COVER PAGE

ABSA BANK LTD v FUTURE INDEFINITE INVESTMENTS 201 (PTY) LTD AND OTHERS (WESTERN CAPE DIVISION CASE NO. 20266/2015)

Coram:	BINNS-WARD J
Date of hearing:	7 September 2016
Judgment delivered:	12 September 2016
Plaintiff's counsel:	J.W. Jonker
Plaintiff's attorneys:	Marais Muller Hendricks Tyger Valley
Defendants' counsel:	Paul Tredoux
Defendants' attorneys:	KJ Bredenkamp Attorneys Cape Town

Summary judgment *– Compliance with Uniform Rule 32(2). Supporting affidavit must amount to more than 'mere assertion' by the deponent; the affidavit must provide the court with a sufficient basis in the context of the papers read as a whole to be able to qualitatively assess the cogency of the deponent's averment that he/she is able to swear positively to the facts verifying the cause of action.*

Practice - Western Cape Division *Opposed summary judgment applications to be disposed of in the Third Division save in exceptional circumstances. Costs of hearing in the Fourth Division disallowed when matter postponed from the Third Division for hearing in the Fourth Division when no exceptional circumstances existed justifying departure from the established practice.*

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 20266/2015

Before: The Hon. Mr Justice Binns-Ward
Date of hearing: 7 September 2016
Date of judgment: 12 September 2016

In the matter between:

ABSA BANK LTD Plaintiff

and

FUTURE INDEFINITE INVESTMENTS 201 (PTY) LTD First Defendant

DAVID CLIFFORD BIRD Second Defendant

WHITE SANDS MARINE (PTY) LTD Third Defendant

JUDGMENT

BINNS-WARD J:

[1] This is an application by the plaintiff, Absa Bank Limited, for summary judgment against the first defendant for payment of the amount of R617 597,47, together with *mora* interest thereon at 10,25% per annum from 27 June 2015 to date of payment, such interest to be calculated daily and capitalised monthly. The claim is founded on the first defendant's outstanding obligations in terms of a loan agreement concluded on 7 November 2008. A copy of the agreement is annexed as annexure POC 1 to the combined summons.

[2] The plaintiff also seeks an order declaring Erf 1…., Vredenburg, to be directly executable in satisfaction of the aforementioned money claim. Erf 1….. was given by the first defendant as security in respect of its obligations under the aforementioned loan by means of a first mortgage registered in favour of the plaintiff in the Cape Town deeds registry in terms of mortgage bond number 1584/09 in January 2009.

[3] Summary judgment is also sought against the second and third defendants, who stood surety for the first defendant. The liability of the second defendant as surety is limited in terms of the applicable deed of suretyship to R1 150 000, together with interest and costs.

[4] The application is opposed by the defendants on two bases. Firstly, it is contended that the supporting affidavit deposed to by Patricia Elizabeth Beyers, a manager in the plaintiff's Corporate and Business Bank, Support and Recovery Department, does not comply with the requirements of rule 32(2). In particular, it is maintained that it does not appear from the affidavit that the deponent had the required personal knowledge of the relevant facts to be qualified to 'swear positively to the facts verifying the cause of action'. As to the merits of the claim, the defendants contend that the plaintiff has bound itself to refinance the debt. For the reasons given below, the court cannot reach the merits of the claim in summary judgment proceedings if the first basis for the defendants' opposition to the application is good.

[5] The supporting affidavit goes as follows:

> I, the undersigned,
> Patricia Elizabeth Beyers
> do hereby make oath and say that:
>
> 1. I am a Manager in the Absa Corporate and Business Bank, Support and Recovery Department of the abovenamed Applicant. In my aforesaid capacity I am duly authorised to depose to this affidavit on behalf of Applicant.
> 2. Unless the contrary is clearly indicated, I have knowledge of the facts hereinafter stated as a result of my access to and regard of (*sic*) all the relevant documents and data which the Applicant has electronically captured and stored which pertain to the cause of action against the Respondents.
> 3. In the light of the aforesaid, I can and do hereby swear positively to the facts verifying the cause of action and the amount as claimed in the summons and confirm that the Respondents are indebted to the Applicant in the amount of R617 597,47 plus interest thereon as set out in the Applicant's Particulars of Claim'.
> 4. In my opinion the Respondents do not have a *bona fide* defense (*sic*) to the action and have entered an appearance to defend solely for the purpose of delay.

It will be noted that the qualification at the beginning of paragraph 2 is purposeless, as there is nothing to the contrary indicated anywhere in the affidavit, whether 'clearly', or at all. Moreover, there are no 'facts hereinafter stated' and there is nothing to indicate definitively which documents and data the deponent considered to be relevant. She does not say positively that she has read the summons.

[6] The sloppy drafting of affidavits made in support of applications for summary judgment is to be deprecated. If a deponent has shown herself to be willing to sign a deposition that is so vacuous in obvious respects, how seriously is the court meant to take her word? Why should the court not be concerned that she has been just as careless in her consideration of 'all the relevant documents and data' and the summons referred to in her averments? Slapdash supporting affidavits in summary judgment applications give cause for concern about their bona fides, and parties, such as the plaintiff in this case, who rely on them should not be surprised if their applications are refused in the exercise of the judge's discretion on this basis alone. Improper attention to the drafting of supporting affidavits in these cases can not only stultify the procedure to the detriment of the plaintiffs, but can also be prejudicial to the efficient disposal of cases in the court system.

[7] Corbett JA made it clear 40 years ago in *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A) at 423D-E, that '[t]*he mere assertion by a deponent that he "can swear positively to the facts" (an assertion that merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are <u>good grounds</u> for believing that the deponent <u>fully appreciated</u> the meaning of these words*' (my emphasis). As mentioned, in the current case, the affidavit gives no indication of what the deponent considered to be 'all the relevant documents and data' and the court thus has no basis to qualitatively assess the cogency of the averment. The averments amount to '*mere assertion*'.

[8] However, as the judgment in *Maharaj* also indicated (at p.423H), '*Where the affidavit fails to measure up to* [the] *requirements* [of rule 32(2)], *the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court (see <u>Sand and Co. Ltd. v Kollias</u>* [1962 (2) SA 162 (W)] *... at p.165). 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 before it*'.

[9] The affidavit was deposed to in Johannesburg and it may be inferred that the deponent employee is based there. The relevant transactions took place in the Western Cape. It may

therefore also be inferred, as indeed indicated in the affidavit, that the deponent's knowledge of the facts germane to the cause of action, such as it was, was derived entirely from her consideration of '*all of the relevant documents and data*' that the plaintiff has electronically captured. It is now established that that is, in principle, unexceptionable in a case like this; see *Trustees for the time Being of the Delsheray Trust and Others v ABSA Bank Limited* [2014] 4 All SA 748 (WCC) and also the provisions of s 15 of the Electronic Communications and Transactions Act 25 of 2002 (to which, curiously in the circumstances, no reference was made in the Full Court's judgment).

[10] *Delsheray* does not, however, stand as authority that bald averments of the nature made in this case are sufficient to satisfy the requirements of rule 32(2). The founding affidavit in *Delsheray* read as follows:

> 1) I am a Specialist employed at the Retail Bank Collection Division of the Plaintiff / Applicant. I am duly authorised to depose of this Affidavit. All the data and records, relating to the Applicant's/Plaintiff's action against the Defendant are under my control and I deal with this account on a day to day basis. The facts contained herein are within my personal knowledge and are both true and correct.
>
> 2) Unless the contrary appears, I have knowledge of the facts hereinafter stated, either personally or as a result of my access to all relevant computer data and documents pertaining to the Trust's mortgage loans, account number 4056939083.
>
> 3) I hereby verify the facts and cause of action stated in the Summons and the Particulars of Claim to the Summons as true and correct and verify in particular, that the Respondents/Defendants jointly and severally the one to pay the other to be absolved are indebted to the Plaintiff in the sum of R1 588 208,61 on the grounds stated in the Summons.
>
> 4) In my opinion the Respondents/Defendants, jointly and severally, the one paying the other to be absolved, do not have a *bona fide* defence to the Applicant's/Plaintiff's claim and their appearance to defend has been entered solely for purpose of delay. (Underlining supplied.)

The affidavit was not a model of draftmanship and quite thin on substance, but the deponent in that matter did make it clear that he dealt with the account in question on a day to day basis and thereby gave the court reason to believe that he had read the summons and particulars of claim on an informed basis. The distinguishing features of the supporting affidavit in *Delsheray* show that the submission by the plaintiff's counsel that I was bound by the principle of *stare decisis* to accept the supporting affidavit in the current case as sufficiently compliant with the requirements of rule 32(2) was misconceived. The *ratio decidendi* of *Delsheray* concerned the admissibility of evidence adduced on the basis of a deponent's reference to computerised records, as distinct from his first-hand knowledge of the

underlying facts. Whether what the deponent states on the basis of such records is adequate for the purposes of rule 32(2) will depend on the content of the affidavit. Each case will have to be individually assessed.

[11] The judgments of the appeal court in *Rees and Another v Investec Bank Ltd* 2014 (4) SA 220 (SCA) and *Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited* [2014] ZASCA 79 (29 May 2014), which the plaintiff's counsel invoked to support his attempt to defend the adequacy of the supporting affidavit in this case, in point of fact both serve to demonstrate that more was required.

[12] It is evident upon a proper reading of the judgment in *Rees* that the appeal court was persuaded to accept the supporting affidavit in that particular case as sufficient on the basis of the cumulative effect of a number of considerations. The affidavit in that matter went as follows:

> 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.'
>
> [Emphasis with italicisation provided in the appeal court's judgment.]

The supporting affidavit in *Rees* was fuller in material respects than the affidavit in the current case. The appeal court also regarded it as material that the contract documents on which the claim was based had been annexed to the summons and that the deponent appeared to have had access to the other relevant documentation in *the ordinary course of her duties* (rather like the bank manager in *Maharaj*).

[13] It was also apparent on the papers before the court in *Rees* that the deponent to the supporting affidavit '*had been corresponding with the appellants' 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'.[1] It is particularly the latter consideration that seems to have satisfied the appeal court that the deponent had been in a position sufficiently to swear positively to the facts verifying the cause of action.[2] The approach of the appeal court in *Rees* was thus in all respects reconcilable with that adopted by the court in *Maharaj* (at pp. 422-424) in dealing with the point raised *in limine* in that case concerning non-compliance by the plaintiff with rule 32(2). It was also in line with the approach of Miller J in *Barclays Bank Ltd v Love* 1975 (2) SA 514 (D) at 516-7, referred to with approval in *Maharaj* at 424A-D.

[14] There was plainly material of substance before the court in *Rees* to satisfy it that the deponent to the supporting affidavit had sufficient knowledge of the facts. In the current matter the court is required to assume that by the 'relevant documents' the deponent meant the documents attached in copied form to the summons. The affidavit does not expressly state as much. The court is also not informed what the deponent considered to be the relevant electronic data. One might assume that the captured data concerns the transactional history of the loan account, but the opacity of the entirely generic references by the deponent to the material that she had regard to means that making that assumption requires educated guesswork rather than reliance on evidence adduced. That is unsatisfactory.

[15] In *Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited* [2014] ZASCA 79 (29 May 2014), it was pointed out that where the supporting affidavit is deficient by reason of a failure to comply punctiliously with the letter of rule 32, the deficiency might be cured by a consideration of the contents of the verifying affidavit together with the other documents properly before the court 'at the end of the day'.[3] As apparent from what has been said earlier in this judgment, that echoed what had been said in *Maharaj*. As Swain AJA explained '*The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is <u>sufficiently reliable</u> to justify the grant of summary judgment.*'[4] (Emphasis supplied.) The learned judge did not purport to depart from the judgment of Corbett JA in *Maharaj*, in which, approving the statement of the requirements of rule 32(2) by Theron J in this court in *Fischereigesellschaft F. Busse & Co. Kommanditgesellschaft v. African Frozen Products (Pty.) Ltd*., 1967 (4) SA 105 (C) at p. 108, it was emphasised that '[w]*hile undue formalism in procedural matters is*

[1] See *Rees* at para 14.
[2] Ibid.
[3] See Maharaj supra, at 423 *in fine* quoting from
[4] *Stamford Sales* supra, at para 11.

always to 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'. Corbett JA went on to state '*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 by the plaintiff himself or by someone who has personal knowledge of the facts*' (emphasis supplied).

[16] The reiterated use by Corbett JA of the word 'important' in this passage (at p.423B-H) also illustrates that plaintiffs such as banks that are not in a position to support their applications for summary judgment with affidavits by any one person who has direct personal knowledge of all the material facts, but which do have comprehensive electronic records of all the pertinent documents and transactional evidence, would be well advised to avail of the Electronic Communications and Transactions Act in the manner advised in *Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC),[5] rather than hoping, that in an opposed application like the current matter where the defendants take the point of non-compliance with rule 32, a judge might be persuaded, on a conspectus of all the papers after the opposing affidavit has been delivered, that there is enough to go on.[6] Use of the relevant provisions of the Act would entail the deponent identifying the 'data messages' (i.e. electronic records) to which reference is made with specificity.

[17] The supporting affidavit in *Stamford Sales* was quoted at para 8 of the appeal court's judgment. It went as follows:

> I, the undersigned
> JANE WILLIS-SCHOEMAN
> do hereby make oath and state:
>
> 1. I am the National Credit Manager of the Applicant herein and I am duly authorised to depose to this affidavit on behalf of the Applicant.
> 2. The facts contained herein are both true and correct and are within my personal knowledge and belief.
> 3. 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

[5] At para 20-21. To the extent that the observations at para 23-25 of the Full Court's judgment in *Delsheray* supra, might suggest that the judgment in *Le Roux* had held that institutional plaintiffs such as banks could not rely on computer data in their supporting affidavits in summary judgment applications, the content of para 19-21 of *Le Roux*, which is to the contrary effect, appears to have been overlooked.

[6] Compare the remarks I made in similar circumstances in *Absa Bank Ltd v Walker* [2014] ZAWCHC 92 (17 June 2014) at para 5-8.

> 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. I have read the Combined Summons in this action and can and hereby do swear positively to the facts and verify all the causes of action and the total amount claimed by the Applicant therein.
>
> 5. I verily believe that the Respondent does not have a *bona fide* defence/defences to any of the Applicant's causes of action, and that Notice of Intention to Defend has been entered solely for the purposes of delay.
>
> WHEREFORE I pray that the Court will grant Summary Judgment against the Respondent in favour of the Applicant in terms of the Notice to which this Affidavit is annexed

It is evident that it contained a more detailed account and, thereby, provided a much firmer basis for the court to have inferred sufficient knowledge by the deponent of the facts of the case than does the supporting affidavit in the current matter. He stated that he had the plaintiff's file pertaining to the matter in his possession and under his control. His averments conveyed enough to confirm that he had indeed read and was *au fait* with its contents. They did this by making express reference to certain of the contents of the file that were germane to the claim. He also expressly stated that he had read the summons.

[18] The affidavit in the current matter, by contrast, is more closely comparable to that which I found to be inadequate in *Le Roux* supra.[7] It does not escape notice that the plaintiff in the current matter was also the plaintiff in that matter, which suggests that little notice appears to have been taken of what was said there.

[19] I think it bears emphasis that the judgment in *Stamford Sales* should not be misread as having suggested that it is no longer 'important', as Corbett JA put it, for an applicant for summary judgment to comply with rule 32(2). What *Stamford Sales* did hold, consistently with *Maharaj*, was that it was not necessary for the deponent to the founding affidavit to have first-hand knowledge of all the material facts. Swain AJA used the term 'personal knowledge' at para 11, but I think it is quite clear from the context that by that the learned judge meant first-hand knowledge, as distinct from knowledge derived from relevant and prima facie reliable sources.

[20] The potential for uncertainty arising out of the use interchangeably in *Maharaj* of the terms 'personal knowledge' and 'direct knowledge' (to which might have been added 'first-hand knowledge') when the rule does not employ any of those expressions was remarked

[7] See *Le Roux* at para 21 in particular.

upon in *Delsheray* at para 54. The rule requires the deponent to be able to 'swear positively' to the facts.

[21] Corbett JA held that for a person to be able to swear positively to the facts they had, 'generally speaking', to be within his 'personal knowledge'. The learned judge of appeal's quotation with approval of the extract from Miller J's judgment in *Love* supra, *loc. cit.*, made it apparent, however, that he did not equate 'personal knowledge' with knowledge necessarily based on actual personal involvement in, or first-hand experience of, the underlying transactions. Thus, evidence predicated on personal knowledge derived from reference to records, which in the circumstances a court might reasonably accept would have been kept reliably and accurately, would be admissible for the purposes of compliance with rule 32(2).

[22] The judgment in *Stamford Sales* did no more than confirm that incidence of the judgment in *Maharaj*. It was in that context that it pointed out that '[t]*hose high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this court in* <u>*Maharaj*</u>'[8] and further '[t]*o insist on personal knowledge by the deponent to the verifying affidavit on behalf of the cessionary of all of the material facts of the claim of the cedent against the debtor, emphasises formalism in procedural matters at the expense of commercial pragmatism*'.[9]

[23] The axiom that adequate compliance with rule 32(2) is important is also confirmed in the Full Court's judgment in *Delsheray* supra, where at para 33, the court disapproved the approach adopted in *FirstRand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC), on the basis of its inconsistency with the reasoning of Wallis J at para 25 of *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP).[10] On the approach in *Huganel Trust*, non-compliance with rule 32(2) could never be raised by a defendant as a self-sufficient basis for opposing an application for summary judgment. It is,

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[8] *Stamford Sales* at para 11.
[9] *Stamford Sales* at para 12.
[10] In *Shackleton*, at para 25, Wallis J held, '*Insofar as the learned judge suggested that a defective application can be cured because the defendant or defendants have dealt in detail with their defence to the claim set out in the summons, that is not in my view correct. That amounts to saying that defects will be overlooked if the defendant deals with the merits of the defence. It requires a defendant who wishes to contend that the application is defective to confine themselves to raising that point, with the concomitant risk that if the technical point is rejected, they have not dealt with the merits. It will be a bold defendant that limits an opposing affidavit in summary judgment proceedings to technical matters when they believe that they have a good defence on the merits. The fact that they set out that defence does not cure the defects in the application, and to permit an absence of prejudice to the defendant to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective, then* <u>*cadit quaestio*</u>*. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons*'.

of course, quite apparent from the judgment in *Maharaj* that an allegation of substantial non-compliance with the requirements of rule 32(2) was treated as a point *in limine*, quite distinct from the allegations in the opposing affidavit set forth in terms of rule 32(3). Adequate compliance by the plaintiff with rule 32(2) is a juristic prerequisite to a court's ability to entertain an application for summary judgment. The supporting affidavit is, after all, the evidence adduced by the plaintiff in support of its case. Indeed, that is the reason why it was necessary for the appeal court in *Maharaj* first to dispose of the question as a point *in limine* before it engaged with the question whether a defence had been made out prima facie. Were the legal effect of non-compliance with rule 32(2) different, *Maharaj* could have been decided solely on the basis that the defendant had not made out a sustainable defence; a determination of the adequacy of the plaintiff's compliance with the sub-rule would not have been necessary.[11]

[24] In the result, the application for summary judgment in the current matter cannot succeed by virtue of the plaintiff's failure to comply adequately with rule 32(2). An order refusing the application will follow accordingly.

[25] Although I heard argument on the merits the case, it would be inappropriate in the circumstances to say anything that might influence their determination at the trial. It does seem to me, however, that the nature and ambit of the dispute between the parties adumbrated in the opposing affidavit is such that the action should be amenable to being disposed of on a stated case in terms of rule 33. I suggest that this observation should be drawn to the attention of the case manager judge.

[26] As far as the costs of the summary judgment application are concerned, I intend to follow the approach adopted in *Le Roux* supra, at para 23. Although the application for summary judgment has failed because of the plaintiff's failure to comply adequately with rule 32(2), I do not think it appropriate that a costs order against the plaintiff should necessarily follow. The object of the remedy is to discourage defendants who do not have a *bona fide* defence from delaying the determination of claims and to diminish the clogging effect on the court rolls of trials in matters in which there is no sustainable defence. The defendants' point *in limine* may have been good, but it is a not a point that defendants should be encouraged to take in the abstract. A defendant who does not have a *bona fide* defence to a plaintiff's claim should not profit by taking the point for technical reasons, instead of conceding that he has no

[11] Cf. *Le Roux* supra, at paras 15 and 18.

defence to the claim and submitting to judgment. In the circumstances I shall, subject to the qualification to be dealt with in the next paragraph, direct that the costs of the summary judgment application shall be costs in the cause in the action.

[27] This application came before me in the Fourth Division. It was postponed for hearing in this Division consequent upon an order that the duty judge in the Third Division was persuaded to make by agreement between the parties. The costs involved in a hearing in the Fourth Division are materially higher than those that would have been involved had the matter been disposed of in the Third Division. Counsel for the plaintiff candidly conceded that his fee in this matter would be higher than that he would have charged for arguing the application in the Third Division. It is the practice of this court that opposed summary judgment applications should, save in exceptional circumstances, be determined in the Third Division.[12] There was nothing exceptional about the current matter. The setting down for hearing in the Fourth Division of matters that should properly be disposed of in the Third Division also means that other cases that have to be heard on the opposed motion roll must wait longer in the queue for hearing than they should do. It would be inappropriate in the circumstances for any costs allowed in respect of the hearing on 7 September 2016 to be taxed or recoverable at a level higher than that that would have been allowed on taxation had the matter been argued in the Third Division.

[28] The following orders are made:

1. The application for summary judgment is refused.
2. The costs of the application shall, subject to paragraph 3 of this order, be costs in the cause.
3. The costs attendant on the hearing of the application in the Fourth Division on 7 September 2016 shall be taxed and recoverable, even as between attorney and client, only at the rate that would have been allowed had the application been argued and determined in the Third Division of this court.

A.G. BINNS-WARD

Judge of the High Court

[12] See *Absa Bank Ltd v Walker* supra (n. 6), at para 18

APPEARANCES

Plaintiff's counsel:	**J.W. Jonker**
Plaintiff's attorneys:	**Marais Muller Hendricks**
	Tyger Valley
Defendants' counsel:	**Paul Tredoux**
Defendants' attorneys:	**KJ Bredenkamp Attorneys**
	Cape Town