REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

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

18/04/2012
DATE

SIGNATURE

CASE NO: 00538/2012

In the matter between:

S A TAXI SECURITISATION (PTY) LIMITED Plaintiff

and

KAITSOE PETER MOELETSI
(ID NUMBER Defendant

AND IN **CASE NO: 807/2012**

In the matter between:

S A TAXI SECURITISATION (PTY) LIMITED Plaintiff

and

ZWANE, KHANYISILE MARGARET
(ID NUMBER Defendant

AND IN **CASE NO: 00643/2012**

In the matter between:

S A TAXI SECURITISATION (PTY) LIMITED Plaintiff

and

BONGANI ENOCH DLAMINI
(ID NUMBER 7 Defendant

J U D G M E N T

COPPIN, J:

[1] The three matters referred to above are all applications for summary judgment. In the matters of Kaitsoe Peter Moeletsi ("*Moeletsi*") and Khanyisile Margaret Zwane ("*Zwane*") affidavits opposing summary judgment were filed and counsel for the plaintiff and for the respondent, who were the same in both those matters, made submissions. In the matter of Bongani Enoch Dlamini ("*Dlamini*") no opposing affidavit was filed and there was no appearance for the defendant at the hearing.

[2] In Moeletsi and Zwane counsel for the plaintiff and the defendant agreed that the same main argument pertained to both those matters. Counsel for the plaintiff also submitted that the outcome of the Dlamini matter depends on the judgment on the main point in the Moeletsi and Zwane

matters. I agree. The common or main issue relates to the question whether the deponent to the affidavit in support of summary judgment in each of the three matters met the requirements of Rule 32(2). More particularly whether the deponent, Ms Phyllis Lombard, can swear positively to the facts in each of the respective matters – i.e. verify the cause of action and the amount. In each of the said matters the plaintiff is seeking to recover a motor vehicle and costs based on the alleged breach by the respective defendant of the terms of the agreement under which the motor vehicle was allegedly acquired.

[3] The affidavit in support of the application for summary judgment in each of the matters is virtually identical in wording. The material part of the affidavit, which I quote for ease of reference, is the following:

> "*I, the undersigned*
>
> *PHYLLIS LOMBARD*
>
> *do hereby make oath as follows:*
>
> 1. *I am a legal manager of the above named plaintiff in this matter and I am duly authorised to depose to this affidavit on behalf of the plaintiff.*
>
> 2. *The facts herein set out fall within my personal knowledge and are true and correct.*
>
> 3. *In consequence of such position held by me with the plaintiff, I have in my possession and under my control the files and records of the plaintiff pertaining to this matter, the contents of which I have familiarised myself with during the course of the plaintiff's dealings with the defendant and for the purposes of this matter. By virtue of the aforegoing, I have personal knowledge of the facts deposed to by me herein.*
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> 4. *I have read the plaintiff's summons, particulars of claim and application for summary judgment in this matter. I can and do*

swear positively to the claim set out in the summons and particulars of claim and verify the plaintiff's cause of action.

5. *I can and do swear positively to the facts herein contained and verify that the defendant is truly and lawfully indebted to the plaintiff in the sum of ...*"

[4] It was submitted by counsel appearing for the defendants in the cases of Moeletsi and Zwane, *inter alia*, that it was apparent from Lombard's affidavit that the facts of those matters were not within her personal knowledge and that she could not swear positively to the facts therein or verify the respective causes of action. It was further submitted that at best, Lombard could merely state that she has had sight of the file or files in the respective matters in the offices of the plaintiff, but she could not state that those files and their contents reflect the truth. Accordingly she was not able to positively swear to and verify the cause of action.

[5] Counsel for the plaintiff relied on the unreported decision of Tuchten J in *Standard Bank of South Africa Limited v Kroonhoek Boerdery CC and Others*[1] in support of the plaintiff's argument that Lombard's affidavit meets the requirements of Rule 32(2). In that case the learned judge, having quoted extensively from the judgment of the leading case on the matter, namely *Maharaj v Barclays National Bank Limited*[2] and after disagreeing with the findings and conclusions of Southwood J in *Standard Bank of South Africa Limited v Han-Rit Boerdery CC and Others*[3] in which Southwood J referred

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1 Case No 23054/2011 (GNP) delivered on 1 August 2011.
2 1976 (1) SA 418 at 423A-424D.
3 An unreported decision of the GNP Case No 32371/2010 delivered on 22 July 2011.

and relied on the decisions in *Firstrand Bank Limited v Beyer*[4] and *Shackleton Credit Management (Pty) Limited v Microzone Trading 88 CC and Another*[5], held that the question in these cases is whether the deponent to the affidavit in support of summary judgment "*can competently testify*" to those documents relevant to the case in question. The learned judge stated further that in deciding whether or not to grant summary judgment, the court must ultimately look at all the documents that are properly before it. The learned judge stated in paragraphs [12] and [13] of the judgment the following:

> "*[12] The enquiry is thus ultimately fact driven. It cannot be disputed that, as was pointed out in Beyer, para [17] 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 – as has been made plain by the SCA in, 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 ...*
>
> ...
>
> *[13] 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 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.*"

[6] Tuchten J, however found it unnecessary "*to express any final view on the question whether, as was found in Hen-Rit, with reference to Shackleton, para [12], possession of the relevant documents alone is insufficient to*

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[4] 2011 (1) SA 196 (GNP) per Ebersohn AJ.
[5] 2010 (5) SA 112 (KZP) per Wallis J.

establish the required personal knowledge for the purposes of summary judgment".

[7] It was submitted by counsel on behalf of the defendants in both the Moeletsi and Zwane matters that in *Kroonhoek Boerdery,* Tuchten J could not have meant that the plaintiff can make use of a deponent who lacks personal knowledge of the facts as long as the facts are not put in issue by the defendant.

[8] One must bear in mind that when the Supreme Court of Appeal held in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[6] that the time has perhaps come to discard labels such as "*drastic*" and "*extraordinary*" in respect of summary judgment proceedings, it did not thereby imply that the threshold requirements in Rule 32(2) were to be diluted or discarded. The object of the requirements in that Rule, regarding the supporting affidavit, *inter alia*, is to protect the defendant and to ensure accuracy and certainty by, as far as possible excluding inadmissible evidence, yet taking into account the summary nature of the proceedings. Our courts have often emphasised strict compliance with that Rule because of the nature of the remedy[7]. In *Mahara*,[8] Corbett J stated in this regard:

> "*[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*

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[6] 2009 (5) SA 1 (SCA).
[7] *Mowschenson & Mowschenson v Mercantile Acceptance Corporation of S.A.* 1959(3)S.A.362(W) at 366C-D.
[8] At 423G-H.

> *it is important that the affidavit should be deposed to either by the plaintiff himself or by someone who has personal knowledge of the facts."*[9]

[9] In *Shackleton* it was held *inter alia* that:

> *"... the requirements that the founding affidavit be deposed to by the applicant or some other person who can swear positively to the facts precludes the affidavit being deposed to by someone whose knowledge of those facts is purely a matter of hearsay. The person who deposes to such an affidavit on the basis that their information comes from another source, whether another person or from documents, is not a person who can swear positively to the facts giving rise to the claim ..."*[10]

The court went on to hold that an affidavit by an attorney based on information given to the attorney by his client does not comply with Rule 32(2), because the attorney is not in a position to swear positively to the facts and such an affidavit is nothing more than a statement of "*information and belief, containing inadmissible hearsay*".[11]

[10] In *Shackleton* the deponent to the supporting affidavit, an attorney, *inter alia,* stated that his personal knowledge was derived from having personally inspected the files of the client to whom the claim was ceded; that he had possession of the files and personally inspected the source documents, computer-generated data, memoranda and correspondence

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[9] In *Maharaj* it was held with reference to authority in *Sand and Co Ltd v Kollias* 1962 (2) SA 162 (W) at 165 that a defect in the affidavit may be cured by other documents that are properly before the court in connection with the application. It is not immediately apparent however how a deponent's lack of personal knowledge could be cured by other documents. Compare with what Wallis J said in this regard in *Shackleton Credit Management v Microzone Trading 88* 2010 (5) SA 112 (KZP) para [25] at 122F-I to what Ebersohn AJ said in that regard in *Firstrand Bank v Beyer* 2011 (1) SA 196 (GNP) para [17] at 202E-F.

[10] The court did not deal with the situation where the affidavit is deposed to in circumstances constituting an exception to the hearsay Rule. See at 116B footnote 5.

[11] Paragraph [7] at 116B.

contain in those files. The court held that the deponent had no direct and personal knowledge of the claims and that the affidavit was entirely hearsay and did not comply with the requirements of Rule 32(2).

[11] In the present case, on her own admission, Lombard's knowledge is only derived from a perusal of the files or records pertaining to a particular defendant. Even though she is employed as a legal manager of the plaintiff, like the attorney in *Shackleton*, her only source of information was the files and records of the defendant, the authenticity and truth of the contents of which had not been established. The affidavit, in my view, is no different to that considered in *Shackleton.* It is nothing more than a statement of information and belief that is based purely on inadmissible hearsay evidence. In my view Lombard, in those circumstances, is not able to swear positively to the facts pertaining to each of the respective defendants. The plaintiff's affidavit in support of summary judgment in each of the above matters accordingly does not meet the requirements of Rule 32(2).

[12] The fact that Diamini is not defended does not render Lombard's affidavit acceptable and one that meets the requirements of Rule 32(2). There is no suggestion by Lombard that by virtue of her position she had acquired personal knowledge of the facts pertaining to any of the defendants as was the position in *Maharaj.* Indeed in the present matters Lombard relies exclusively on her perusal of the alleged files and/or records pertaining to the respective defendants in order to verify the causes of action and the facts giving rise to them. I do not understand *Maharaj* or any of the cases to have

held that the deponent to an affidavit in support of summary judgment does not have to have any personal knowledge whatsoever of the facts giving rise to the claim and that it is sufficient if such a deponent relied exclusively on "*having, familiarised*" herself with the records and files of the defendant in order to verify the cause of action and amount.[12] Insofar as there is a suggestion in *Kroonhoek Boerdery* to the contrary, I do not, with respect, agree with its correctness.

[13] In Moeletsi, besides raising the main point regarding the failure to comply with the requirements of Rule 32(2), the defendant has also raised a *bona fide* and triable defence relating to the condition of the motor vehicle. However, in the light of my conclusion regarding the main issue, I do not deem it necessary to deal in any detail with that defence.

[14] Since the plaintiff has not met the requirements of Rule 32(2) in all of the above matters the application for summary judgment in each of them stands to be dismissed with costs.

[15] I accordingly:

1. Dismiss the application for summary judgment with costs in the Moeletsi matter and the defendant is given leave to defend;

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[12] See also *Shackleton (supra)* at para [13] at 118D-G.

2. Dismiss the application for summary judgment with costs in the Zwane matter and the defendant is given leave to defend;

3. Dismiss the application for summary judgment in the Dlamini matter and the defendant is given leave to defend.

P COPPIN
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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COUNSEL FOR THE DEFENDANT IN THE MOELETSI AND ZWANE MATTERS	MR K LEVIN
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