applicant in terms of any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

15 The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim F

16 Summary judgment is granted in favour of the applicant against the first respondent for payment of R3,755,044.55 plus interest thereon from 15 June 2011 to date of payment (both days inclusive) at a rate equal to the applicant's prime rate less 0.25% calculated daily and compounded monthly in arrears.

17 The liability of the first respondent to the applicant in terms of the judgment referred to in paragraph 16 above shall be joint and several with the liability of the second defendant to the applicant in terms of any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

18 Leave to defend is granted to the first respondent in respect of the applicant's claim for penalty interest.

19 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim G

20 Summary judgment is granted in favour of the applicant against the first respondent for payment of R63,581.95 plus interest thereon at the rate equal to the applicant's prime rate less 0.5% calculated daily and compounded monthly from 14 February 2012 to date of payment (both days inclusive).

21 Leave to defend is granted to the first respondent in respect of the applicant's claim for penalty interest.

22 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim H

23 Summary judgment is granted in favour of the applicant against the first respondent for payment of R1,198,311.97 plus interest thereon at the rate equal to the applicant's prime rate less 1.25% from 7 February 2012 to date of payment (both days inclusive) calculated daily and compounded monthly in arrears.

24 The liability of the first respondent to the applicant in terms of the judgment referred to in paragraph 23 above shall be joint and several with the liability of the second defendant to the applicant in terms of any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

25 Leave to defend is granted to the first respondent in respect of the applicant's claim for penalty interest.

26 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim I

27 Summary judgment is granted in favour of the applicant against the first respondent for payment of R477,282.78 plus Interest thereon from 1 June 2011 to date of payment (both days inclusive) at the rate equal to the applicant's prime rate less 1.5%, calculated daily and compounded monthly in arrears.

28 Leave to defend is granted to the first respondent in respect of the applicant's claim for penalty interest.

29 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim J

30 Summary judgment is granted in favour of the applicant against the first and second respondents, jointly and severally, the one paying the other to be absolved, for payment of R5,309,809.54 plus interest thereon from 8 February 2012 to date of payment (both days inclusive) at the rate equal to the applicant's prime rate less 0.25%, calculated daily and compounded monthly in arrears.

31 The liability of the first and second respondents to the applicant in terms of the judgment referred to in paragraph 30 above shall be joint and several with the liability of the second defendant to the applicant in terms of any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

32 Leave to defend is granted to the first and second respondents in respect of –

32.1 the balance of the applicant's claim i.e. for payment of the sum of R1,649,422.00; and

32.2 the applicant's claim for penalty interest.

33 The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim K

34 Summary judgment is granted in favour of the applicant against the first respondent for payment of the sum of R1,000,000.00 plus *mora* interest thereon at the rate of 15.5% per annum calculated from 5 July 2010 to the date of payment (both days inclusive).

35 The liability of the first respondent to the applicant in terms of the judgment referred to in paragraph 34 above shall be joint and several with the liability of the second defendant to the applicant in terms of any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

36 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim L

37 Summary judgment is granted in favour of the applicant against the first respondent for payment of the sum of R1,000,000.00 plus *mora* interest thereon at the rate of 15.5% per annum calculated from 10 December 2010 to the date of payment (both days inclusive).

38 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim M

39 Summary judgment is granted in favour of the applicant against the first respondent for payment of the sum of R5,800,000.00 plus *mora* interest thereon at the rate of 15.5% per annum calculated from 27 September 2010 to the date of payment (both days inclusive).

40 The liability of the first respondent to the applicant in terms of the judgment referred to in paragraph 39 above shall be joint and several with the liability of the second defendant to the applicant in terms of any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

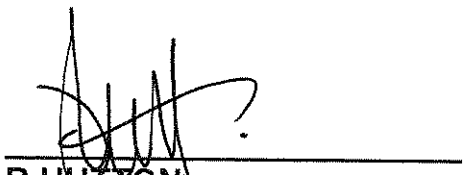
41 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.

Claim N

42 Summary judgment is granted in favour of the applicant against the first respondent for payment of the sum of R5,800,000.00 plus *mora* interest thereon at the rate of 15.5% per annum calculated from 14 December 2010 to the date of payment (both days inclusive).

43 The liability of the first respondent to the applicant in terms of the judgment referred to in paragraph 42 above shall be joint and several with the liability of the second defendant to the applicant in terms of any judgment that may in due course be granted against the second defendant in respect of the applicant's claim.

44 The first respondent is ordered to pay costs of suit on the scale as between attorney and client, which costs are to include the costs attendant upon the employment of two counsel.



R HUTTON
Acting Judge of the High Court

APPEARANCES:

For the applicant:

AP Rubens SC and AJ Michael, instructed by Werksmans

For the respondents:

S van Nieuwenhuizen SC and EL Theron, instructed by Routledge Modise

DATE OF HEARING

18 and 19 February 2013

DATE OF JUDGMENT

5 March 2013