IN THE HIGH COURT OF SOUTH AFRICA
(DURBAN & COAST LOCAL DIVISION)

CASE NO: 348512007

In the matter between:-

GRINDROD BANK LIMITED **Applicant**

and

ERICK BAMOZA MOLEFE N.O. **First Respondent**

HENDRIK JACOBUS VAN DER MERWE N. O. **Second Respondent**

ERICK BAMOZA MOLEFE **Third Respondent**

HUSAB INVESTMENTS CC **Fourth Respondent**

JUDGMENT

ROWAN AJ

[1] This is an application for summary judgment by the plaintiff bank as applicant. I shall continue to refer to the applicant herein as the plaintiff and the respondents as the defendants.

[2] In terms of a written loan agreement entered into between the plaintiff bank and The Mpho Jessica Trust (in respect of which the first and second defendants are cited as trustees), the plaintiff advanced the sum of R5,319,572.79 to the Trust. This is not disputed.

Neither is it disputed that in terms of the agreement the Trust was obliged to repay the loan in monthly instalments and, in any event, in full by no later than *27th* July 2006.

There also appears to be no real contest as to the fact that the Trust breached the agreement by failing to pay monthly instalments and in any event failed to repay the loan in full by 27th July 2006.

[3] The third and fourth defendants signed as guarantors for the Trust's indebtedness to the plaintiff, but limited to R5,000,000.00. They waived the benefits of excussion.

[4] The first, third and fourth defendants raised various technical defences in opposition to the plaintiff's summary judgment application as well as certain defences on the merits.

[5] With regard to the technical defences, it was contended that strict compliance with the Rule 32(2) requirements was required due to the nature of the application and the relief sought and the court's reluctance to deprive a defendant of his normal rights to defend. On behalf of these defendants it has been argued that the affidavit in support of the application for summary judgment does not meet the requirements of the Rule.

[6] The relevant portion of Rule 32(2) as it pertains to the argument tendered in this matter, my underlining, is: "*The Plaintiff shall ……deliver notice of application for summary judgment, <u>together with an affidavit</u>*

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.

[7] The deponent to the affidavit in support of the application for summary judgment in this matter is a director of the applicant. He avers in paragraph 1 of his affidavit that, "The facts contained in this affidavit are within my personal knowledge." He further avers in paragraph 2, "I am duly authorized to make this affidavit" and in paragraph 3 "I can and do swear positively to the facts verifying the cause of action and the amounts claimed in the Plaintiff's summons".

[8] It was argued in the first instance by counsel for the three mentioned defendants that the deponent swore positively to the facts verifying the cause of action and the amounts claimed, but did not verify the cause of action. Although what is stated by the deponent in paragraph 3 follows the precise wording and punctuation of the Rule, it has been held in case law dating back to the 1960's *(**Fischereigesellschaft F Busse & Co Kommanditgesellschaft vAfrican Frozen Products (Pty) Ltd** 1967 (4) SA 105 (C) @ page 108 D – H)* and re-affirmed thereafter, that this sub-rule must be read as if a comma were inserted after the word 'facts'. It has been held that "the word 'verifying' does not qualify the word 'facts' and forms no part of the definition of the 'any other person' who may make the affidavit." (See Erasmus: Superior Court Practice – B1 - 217: Commentary to the Uniform Rules. Supported by case law the author states: "Thus it is necessary in order to comply with the rule that the affidavit must (a) be made by the plaintiff himself or herself or by any other person who can

swear positively to the facts; (b) contain a verification of the cause of action and the amount, if any, claimed; and (c) contain a statement by the deponent that in his or her opinion there is no bona fide defence to the claim and that appearance to defend has been entered solely for the purposes of delay. The court will have to be satisfied that each of these three requirements has been fulfilled before it can hold that there has been proper compliance with rule 32."

Technically it would appear that the deponent in this matter may have done better in bringing himself within the ambit of the provisions by stating "I can and do swear positively to the facts and verify the cause(s) of action ….. etc". In this matter, bearing in mind the guarantees/suretyships in respect of the third and fourth defendants, there are more than one "causes of action".

However it is significant to note the author's further comment : "If the verifying affidavit is not technically correct due to some obvious or manifest error which caused no prejudice to the defendant and there had been substantial compliance with the Rules, the application would still be granted if the defendant's opposing affidavit makes it clear that the defendant knew and appreciated the plaintiff's case against him or her". It cannot be said that the defendants in this matter did not appreciate the plaintiff's case against them. Their affidavit as to the merits makes that clear.

[9] It was further argued that the affidavit did not contain an allegation that the deponent had personal knowledge of the facts relating to the cause of action and the amount claimed, resulting in his affidavit being based on hearsay. Reference was made, *inter alia,* to ***Wright v McGuinnes*** *1956 (3) SA 184 (C)* in support hereof. I can find nothing in that judgment that refers to the necessity of an allegation as to "personal knowledge of the

facts relating to the cause of action and the amount claimed" or which mentions the words "personal knowledge" at all or makes any mention of the word "hearsay".

What the deponent in the matter before us did say, my underlining, was that "The facts contained in this affidavit are within my personal knowledge"; "I am duly authorized to make this affidavit" and "I can and do swear positively to the facts verifying the cause of action and the amounts claimed in the Plaintiff's summons." By necessary implication, in my view, the deponent is more accurately intending to say, and mean, the facts "referred to" in this affidavit, when he uses the word "contained". Had he stated this in so many words this would mean that the facts that he can and does swear positively to in paragraph 3 of his affidavit would be the facts that he previously, (in paragraph 1), stated would have been within his personal knowledge. A pragmatic line of reasoning in interpreting what the deponent must have intended to say was applied by Miller J in *Barclays National Bank Limited v Love* 1975 (2) SA 51 4 (D), dealt with more fully below.

[10] In addition it was argued by the defendant that there were no other facts appearing from the papers which confirm that the deponent has personal knowledge regarding the matter. In support of this contention counsel for the three mentioned defendants cited various references. The first of these was ***Sekeretaris van Landbou Krediet en Grondbesit v Loods*** 1973 (3) SA 296 (NC) at 297 H. An extract from this decision at page 297 H as referred to is not necessarily entirely supportive of the defendant's case. But this is in relation to the argument in the preceding paragraph. *"Eiser self het nie die beëdigde verklaring verly nie. Dit is egter voldoende dat iemand anders met persoonlike kennis van die tersake feite, so 'n*

verklaring verly; en die Hofreël vereis nie dat die verklaring voorgeskrewe woorde, soos 'ek dra persoonlik kennis van die feite uiteengesit in die dagvaarding', moet bevat nie. Direkte bewering is gewoonlik die maklikste manier om hierdie vereiste te laat blyk; maar is netsomin onontbeerlik as wat dit altyd voldoende is.

There is also reference to ABSA *Bank Limited v Coventry* 1998 *(4)* SA 351 (N) @ 353 C. What is stated in this case is that "*Rule 32(2) requires, inter alia, that the affidavit in support of the application must be one verifying the cause of action; as stated by Corbett JA, who gave the judgment of the Court in Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 422D: 'The Rule demands . . . that the affidavit . . . should verify the cause of action. . . .'* This again goes more to the point raised in the abovementioned paragraph [8] and has already been dealt with.

The reference in the *Pinepipe (Pty) Ltd v Nolec (Pty) LM* 1975 (4) SA 932 (W) @933 G – H is also not apposite in the context of what is being argued here. What is stated at this point in this judgment is "*I respectfully agree with the judgments by THERON, J., in the case of Fischereigesellschaft F. Busse & Co. G Kommanditgesellschaft v African Frozen Products (Pty.) Ltd., 1967 (4) SA 105 (C) , and by VAN DEN HEEVER, J., in Sekretaris van Landboukrediet en Grondbesit v Loots, 1973 (3) SA 296 (NC), that the Rule must be read as if there is a comma after the word "facts". This, in my view, means that it must be an affidavit verifying the cause of action; it is not the facts which it must so verify.* Again this relates to what has been dealt with in paragraph [8] above.

Pick 'n *Pay v Dednam* 1984 *(4)* SA 673 at 679B, which was also cited, states at the page and marginal letter referred to "*Daar kan geen twyfel*

bestaan dat waar die funderende verklaring soos in die onderhawige geval deur 'n direkteur van eiser gemaak is moet hy onder eed die feite bevestig waarop die skuldoorsaak en die geëisde bedrag berus. Dit moet duidelik wees dat hy inderdaad persoonlike kennis van gemelde feite dra." This is perhaps the authority that should have been cited in place of Wright v McGuiness in paragraph [9] above.

[11] Counsel for these three defendants in further elaboration stated that there is not a single allegation that the deponent has personal knowledge of the facts regarding the cause of action, and the amount and does not have personal knowledge to verify the cause of action. I have just quoted from the citation referred to by counsel in the aforegoing paragraph **S*ekeretaris van Landbou Krediet en Grondbesit v Loods*** where it states that the Rule does not require the prescribed words such as "I have personal knowledge of the facts", although this may be the easiest way of complying with this requirement.

The case cited by the said defendants' counsel is also against him in certain respects. In *Barclays National Bank Limited v Love* 1975 (2) SA 51 4 (D) @ 516 Miller J as he then was stated (my underlining) "*Although it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his own knowledge he should, where he is not the plaintiff himself, at least give some indication of his office or capacity which would show an opportunity to have acquired personal knowledge of the facts to which he deposes (cf. Sand & Co. Ltd. v Kollias, supra at p. 166; Sekretaris van Landboukrediet en Grondbesit v Loots, 1973 (3) S. A. 296 (N. C.) at pp. 297 - 8). It must be remembered that there is nothing in Rule 32 which requires the deponent to use a formula or to confine himself to specific words in qualifying himself as a*

person able to swear positively to the facts. In the present case we know that the deponent is a director of the plaintiff bank and we also have the benefit of a certificate by the managing director of the bank, David Andrew Polkinhorne (Annexure “H” papers page 83) certifying the amount of indebtedness as at February 2007.

The deponent has indeed stated that he can and does swear positively to the facts verifying the cause of action and the amounts claimed in the Plaintiff’s summons. Albeit that the proper interpretation of this provision separates swearing positively to the facts on the one hand and verifying the cause of action on the other, this does not mean that the deponent has not sworn positively to the facts in this matter. He has done just that. He has in my interpretation, sworn positively to the facts “from which I” (my insertion) verify the cause of action. The only thing he has not done in so many words is verify the cause of action itself or verify the amount claimed, despite the fact that this must clearly have been intended.

What Miller J goes on to say at page 516 C – D is “*What emerges from the affidavit made by Williams, read with the summons which is referred to therein, is that he is the manager of the Stanger branch of the plaintiff bank, that overdraft facilities were afforded the defendant by that branch and that the amounts claimed by plaintiff in the summons are due and owing in respect of the grant by the bank of such facilities. Those are the facts which he verifies and which he says in his affidavit are within his own "knowledge or belief".* What follows in the judgment is a debate on the use of the word *“or”* which the learned judge found to mean “*and”.* But he then goes on to say *“We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself*

suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment. It goes without saying that a manager of a bank who claims to have personal knowledge of the extent to which a client has overdrawn his account must needs rely upon the bank records which show the amounts paid into his account and the amounts withdrawn by the client. When such a manager says that he knows or believes that the client is indebted to the bank in a specified sum of money, it is implicit in what he says that he has had regard to the bank records and that he accepts (or "believes") that they give a true reflection of the State of the client's account." There seems to be no weighty reason why the same rationale could not apply in this matter.

[12] In final further elaboration counsel for these defendants contended that the deponent swore positively to the facts verifying the cause of action and did not verify the cause of action itself. He argues that the deponent can verify the facts. The facts cannot verify the cause of cause of action or the amount.

This leg of the argument appears to concede that the deponent did indeed swear positively to the facts. Erasmus tells us in this connection that, "Generally speaking, before a person can swear positively to facts in legal proceedings, they must be within his personal knowledge". By implication therefore the facts to which the deponent in this matter positively swore

must have been within his personal knowledge.

The *Mmabatho Food Corporation (Pty) Ltd v Fourie* 1985 (1) SA 318 (T) case to which counsel for the defendant s refers at 321B again tells us per Stegman J that "*Die aangehaalde gewysdes dui daarop aan dat wat deur die Engelse teks vereis word is "an affidavit verifying the cause of action" en dat sodanige eedsverklaring deur die eiser self gemaak moet word of deur enige ander persoon "who can swear positively to the facts". Met ander woorde, die woord "verifying" kwalifiseer die woord "affidavit". Dit kwalifiseer nie die woord "facts" nie.*

There is a detailed discourse by Corbett JA in the matter referred to by both counsel , *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 422 A – H, on the separate need of a person, be it the plaintiff or other person with personal knowledge of the facts, to verify the cause of action and on the need for such person other than the plaintiff to establish that he can indeed swear positively to the facts. However the learned judge goes on to state "*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*".

[13] On a careful consideration of the cited authorities and more, as well as the wording used in the affidavit in support of the application for summary judgment and its intended meaning, and the fact that the defendants in this matter fully appreciate the plaintiff's case against them, I have nonetheless, influenced by the warning given by Corbett JA, come to the conclusion that if I am to err at all, I should err on the side of caution and not grant summary judgment herein. My view on the merits is that on the

face of it, the defences raised do not appear to be of real substance and can be expeditiously dealt with. I refrain however from expressing any further opinion on this aspect of the matter in this judgment. This will become the domain of the trial court in due course. I merely mention my prima facie view in support of the order which I am prepared to make referring this trial to the expedited roll and the reservation of costs. In my discretion with regard to costs and the tenuous reliance on technicalities in this matter, as well as my prima facie opinion on the merits as they stand in the affidavits, I do not intend to follow the decision of Myburgh J in the *Pinepipe (Pty) Ltd v Nolec (Pty) LM* matter mentioned above on the question of costs.

[14[The alleged settlement and an interpretation of the provisions of the non-variation clause in the agreement of loan, the role played by the second defendant and the proceedings in the Transvaal Provincial Division, the so called “notice” that the third and fourth defendants complain of not having received, the corporate identity of the fourth defendant (which the third defendant tells us he is “the sole active member of” in paragraph 1 of his affidavit opposing summary judgment and which signed a guarantee in June 2005 as close corporation yet then denies its existence contending conversion into a company in 2001), the alleged unliquidated counter-claim, are all matters capable of speedy resolution with full and proper co-operation by the defendants. A comprehensive pre-trial conference with detailed answers being given to requests for further particulars for trial and admissions and other enquiries under Rule 37(4) will crystalise, and, if not resolve most of these so called issue, reduce them to simple issue capable of expeditious resolution.

[15] The order I accordingly make is as follows:

1. Summary judgment is refused and the defendants are given leave to defend the action;

2. The costs of the application for summary judgment are reserved for decision by the trial court.

3. This matter is to be placed on the expedited trial roll referred to in Rule 21 of the revised Rules of Practice for the Natal Provincial Division.

4. The defendants are directed to deliver their plea within five calendar days of the grant of this order, failing which they shall be ipso facto barred.

5. The parties shall comply with the provisions of uniform Rule 35(1) within ten calendar days of the grant of this order.

6. The parties shall hold a pre-trial conference and shall comply with the provisions of Rule 37 not less than five calendar days before the hearing of this matter.

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ROWAN AJ
ACTING JUDGE OF THE HIGH COURT

DURBAN AND COAST LOCAL DIVISION

Date of Hearing	**:**	**3 August 2007**
Date of Judgment	**:**	**23 October 2007**
Counsel for Plaintiff/Applicant	**:**	**P D Quinlan**
		Instructed by:
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Counsel for First, Third and Fourth Defendants/Respondents	**:**	**H Louw**
		Instructed by:
		Atkinson Turner De Wet **First, Third and Fourth Defendant's/Respondent's Attorneys** **487 Windermere Road** **Morningside** **DURBAN** **Ref: Mr de Wet/01/M1760**