

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 18472/11

DATE: 2013-06-05

In the matter between

METRALARK

Plaintiff

And

STAMFORD SALES

Defendant

J U D G M E N T

VICTOR. J:

[1] The applicant for leave to appeal has supplemented its notice of appeal to include a new issue which was not previously raised namely a defective affidavit in support of summary judgment.

[2] It is a perennial but very important defence by defendants that the affidavit supporting the summary judgment claim is defective. In this case the complaint is that because the plaintiff sues on a cession of book debts and does not attach an affidavit from the cedent in confirmation of the cession and amount owed by the defendant to the cedent it is thus fatal. In addition the complaint is that there is no elaboration by the deponent to the affidavit in support of summary judgment as to her personal knowledge of the cession.

[3] The relevant portion of the affidavit is:

"The Applicant's file pertaining to the above-captioned matter which contains, inter alia, a cession of book debts in favour of the applicant, proof of the Applicant's claim against Quali Cool CC and all correspondence entered into by the Applicant and/or its attorney with the Respondent, is currently in my possession and under my control and I am fully conversant with the content thereof."

[4] She also swears positively to the facts and can verify the facts based on the combined summons.

[5] It is trite law that new issues may be raised on appeal. Counsel on behalf of the defendant referred to many cases including *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A), *Standard Bank of South Africa and Han-rit Boerdery CC* and others an unreported judgement of North Gauteng High Court dated 22 July 2011, *Standard bank South Africa Limited v Kroonhoek Boerdery CC and Others* an unreported judgement of North Gauteng High Court dated 1 August 2011 and many other judgements. The phrasing and the wording of each affidavit has to be considered and the context thereof. It is also unlikely that the cedent would cooperate with the respondent thus complicating a situation such as this.

[6] This new issue took the respondent by surprise. Obviously had this point been raised at the outset a multitude of considerations would have taken place including giving leave to defend and the like. This new approach has a serious cost implication for the respondent.


[7] This new issue is of importance to the applicant and thus justifies the grant of leave to appeal. I do not deal with the other grounds of appeal. It would be prudent that all the issues be canvassed on appeal.

The applicant never indicated to which court of appeal the matter should be referred to.

[8] There are many different approaches in the various High Courts to the appropriate amount of detail required in the affidavit in support of summary judgement. There is also very little case law as to the amount of detail required when a cessionary sues. I find that this is an appropriate case to be referred to the Supreme Court of Appeal.

THE ORDER

1. The application for leave to appeal to the Supreme Court of Appeal is granted.
2. Costs in the cause of the appeal.

A handwritten signature, appearing to be 'VJ', is written over a horizontal line.

VICTOR J

5 June 2013

Counsel on behalf of the applicant Adv Els

Counsel on behalf of the respondent Adv Riley