IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE
CASE NO: 17121/2011

In the matter between:

FIRSTRAND BANK LTD **Plaintiff**

and

TRUSTEES FOR THE TIME BEING OF THE HUGANEL TRUST **Defendant**

CORAM	:	**D M DAVIS J**
JUDGMENT BY	:	**DAVIS J**
FOR THE PLAINTIFF	:	**ADV DICKERSON SC**
INSTRUCTED BY	:	**WERKMANS ATTORNEYS**
FOR THE RESPONDENTS	:	**ADV J MULLER SC**
INSTRUCTED BY	:	**VAN DER SPUY CAPE TOWN**
DATE OF HEARINGS	:	**10 NOVEMBER 2011**
DATE OF JUDGMENT	:	**15 NOVEMBER 2011**

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CASE NUMBER: 17121/11

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In the matter between:

FIRSTRAND BANK LTD Plaintiff

and

TRUSTEES FOR THE TIME BEING

OF THE HUGANEL TRUST AND 4 OTHERS Defendant

J U D G M E N T

DAVIS, J

Introduction

The plaintiff instituted an action for payment by one Huganel and 5th Defendant, jointly and severally, in the amount of R15 215 877,25 and interest thereon at the rate of 11% per annum calculated daily and compounded monthly from 7 July 2011 to date of payment.

The defendant entered an appearance to defend and the plaintiff applied for summary judgement, and thus for the relief which I have set out above.

The defendants filed an affidavit opposing summary judgment which was deposed to by Mr Hugo Lamprechts, acting both in his personal capacity as 5th defendant and on behalf of Huganel.

The plaintiff's cause of action against Huganel and 5th defendant appears to rest on the following:

1. On 26 August 2010, the plaintiff and Huganel concluded a written loan agreement in terms of which Huganel was afforded and *ad hoc* term facility with a maximum of R14,2m repayable in six months.

2. In the event of Huganel's failure to pay any amount owing to the plaintiff when due or in the event of the debt exceeding the sum of R14,2m, the plaintiff would be entitled to withdraw or terminate the facility and claim immediate repayment of the full outstanding balance.

3. Huganel failed to repay the required amounts within the specified period and the amount owing as at 7 July 2011 amounted to R15 215 877,12 which clearly exceeded the stipulated maximum of R14,2m. Notwithstanding demand for the amount there has been a refusal or a failure to make payment thereof.

4. Fifth defendant bound himself to plaintiff as surety and co-principal debtor in respect of these debts in terms of a suretyship agreement which was executed on 14 March 2008.

5. Hugonel, the fifth defendant, therefore are liable for the amount which is claimed together with interest thereon.

In the opposing Affidavit to which I have made reference, Defendants have raised three central defences:

1. A point *in limine* that the application for summary judgment was defective because the deponent to the affidavit filed in support thereof was a person who could not swear positively to the facts and verify the cause of action and the amount claimed.

2. Whilst the terms of the loan are not disputed there was an agreement between plaintiff and Huganel: sell one or two of the properties in the trust in order to extend the facility rather than converting it to a normal mortgage facility which arrangement had already been put into partial effect.

3. In relation to the quantum, an amount of R1 220 614,64 was paid on account of Huganel's indebtedness on 19 September 2011.

With this introduction to the dispute and the papers which were placed before this court, I turn to deal with the *in limine* point. Rule 32(2) of Uniform Rules of Court, requires an affidavit in support of an application for summary judgment be made "by any ... person who can swear positively to the fact verifying the cause of action in the amount it claimed."

Mr Botha, who deposed to the affidavit on behalf of the plaintiff, is employed by the plaintiff as a litigation administrator. In his affidavit, he not only states that he has knowledge of the facts set out in the summons and in the particulars of claim but goes on to say:

"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."

According to Mr Dickerson, who appeared on behalf of the plaintiff, all the relevant facts are documented. He contended that the known terms thereof, the suretyship and its terms and the amount owing are demonstrated by virtue of the bank's records and could be clearly established from all the documents to which Mr Botha claimed to have regard. Furthermore, none of the facts were disputed by the defence. Even the quantum of the debt was left unchallenged save for the reference to a payment of R1,22m made on the account and paid the day before the deposition by Mr Botha of the affidavit to which I have made reference.

In Mr Dickerson's view, this affidavit met the requirements of the Rule. In support thereof, he referred to the decision of Standard Bank v Secatsa 1999(4) SA 229 (C) in it was held that:

> "Firsthand knowledge of every fact which goes to make up the Plaintiff's cause of action is not required...Where the Plaintiff is a corporate entity the deponent may legitimately rely on for his or her personal knowledge of at least certain of the relevant facts...on records in the company's possession."

In addition he referred to Nedcor Bank Limited v Behardien 2000(1) SA 307(C):

> "Although the deponent is a legal advisor one must also bear in mind that since it would appear that the claim against the Respondent has been established by reference to the books of the company and records of the Applicant, the legal advisor is probably in as good a position as anyone else to swear to the fact of the case."

For these reasons, Mr Dickerson submitted, that the *in limine* point was devoid of any merit as the point had already been settled by the cases to which I have made reference.

Mr Muller, who appeared on behalf of the defendant submitted that the bank's claim against first defendant, was based on a series of agreements concluded between the Trust as principal debtor during the period March 2008 to August 2010. These agreements were concluded in Stellenbosch where various known facilities were all countersigned by Megan Ho-Kim and Fanie Steenkamp who had acted on behalf of plaintiff.

The plaintiff's affidavit filed in support of its application for summary judgment was deposed to by Mr Botha. Mr Muller

pointed out that Mr Botha described himself as employed by the bank as a litigation administrator at 5 Merchant Place, 9 Fredman Drive, Sandton. The point that Mr Muller made, was that there were negotiations which had taken place, prior to the conclusion of the contract, that as will become evident later in this judgment, this had a material bearing on the case which had been raised by the defendants. Further personal knowledge, which is required in terms of the Rule, cannot simply be derived without more from the documents which constituted the contractual basis of the relationship.

In support of this more restrictive approach to Rule 33(2), Mr Muller referred to the manner in which courts have described summary judgment as "extraordinary", "stringent" and "drastic". Trust Bank van Afrika Bpk v K B Haarhoff en 'n Ander 1986(4) SA 446 (NKA) 451, Joob Joob Investment (Pty) Ltd v Stocks Mavundlazek 2 Adventure 2009(5) SA 1 (SCA) at 12. Further, he noted that in the Joob Joob case the summary judgment procedure was held not to intend to "shut (the defendant) out from defending unless is very clear indeed that he had no cause of action," at 11.

According to Mr Muller, because of the summary nature of the remedy, it is appropriate that the requirements of the Rule be strictly construed and that the verifying affidavit be carefully

scrutinised by the Court to ensure that it comply fully with the requirements of Rule 33(2).

In this regard he referred to the judgment of Corbett, JA (as he then was) in Maharaj v Barclays National Bank 1976(1) SA 418 (A) 423:

> "The mere assertion by the deponent that he "can swear positively to the fact" (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 his words...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 is often being 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 either the plaintiff himself or by someone who has personal knowledge of the facts."

On the basis of this dictum, Mr Muller submitted that it was not sufficient for the deponent to state only that he could verify the facts; rather he was required to verify them. See also Mmabato Food Corportation (Pty) Ltd v Fourie en Andere 1985(1) SA 318 (T) at 320. Similarly, the requirement that the deponent must be someone who in fact can swear positively to the facts is a pre-requisite for a successful application under Rule 33.

To return to the Maharaj case,which has some considerable relevance to the present dispute, Corbett, JA noted:

> "The relevant facts would, therefore, be the conclusion of the contract and the terms thereof, the deposits in and withdrawals from the defendant's current account at the Stanger branch of the plaintiff's bank and the interest debits resulting in the debit balance as at that date alleged in the summons... and the further making of a demand for payment."

Coprbett, JA then observed -

"in regard to certain of these facts it would be difficult if not impossible for any one person to have first hand knowledge of every fact that goes to make up the plaintiff's course of action...In this case the deponent, Mr Mason, does not specifically state that he had personal knowledge of the overdraft arrangements made by the defendant with manager of the Stanger branch of the bank and the state of the 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 this branch." at 424 A-E

Corbett JA thus found that it was not clear as to the precise duties or indeed the status of an assistant to the branch manager. Accordingly, the fact that Mr Mason had sworn positively that the defendant was liable to plaintiff on the claim and for the amount which had been detailed on the summons was:

"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 at the bank and the state of his current account," at 424F

He did insert the following caution:

"[t]he affidavit does not specifically allege that Mr Mason was not present when the arrangements were made or that he could not have acquired first hand knowledge of the arrangement in the course of his duties e.g. in a discussion with the defendant himself. Finally, it appears from the rest of defendant's affidavit that the real dispute relates not to the fact overdraft facilities were granted to him, but to the amount actually owed by him on the 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 424G-H

It appears therefore from this leading case, that Mr Muller was correct in his submission that personal knowledge is not invariably to be equated with a reading of the documents as provided to the reader.

In the present case the defendant states as follows in his affidavit:

> "I submit with respect that it was at all relevant times agreed between the applicant and the Trust that the so-called RMB *Ad Hoc* Credit Facility would upon the expiry thereof be converted to a so-called 'Single Mortgage Redemption Facility' over a period of 138 months with an interest rate of prime less 1%. In other words, at the expiry of the term of six months referred to in the so-called fourth amended loan agreement to the particulars of claim, the trust would be granted the opportunity to repay the full amount of the debt over a period 138 months (11½ years) at a reduced interest rate in the same manner as any other mortgage loan over a property. In the current instance the mortgage loan would have been over no less that ten properties referred to in the particulars of claim and the Trust would have been granted the opportunity to settle the mortgage loan over a period of 138 months as stated above. This was explicitly agreed to with the applicant who at all relevant was represented by Mr Fanie Steenkamp...

The RMB *ad hoc* credit facility referred to as the fourth amended loan was due to expire six months after the date of the facility having been granted namely on 26 February 2011 upon which date the conversion to the Single Credit Mortgage Redemption Facility was to take place.

I represented the Trust in its dealings with Applicant and I had at all relevant times dealt with Steenkamp, a structured lending specialist in the employ of the Applicant. Steenkamp at all relevant times had personal knowledge of the matter and could easily have deposed to the affidavit in support of the application for summary judgement. It was furthermore Steenkamp himself who assisted the Trust in obtaining the facility and who negotiated with the Trust in respect of the conversion of the facility into a normal mortgage loan facility. On 28 February 2011 Steenkamp wrote an e-mail to me... The e-mail refers to so-called *termyn lening* and it did not really make sense to me as I was under the impression that the facility would at the end of February 2011 automatically be converted to a normal mortgage loan facility as explained above. Be that as it may, the proposal by Steenkamp

which the Trust agreed to,was to sell one or two of the properties of the Trust in order to extend the facility rather than converting it to a normal mortgage loan facility. For this reason one of the properties of the Trust was marketed for sale to which Applicant agreed and sold for an amount of R1 220 614.64 prior to the issuing of the summons herein.

In support of the aforementioned, I annex hereto a guarantee issue by Standard Bank on behalf of the purchase of the property... as well as a letter from the Applicant to the transferring attorneys who were also the Trust attorneys of record...The sale was effected by an agreement in the Trust represented by myself and applicant represented by Steenkamp.

Clearly the one hand of the Applicant did not know what the other was doing if the meaningless content of Annexure POC21 to the particulars of claim is taken into account."

These averments would appear, in my view, to tilt the balance back within the border to which Corbett JA had referred in Maharaj; that is, if the defendant's version is read as a whole, there are averments concerning the contractual relationship

between the parties which could not have been within the personal knowledge of Mr Botha and could not simply be derived from the written documentation to which Mr Botha had referred.

Post Maharaj jurisprudence.

The difficulty with this conclusion is that a number of more recent decisions have grappled further with this problem of personal knowledge. In Shackleton Credit Management (Pty) Ltd v Microsone Trading 88 CC and another 2010(5) SA 112 (KZP), Wallis J (as he then was), said at 115:

> "What is clear is that the deponent of summary judgment affidavit is expected to be someone who had knowledge of the facts in relation to the underlying claim.
>
> As Theron J pointed out in Fischereigesellschraft in order to satisfy the requirements that the Affidavit be made by a person who can swear positively to the facts, it is essential for the deponent to have personal or direct knowledge regarding the facts alleged in the particulars of claim, and it is improper for the deponent to make statements based only on his own information and belief.

The requirement 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 thus a 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 could swear positively to the facts giving rise to the claim."

Wallis J then continues at 117:

"It may be that the effective cases such as these is as Van Heerden AJ said in Standard Bank of SA Limited v Secatsa Investments (Pty) Ltd and Others that first hand knowledge of every fact which goes to make up the applicants course 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 that 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 course of action and the facts giving rise to it."

In an even more recent decision, Ebersohn AJ dismissed an application for summary judgment by a bank on the basis that the verifying affidavit failed to satisfy the requirement that the deponent should be possessed of personal knowledge of the facts relating to the course of action and the amount claimed, notwithstanding the deponent described herself as the bank's: "manager arrears – legal" and that accordingly she had: "personal knowledge of the facts and records related to this matter, the course of action as well as the amount owing."

In the course of his judgment Ebersohn AJ said:

> "An employer of a bank like Van Mohlman will clearly not acquire personal knowledge of every one of millions of accounts with the employed bank and the supporting documents thereto and would clearly not be able to testify with regard

thereto in an open court. To argue that the evidence becomes relevant and acceptable just because it is before the court by way of an affidavit will 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 hearsay 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." First Rand Bank Limited v Beyer 2011(1) SA 196(GNP) at 203.

These two decisions follow the approach which was set out by Corbett JA in Maharaj or, certainly the interpretation which I have accorded to this important judgment.

By contrast, in Standard Bank Limited v Kroonhoek Boerdery CC and others (unreported decision NGP of 1/8/2011) Tuchten J was faced with an application for summary judgment against respondents which was based on a loan agreement. The application for summary judgment was supported by an affidavit sworn to by a Ms Harripersad in which she said the

following:

> "I am employed at the Standard Bank of South Africa Limited as manager, business recovery, 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. I confirm that all files, documents and records pertained in this matter are in my possession and under my control. I can swear positively that the facts therein stated, 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 contents and the correctness of the averments contained in the summons and hereby verify the facts, course of action and the amounts claimed.
>
> In my opinion the first, second and thirds respondents/defendants do not have a *bona fide* defence and that the action of notice of intention to Defend has been delivered solely for the purpose of delay."

In short, a fairly standard affidavit had been deposed to and

similar arguments were raised as to whether this particular set of averments complied with Rule 33(2).

In dealing with a series of arguments similar to those which I have outlined, Tuchten J said at para 10:

> "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 of the bank but whether she can competently testify to those relevant to the case in question. In the present case, Ms Harripersad, is the official with the applicant and the head of the department responsible for the recovery of the amounts which the applicant regards as being in arrears. She had the means to acquire personal knowledge of the contents of the documents attached to the statement of claim and she says in effect that she did so." para 10

Referring to the Maharaj decision, Tuchten J said 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." para 11

He therefore accepted:

> "The enquiry is thus ultimately fact driven. It cannot be disputed as was pointed out in Beyer at 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... It is true that in the present case Ms Harripersad probably was not present when the transaction given rise to the applicants cause of action was 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...But these should not be elevated to essential requirements the absence of which could be fatal to the Applicant's case." para 13.

Accordingly, the learned Judge concluded that there was no factual allegation in the plaintiff's statement of claim in respect

of which the deponent would not have been able to testify in open court. In short, she would have been able to testify on all the relevant factors which justified the claim which had been brought by the plaintiff. See para 15.

See also Standard Bank of SA Limited v Hanrit Boerdery CC and others [2011] ZAGPPHC 120 which follows the decisions in Shackleton and Beyer. In this case, Southwood J at para 7 said:

> "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 fact and can verify the course of action and the amount of any claim and can express an opinion if defendant has no *bona fide* defence of the action and has delivered a notice of intention to defend solely for the purpose of delay."

On this basis, the learned Judge found that the deponent could not claim to have sufficient personal knowledge and thus summary judgment was refused.

There is one further decision to which I am required to make

reference. That is a judgment in this Division of fairly recent origin in Chandler Cole (Pty) Ltd v Fruin (Case 168504/2011), a judgment of Eloff AJ.

The learned Judge carefully analysed the various decisions to which I have made reference and concluded, in essence, on the basis of an analysis of the Beyer judgment:

> "The learned Judge in my respectful view over-emphasised the necessity for providing detailed evidence on the factual materials supporting the knowledge of the deponent to an affidavit supporting an application for summary judgment in order to do so." para 14

However in this case, notwithstanding the approach adopted, the learned Judge examined the affidavit which had been deposed to in support of the application for summary judgment and found that there was at least:

> "A rather awkward and incomprehensible statement in paragraph 1, that the facts therein contained being within my own personal knowledge alternatively obtained only from the Applicant's books and records which fall under

my custody and control."

Accordingly, Eloff, AJ found that the deponent who, on the basis of this averment, either had personal knowledge or he did not have personal knowledge – had obtained personal knowledge from the books of account. In Eloff,AJ's view:

> "This type of equivocal approach to the matter is in my view unacceptable." para 16.

Accordingly summary judgment was refused.

What is one to make of these conflicting judgements 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/her/its day in court, there are many cases where the plaintiff is entitled to relief on the basis that *ex facie* the papers which have 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 have been placed before 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 these summary judgment applications are brought by large corporations and, accordingly, it may well be that firsthand knowledge of every fact cannot and should not be required, each a 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 in so far 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.

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 upon 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. That special condition reads thus:

> "4.1 Upon expiry of the single credit *ad hoc* facility, it will be converted into a Single Credit Mortgage Redemption Facility over a period of 138 months with an interest rate of prime less 1%."

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 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 defendants' 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 33(2). On the Maharaj line of reasoning, the defendant has 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 plaintiffs. 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.

For these reasons therefore, the Plaintiff's application for summary judgment **IS REFUSED AND THE DEFENDANTS ARE GIVEN LEAVE TO DEFEND. THE PLAINTIFF SHALL PAY THE COSTS OCCASIONED BY THE OPPOSED APPLICATION INCLUDING THE COSTS RELATING TO THE PREPARATION OF HEADS OF ARGUMENT. ALL OTHER COSTS SHALL STAND OVER FOR LATER DETERMINATION.**

DAVIS, J