THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 330/13

In the matter between

DEAN GILLIAN REES **FIRST APPELLANT**

EDWARD CHRISTOPHER JOWITT **SECOND APPELLANT**

and

INVESTEC BANK LIMITED **RESPONDENT**

Neutral citation: *Dean Gillian Rees v Investec Bank Limited* (330/13) [2014] ZASCA 38 (28 March 2012)

Coram: Mthiyane DP, Lewis, Ponnan, Maya and Saldulker JJA

Heard: **20 FEBRUARY 2014**

Delivered: **28 MARCH 2014**

Summary: Summary Judgment – Rule 32(2) – Affidavit in support of application for summary judgment complying with the requirements of the sub rule– Deponent employee of bank – averring facts obtained in the ordinary course of her duties as employee of bank – Personal knowledge of every fact not required.

ORDER

On appeal from: South Gauteng High Court (Johannesburg), Hutton AJ sitting as court of first instance.

The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

Saldulker JA (Mthiyane DP, Lewis, Ponnan, Maya JJA concurring):

[1] This is an appeal against the judgment and order by Hutton AJ in summary judgment proceedings in the South Gauteng High Court (Johannesburg) on 5 March 2013. The appeal is with the leave of the high court .

[2] Described by Hutton AJ as a 'work of epic proportions', the combined summons issued by the respondent, Investec Bank Limited (Investec) against the first appellant, Dean Gillian Rees (Mr Rees), the second appellant, Edward Christopher Jowitt (Mr Jowitt), and Benjamin Henry Jowitt NO, in his capacity as trustee of the Aljebami Trust (the trust), runs into some 250 pages, consisting of 14 claims in all, set out in the particulars of claim from claim A to claim N.[1] The claims are supported by annexures which in turn run into some 770 pages, consisting of loan agreements, mortgage bonds, deeds

[1] Claim A – Plankjol (Pty) Ltd; Claim B – Diepdwang (Pty) Ltd; Claim C – Friedshelf 690 (Pty) Ltd; Claim D – Before Sunset Properties 40 (Pty) Ltd; Claim E – Silver Armor Properties (Pty) Ltd; Claim F – Built Up Estates (Pty) Ltd; Claim G – Aish 2 Ou Bottling (Pty) Ltd; Claim H – Aish 2 Ou; Claim I – Friedshelf 715 (Pty) Ltd; Claim J – Riversong Wildlife Estates (Pty) Ltd; Claim K – Friedshelf 714 (Pty) Ltd; Claim L – Redeal (Pty) Ltd.

of suretyships, certificates of balances and so on. The aggregate of these claims excluding interest amounts to R34 050 118.

[3] The claims are based on an agreement between Investec and 12 principal debtors, each of which is a company. Two of the principal debtors feature in two claims each. In all but one of the claims, Claim G, the alleged principal indebtedness arises from one or more loan agreements entered into between Investec and the principal debtor, secured by a mortgage bond. Claim G is based simply on an agreement of loan in existence between Investec and the principal debtor. Mr Rees and the trust are alleged to be sureties for the indebtedness of the principal debtor in each of the claims. Investec pleaded that either a default judgment had been taken against the relevant principal debtors or that the principal debtors had been wound up.

[4] After the appellants gave notice of their intention to defend the action, Investec launched summary judgment proceedings against the first and second appellants: the latter is alleged to be a surety in respect of claims E and J only. The trust was not included in that application and for present purposes this appeal does not concern the Aljebami trust.

Verifying affidavit

[5] The application for summary judgment was supported by an affidavit by Ms Mirielle Ackermann, who is employed as a recoveries officer by Investec. It is necessary to quote her affidavit in full, which reads:

'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 marked **"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.' (my emphasis.)

[6] In response the appellants filed an affidavit by Mr Rees resisting summary judgment. It stated:

'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." (my emphasis.)

[7] After having considered the affidavits filed in the matter, and applying the principles laid down in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) and certain other authorities,[2] Hutton AJ granted summary judgment in favour of Investec in respect of 13 of the 14 claims. Leave to defend was granted to Mr Rees in respect of claim D as the suretyship that Investec relied upon in support of that claim was allegedly not signed by Mr Rees. Investec also did not persist in its claim in respect of its various prayers for penalty interest.

[8] The primary contention advanced on behalf of the appellants is that Ms Ackermann was not a person who could 'swear positively to the facts' as envisaged in rule 32(2).

[9] Rule 32(2) 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'.(*My emphasis.)

The applicable law

[10] In *Maharaj,*[3] Corbett JA in considering the requirement that the affidavit should be made by the plaintiff himself 'or by any other person who can swear positively to the facts' stated:

'Concentrating more particularly on requirement (*a*) above, I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person "who *can swear positively to the facts".* In the latter event, such other person's *ability*

---

[2] *Standard Bank of SA Ltd v Secatsa Investment (Pty) Ltd & others* 1999 (4) SA 229 (C); *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D)*; FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC).

[3] At 423A-H.

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 therefor 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 adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates' courts), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated . . .* 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 by 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….' (My emphasis.)

[11] In *Barclays National Bank Ltd v Love*[4] (quoted with approval in *Maharaj* at 424B-D) the following is said:

'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

[4] *Barclays National Bank Ltd v Love*1975 (2) SA at 514 (D) at 516H-517A.

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.'* (My emphasis.)

[12] Since *Maharaj,* the requirements of rule 32(2) have, from time to time, occupied the attention of our courts.[5] In *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & another* 2010 (5) SA 112 (KZP), para 13, it was held that:

'[F]irst-hand 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.' (My emphasis.)

Did the Ackermann affidavit meet the requirements of rule 32?

[13] Here Investec had issued a combined summons annexed to which was a comprehensive particulars of claim setting out the cause of action against the appellants, supported by written agreements concluded with the principal debtors in each instance and suretyship agreements concluded with sureties on the terms set out in the agreements. Investec thus had either obtained judgment against the principal debtor or the principal debtor had been wound up at the instance of Mr Rees. Those occurrences operated as the trigger for Investec to proceed on the suretyship agreements against the appellants. Moreover, the suretyships provided for a certificate of balance to be issued by the relevant bank manager of Investec, which would either serve

---

[5] See *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC & another* 2010 (5) SA 112 (KZP); *FirstRand Bank Limited v Beyer* 2011 (1) SA 196 (GNP); *Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W); *Jefrrey v Andries Zietsman (Edms) Bpk* 1976 (2) SA 870 (T); *Standard Bank of South Africa Ltd v Han-Rit Boerdery CC & others* [2011] JDR 0870(GNP); *Standard Bank of South Africa Ltd v Kroonhoek Boerdery & others* (1 August 2011) Case No 23054/2011 (GNP); *ABSA Bank Ltd v Le Roux 2013* JDR 2283 (WCC).

as a liquid document or constitute prima facie proof of the sureties' indebtedness. It is against that backdrop that Ms Ackermann's affidavit must be viewed.

[14] Ms Ackermann relied on the information at her disposal which she obtained in the course of her duties as the bank's recoveries officer, to swear positively to the contents of her affidavit. It is not in dispute that in the discharge of her duties as such she would have had access to the documents in question and upon a perusal of those documents she would acquire the necessary knowledge of the facts to which she deposed in her affidavit on behalf of Investec. Prior to the institution of the action Ms Ackermann had been corresponding with the appellant's attorney in regard to the principal debtors' delinquent accounts and had also addressed letters of demand to them, receiving letters in response which canvassed the appellants' defences. She could thus 'swear positively to the facts', 'verify the cause of action and the amount claimed' and assert that in her opinion the appellants did 'not have a *bona fide* defence to the action' and had entered an appearance to defend 'solely for the purposes of delay'. These factors show that the requirements set out in *Mahara*j are met.

[15] The fact that Ms Ackermann did not sign the certificates of indebtedness nor was present when the suretyship agreements were concluded is of no moment. Nor should these be elevated to essential requirements, the absence of which is fatal to the respondent's case.[6] As stated in *Maharaj*, 'undue formalism in procedural matters is always to be eschewed' and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a fact-based enquiry. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj.*

---

[6] *Standard Bank of South Africa Ltd v Kroonhoek Boerdery & Others* (1 August 2011) Case No 23054/2011, para 13 (GNP).

[16] The fact that leave to defend was granted in respect of Claim D does not mean as was suggested in argument that Ms Ackermann was untruthful and that her affidavit must be rejected in its entirety. It is clear that Ms Ackermann acquired her knowledge from documents under her control. She thus had the requisite knowledge as required by rule 32(2). In making such a finding Hutton AJ did not err.

[17] Turning to Mr Rees' affidavit filed in opposition to the application for summary judgment, what emerges is that he does not dispute that: (a) A plethora of loan agreements had been concluded between the principal debtors and Investec; (b) mortgage bonds had been registered against various immovable properties as security for Investec's debts; (c) various deeds of suretyships had been concluded as additional security for Investec's debts; and (d) each of the principal debtors had defaulted on its obligations to Investec.

[18] The thrust of the appellants' case is encapsulated in the following excerpt from Mr Rees' affidavit:

'Once the Respondents, being essentially removed sureties, have had the opportunity seek and obtain proper discovery and further particulars, they would be in a better and proper position to raise all the defences available to them against the Applicant'.

[19] What exactly is meant by the expression 'removed sureties' is not explained. What does emerge later in the affidavit, which on the face of it appears to put paid to the suggestion that he was a 'removed surety' is this:

'In an attempt to gain some closure and access documentation relative to the principal debtors, I instructed my attorneys to apply for the winding-up of the majority of the companies referred to in the claims with the intention that their assets could in due course be sold by the liquidator to discharge their indebtedness to the Applicant. In 2010 and 2011, the principal debtors referred to in Claims E to L were wound up by the Court. In July 2010, the principal debtors referred to in claims B and C were wound up by way of voluntary resolutions of the members.'

[20] Mr Rees' affidavit is replete with conjecture and speculation for which no factual foundation is advanced. Mr Rees has contended that the appellants

and principal debtors have been prejudiced inasmuch as they have been denied access to their accounts which have been frozen by Investec, and which, so it is contended, occurred in breach of the banker/customer relationship. The freezing of those bank accounts has never been challenged by any of them on the basis that Investec's conduct was unlawful. In any event a perusal of all of the documentary evidence reveals that Mr Rees was the alter ego of many of the corporate entities involved in this case and intimately involved in their affairs. He was in most instances the signatory of the agreements in question.

[21] The court below correctly reasoned that what is striking about Mr Rees' affidavit is the lack of 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. The fact is that each of the principal debtors defaulted on its obligations to Investec and no defence to the claims against them have been raised.

[22] In my view Mr Rees was sparse with the truth and deliberately vague. Hutton AJ aptly put it: '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.' His claim of prejudice thus rings hollow and appears to smack of desperation as indeed does his assertion that Ms Ackermann's affidavit lacks effectiveness for the grant of summary judgment.

[23] The appellants argued that summary judgment, which deprives a defendant of the opportunity to raise its defence in trial proceedings, should be granted only exceptionally: it is said to be a drastic procedure. However, as was stated by Navsa JA in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*:[7]

'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of

[7] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) paras 32 & 33.

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.
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.'

[24] Looking at the matter at the '"end of the day" on all the documents that [were] properly before it',[8] it cannot be said that the high court erred in granting summary judgment against the appellants.

[25] In view of the aforegoing, the result is that the appeal must fail. The following order is made:
'The appeal is dismissed with costs, such costs to include the costs of two counsel.'

_____

HK SALDULKER
JUDGE OF APPEAL

[8] *Maharaj* at 423H.

APPEARANCES

For Frist and Second Appellant:	E L THERON Routledge Modise Inc, Johannesburg Matsepes Inc, Bloemfontein
For Respondent:	A P RUBENS SC, A J MICHAEL Werksmans Inc, Johannesburg Symington & De Kok, Bloemfontein