

**FORM A**  
**FILING SHEET FOR EASTERN CAPE JUDGMENT**

ECJ no: 92

PARTIES:

**NIC'S JOINERY CLOSE CORPORATION**

**Plaintiff**

(With registration number 1995/006361/23)

and

**KAREN TILANA ADLEM**

**First Defendant**

**FREDERICK JACOBUS BRITS**

**Second Defendant**

**HESTER MAGDALENA BRITS**

**Third Defendant**

REFERENCE NUMBERS -

- Registrar: **3350/2006**
- Magistrate:
- High Court: **Eastern Cape Division**

DATE HEARD: **29 March 2007**

DATE DELIVERED: **2 April 2007**

JUDGE(S): **Leach J**

LEGAL REPRESENTATIVES -

*Appearances*

- for the State/Applicant(s)/Appellant(s): **Adv Dela Harpe**
- for the accused/respondent(s):
- 

*Instructing attorneys:*

- Applicant(s)/Appellant(s): **Wheeldon Rushmere and Cole**
- Respondent(s):

CASE INFORMATION -

- *Nature of proceedings* : **Summary Judgment**
- *Topic:*
- *Keywords:*

**THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE DIVISION)**

**CASE NO: 3350/2006**

In the matter between:

NIC'S JOINERY CLOSE CORPORATION

Plaintiff

(With registration number 1995/006361/23)

and

KAREN TILANA ADLEM

FREDERICK JACOBUS BRITS

HESTER MAGDALENA BRITS

First Defendant

Second Defendant

Third Defendant

---

## JUDGMENT

---

### LEACH,J

A plaintiff who wishes to apply for summary judgment is required by Rule 32(2) to file 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 notice of intention to defend has been delivered solely for the purpose of delay” (my emphasis).

It is a source of never ending amazement to me that so many plaintiffs continually find so much difficulty complying with so simple a rule. This is one of those cases.

It is alleged in the summons that:

(a) that during the period 30 January 2004 to 10 October 2005 while the first defendant was employed as its bookkeeper, she stole R328 611,04 from the plaintiff

(b) that on 13 October 2005, the plaintiff concluded a written agreement with the second and third defendants (who are the parents of the first defendant) under which they undertook to repay the amounts the first defendant had stolen, and,

c) that the defendants have not repaid any amount of the stolen money.

The plaintiff therefore claimed payment of the sum of R328 611,04 from the three defendants, jointly and severally, the one paying the others to be absolved.<sup>1</sup> When the first defendant entered appearance to defend, the plaintiff applied for summary judgment. At the hearing of the application, the first defendant neither appeared nor filed an affidavit to attempt to show that she indeed has a *bona fide* defence and, if the plaintiff's affidavit can be construed as being in proper form, there is no reason why summary judgment should not to be granted against her.<sup>2</sup>

But as is so often the case, the author of the plaintiff's Rule 32(2) affidavit has made life difficult for the plaintiff. The deponent to the affidavit, one Nagel, stated under oath that he is a member of the plaintiff close corporation duly authorised to make the affidavit, the contents of which are within his personal knowledge, and I am satisfied that he is a person who can swear positively to the facts as required by Rule 32(2). The difficulty I have relates to Nagel's verification of the cause of action and the amount claimed. In this regard his affidavit reads as follows:

"I can swear positively to the facts contained in the Particulars of Claim and:

- a) **Verify** the cause of action;
- b) Confirm the correctness of all allegations made in the Particulars of Claim;
- c) **Confirm** that the amount due to the Plaintiff, as claimed in the Particulars of Claim, is the following:
  - i) The sum of R328 611.04 (Three Hundred and Twenty Eight Thousand Rand, Six Hundred and Eleven Rand and four Cents);
  - ii) Interest on the aforesaid amount from date of service on the summons until the date of final payment at the legal rate;
  - iii) Alternative Relief;
  - iv) Costs of Suit, on the scale as between Attorney and Client" (emphasis added).

---

<sup>1</sup> The second and third defendants entered appearance to defend this action on 26 January 2007. Although the plaintiff immediately sought summary judgment against them, they were granted leave to defend by order of this court on 22 February 2007. For present purposes, nothing further need be said about that application.

<sup>2</sup> The plaintiff claims costs on the attorney and client scale. In the light of the claim being for repayment of moneys stolen from an employer, such a claim would undoubtedly succeed if the matter went to trial.

Accordingly, while he **verified** the cause of action required by the rule, Nagel only **confirmed** that the amount claimed in the summons was due to the plaintiff. As the sub-rule requires both the cause of action and the amount of the claim to be verified (not confirmed), the affidavit *prima facie* appears not to confirm with the requirements of the rule. And if the requirements of the rule in regard to verification have not been met, this court has no jurisdiction to grant summary judgment.<sup>3</sup>

Mr *De la Harpe*, who appeared on behalf of the plaintiff, very properly conceded that, conceptually, “*verification*” differs from “*confirmation*”. However, in many instances, a *confirmation* is akin to a *verification*. In the Shorter Oxford Dictionary<sup>4</sup>, the verb “**verify**” is defined, *inter alia*, as meaning to “*assert or affirm to be true or certain*” and to “*confirm the truth or authenticity of*” while the verb “**confirm**” is *inter alia*, defined as meaning to “*corroborate, verify, put beyond doubt*”. Similarly the Concise Oxford English Dictionary<sup>5</sup> defines the verb “**confirm**” as meaning, *inter alia*, to “*state with assurance that something is true*” while the verb “**verify**” is defined as meaning “*make sure or demonstrate that (something) is true, accurate or justified*”.

---

<sup>3</sup> See for e.g. *Absa Bank Ltd v Coventry* 1998 (4) SA 351 (N) at 353 C-F and the cases there cited.

<sup>4</sup> 5<sup>th</sup> Edition 2002.

<sup>5</sup> 11<sup>th</sup> Edition 2004

Bearing these definitions in mind, and while I accept that the word “**verifying**” in Rule 32(2) may differ from “**confirming**”, the two words may have the same connotation depending upon the context in which they are used. In the present case, it seems to me that for all practical purposes Nagel, in stating that he confirmed that the amount claimed in the summons was due to the plaintiff, was in fact verifying that to be the case.

Moreover, it is necessary to bear in mind that Nagel undoubtedly verified the cause of action. A “cause of action” amounts to all the facts necessary for a plaintiff to prove “in order to support his right to judgment” or “every fact which is material to be proved to entitle a plaintiff to succeed in his claim”.<sup>6</sup> In this case, the plaintiff’s cause of action is that the first defendant stole funds totally R328 611,04. In order to succeed, the plaintiff would therefore have to establish that those funds were stolen. Verification of the cause of action in the particular circumstances of this particular case accordingly entails verification of the amount of the claim.

Strictly speaking, of course, Nagel should have said that he verified the plaintiff’s cause of action and the amount of the claim. However legal consequences should not be dependant upon the correct recitation of a jingle, and while slackness in the observance of the rules is not be encouraged, form

---

<sup>6</sup> See e.g. *Evins v Sheild Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 and the cases there cited.

should not be allowed to triumph over substance<sup>7</sup> and technical imperfections should not stand in the way of the speedy and inexpensive resolution of litigation.<sup>8</sup>

Accordingly, although a court should not readily grant summary judgment where there is a material defect in any of the formalities required by Rule 32, where it is clear that the rule has been substantially complied with and there is no prejudice to the defendant, a slight failure to comply with the technical requirements of the rule should not stand in the way of relief being granted.<sup>9</sup> After all, the function of the court is not to protect a dishonest defendant because the pleadings (or summary judgment affidavit) of a plaintiff are less than perfect.<sup>10</sup>

In the present matter, it is not without significance that although the first defendant entered an appearance to defend, she did not seek to oppose the summary judgment proceedings. Bearing that in mind, despite the deponent to the plaintiff's affidavit confirmed the amount to (which for all practical purposes can be construed *in casu* as being a verification), I am of the view that summary judgment should be granted. This is not to be construed as a finding that a plaintiff in all cases confirmation of a cause of action and the

---

<sup>7</sup> See: *Maharaja v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423 E-F. Compare further *Standard Bank of SA Ltd v Carports for Africa CC and Others* 1998 (4) SA 811 (W) at 813H-814B.

<sup>8</sup> See the remarks of Schreiner JA in *Trans-Africa Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278.

<sup>9</sup> *Charsley v Avob (Begrafinisdiens) Bpk* 1975 (1) SA 891 (E) at 893C-D.

<sup>10</sup> *Standard Bank of SA Ltd v Roestof* 2004 (2) SA 492 (W) at 498C.

amount owing will suffice. However, in the lights of the present case, the plaintiff's affidavit is to be construed as sufficient verification.

There will be summary judgment in the plaintiff's favour against the first defendant for:

- a) Payment of the sum of R328 611,04 together with interest thereon calculated from the date of service of the summons until date of payment;
- b) Costs of suit on the scale as between attorney and client.

---

**L.E.LEACH**  
**JUDGE OF THE HIGH COURT**

### **SUMMARY**

Summary judgment – plaintiff verifying the cause of action but only confirming the amount claimed – in the light of the facts, confirmation of the amount akin to verification – summary judgment granted.