REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 4498/2016

In the matter between:

ABSA BANK LIMITED

(REG No: 1986/004794/06) Plaintiff

and

HRM CONCRETE CC

(REG No: 2007/124929/23) First Defendant

ANTHONY MICHAEL WARWICK HEBDEN

(ID No: […]) Second Defendant

JAN HOFMAN

(ID No: […]) Third Defendant

HAARTEBEESPOORT READYMIX CC

(REG No: 2005/001235/23) Fourth Defendant

GAPATSIE MATTHEW MK

(ID No: […]) Fifth Respondent

HENNING OTTO LE GRANGE

(ID No: […]) Sixth Respondent

BONGANI KHUMALO
(ID No: […]) Seventh Respondent

J U D G M E N T

KUBUSHI, J

[1] The application before me is for a summary judgment in a case in which the plaintiff s claim against the defendants is for payment of the amount of R526 825, 06 representing the balance of the amount lent and advanced as well as agreed upon debits charged by the plaintiff to the first defendant in terms of a loan agreement entered between the plaintiff and the first defendant.

[2] It is alleged in the particulars of claim that the aforementioned amount is due and payable by virtue of the fact that the first defendant failed to comply with the terms and conditions of the agreement, alternatively, failed to make repayments as agreed with the result that the full outstanding amount became due and owing.

[3] A further averment is that the second, third, fourth, fifth, sixth and seventh defendants bound themselves as sureties and co-principal debtors for the due fulfilment of the obligations of the first defendant towards the plaintiff in terms of written deeds of suretyship signed on 4 September 2007 .

[4] There are two summary judgment applications set down, however, before me only the summary judgment application against the sixth defendant (for convenience I shall refer to him as "the defendant") is to be heard. The defendant is opposing the summary judgment application and does not raise any substantive defence to the merits of the matter, but, raises what the plaintiff refers to as contrived technical defences to the application.

[5] In his argument in court, the plaintiff s counsel submits that the defendant is not entitled to raise only technical defences to the summary judgment application without disclosing any defence to the merits of the claim. This submission is not correct.

[6] It has been said that the court has the power to condone mere technical non-compliance with the provisions of uniform rule 32 (2).[1] It has also been held that it is open to a respondent [defendant] in summary judgment proceedings to attack the validity of the application on any aspect.[2]

[7] I intend therefore to proceed to determine whether or not the technical points raised by the defendant are valid. The defendant raises six points *in /imine,* one of which was abandoned at the commencement of arguments, as follows:

THE DEPONENT CANNOT SWEAR POSITIVELY TO THE FACTS

[8] The defendant submits that although the deponent states that the documents and records in respect of the relationship between the plaintiff and the defendant are in her possession and under her control and that she has access and insight into that documentation on a continuous basis, she fails, however, to state that she has ever read the said documentation. The defendant's contention is that personal knowledge must appear from other facts stated in the deponent's affidavit (such as the fact that the deponent read the file in question) and that the deponent's allegations as contained in the affidavit are not sufficient to sustain her claim that she has personal knowledge. According to the defendant, the deponent having not stated that she read the documentation under her control, failed to prove that she has personal knowledge as required in uniform rule 32 (2). The defendant's counsel referred me to the judgment in *Firstrand Bank Limited v Beyer* 2011 (1) SA 196 (GNP).

[9] The submission by the plaintiff is that it is evident from the application that the

[1] See Firstrand Bank Limited v Beyer 2011 (1) SA 196 (GNP) para 17
[2] Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959 (3) SA 362 CN)

deponent has personal knowledge in the circumstances. Its counsel argued that the deponent stated that she has insight into the contents of the documentation in her possession which does not denote cursory reading but perusing and understanding the contents of the documentation.

[10] Uniform rule 32 (2) provides as follows:

> "The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, together with 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 is his opinion there is no bona fide defence to the action and that notice to defend has been delivered solely for purpose of delay. . . ."

[11] Companies, firms and other legal *personae* like the plaintiff, can only speak and act through a representative and therefore, the deponent on behalf of such company or legal *persona* has to state unequivocally that the facts were within his personal knowledge and furnish particulars as to how the knowledge was acquired by him so as to enable the court to assess the evidence put before it and to be able to make a factual finding regarding the acceptability of the supporting affidavit for summary judgment purposes.[3]

[12] An analysis and consideration of uniform rule 32 (2) clearly shows that the court must, from the facts set out in the affidavit itself, before it can grant summary judgment, be able to make a factual finding that the person who deposed to the affidavit, was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any, and was able to form the opinion that there was no *bona fide* defence available to the defendant and that the notice of intention to defend was given solely for the purpose of delay.[4]

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[3] See Firstrand Bank Limited v Beyer above para 19
[4] See Firstrand Bank Limited v Beyer above para 9

[13] The affidavit in support of the summary judgment application, in this instance, is deposed to by Deirdre Marchell E'Silva who describes herself as a major female in the employment of the plaintiff as Recovery Specialist: Off Balance Sheet Recoveries Commercial, Barclays Africa Recoveries. She states as follows in the affidavit:

> "1.2 I am duly authorized to make this affidavit and to launch an application for summary judgment on behalf of the plaintiff against the defendants.
>
> 1.3 I am responsible for attending to the matter and as such all the documents and records in respect of the relationship between the plaintiff and the defendants are in my possession and under my control and I have access and insight into that documentation on a continuing basis. The indebtedness of the defendants is apparent from the documentation in my possession and under my control.
>
> 1.4 In the circumstances I have personal knowledge of the facts underlying the causes of action against the defendants and can swear positively to the facts verifying those causes of action and the amounts due as set out in the summons issued on behalf of the plaintiff against the defendants in the abovementioned matter."

[14] It is evident from the content of the affidavit that the deponent is the person responsible for attending to the matter and as such all the documents and records in respect of the relationship between the plaintiff and the defendants are in her possession and under her control. She also has access and insight into the documents and records on a continuous basis. The defendant, however, contends that for her to have personal knowledge of the documents she must allege in her affidavit that she has read the documents.

[15] I do not think that the said assertion by the defendant is correct. Sight should

not be lost that what is required is for the deponent to furnish particulars as to how the knowledge was acquired by her. In this instance the particulars furnished are that first, she is the person responsible for the relationship between the plaintiff and the defendants , secondly, she is in possession and control of the documents and records and thirdly she has access and insight into the said documents and records. The implication is that she knows what is in the documentation and records and can therefore swear positively thereto. She can only have knowledge of what is in the documents and record by having read them. The fact that she alleges that she is in possession and control and is also able to access the record suffices to show that she is able, whenever so required, to read the documents and records and have the necessary insight to can depose to an affidavit. It does not require that she specifically state in the affidavit that she read the documentation. I do not understand the Beyer-judgment, to which the defendant relies for this submission, to be saying so as well.

NON-COMPLIANCE WITH UNIFORM RULE 32

[16] According to the defendant uniform rule 32 sets out the jurisdictional facts that must be set out in the application for summary judgment in order for the plaintiff to succeed in such an application. The defendant's contention is that the plaintiff has set out in its affidavit more allegations than those required by uniform rule 32. Put differently, is that, the plaintiff has put other information in the affidavit which is not required by the rule.

[17] I do not think that this point is sustainable. In fact as the plaintiff submits the point does not take this matter any further. The defendant does not say that the defendant has not complied with the jurisdictional facts of the rule but that more information has been added. The jurisdictional facts having been covered in the affidavit, it means that the other information need only be ignored.

RELIANCE ON HEARSAY EVIDENCE BY DEPONENT

[18] It is the defendant's submission that the plaintiff is relying on hearsay

evidence by producing a certificate of balance which has not been signed by its deponent to the founding affidavit to the summary judgment application. According to the defendant, since the plaintiff has not read the certificate of balance it means that she depends on the knowledge of third parties and it is not allowed in a summary judgment application. I do not agree.

[19] I am inclined to agree with the plaintiffs contention that the mere production of a certificate of balance is *prima facie* proof of the facts contained therein. This is in any event covered by the agreement between the parties. Clause 14 of the suretyship agreement states as follows:

'A certificate signed by the manager of the Bank shall be sufficient proof of any applicable rate of interest and of the amount owing in terms hereof or of any other fact relating to the suretyship for the purpose of judgment, including provisional sentence and summary judgment . . . and if I/we dispute the correctness of such certificate, I/we shall bear the onus of proving the contrary. It shall not be necessary to prove in such proceedings the appointment or capacity of the person signing such certificate."

This clause brings this point to rest, in my view.

EXCIPIABILITY

[20] The defendant's submission on this point is that the plaintiffs summons is excepiable in that it does not disclose certain facts which will enable the defendant to plead thereto. For instance, in paragraph 1 of the summons it is said that there is no indication in what manner the defendant failed to comply with the agreement; there is also no indication of how much the defendant failed to pay and as such, the defendant does not know which case to defend. Defendant contends that no breach is actually alleged in the summons.

[21] The plaintiff s submission on the other hand is that a simple summons is not a pleading and an exception cannot be taken to it. As such the argument is that

the defendant's point should be dismissed.

[22] It is trite that summary judgment cannot be granted in circumstances where the summons is exceptiable.

[23] It is common cause that the action in this instance was commenced by way of a simple summons issued in terms of uniform rule 17 (2) *(b).*

[24] There is plethora of authority that a simple summons is not a pleading and therefore not susceptible of being attacked by way of an exception.[5]

[25] In this instance, the defendant, without disputing that the summons issued against him is a simple summons, contends that not sufficient facts have been provided for in the summons to enable him to defend the matter.

[26] In accordance with uniform rule 18 (4), every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for the claim with sufficient particularity to enable the opposite party to reply thereto. A simple summons is issued in terms of uniform rule 17 (2) *(b)* in accordance with Form 9 of the First Schedule and no particulars of claim are either annexed thereto or required. The form only requires that the cause of action be set out in concise terms. All that is required in setting out the concise terms of one's cause of action in a simple summons is to give a general indication of the claim amounting merely to a label.

[27] In my view, the defendant is thus correct that he could not have been able to reply to the summons. What would normally have happen after the defendant had filed appearance to defend was for the plaintiff to file a declaration which would have set out all the particulars which would have enable the defendant to plead and/or raise a defence, if any, against the plaintiff's claim. On the basis of this technicality I intend to exercise my discretion in favour of the defendant and not

[5] See the unreported Kwa-Zulu Natal High Court judgment in Icebreakers No. 83 (Pty) Ltd v Medicross Health Care Group (Pty) Ltd case no 5551/2010 delivered on 18 February 2011.

to allow the summary judgment application.

[28] This point is as such dispositive of this matter I do not, therefore, intend to deal with the other remaining points.

[29] In the premises I make the following order:

1. The application for summary judgment is dismissed.
2. The defendant is granted leave to defend the matter.
3. Costs are costs in the main action.

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E M KUBUSHI J

JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE: 23 May 2016
DATE OF JUDGMENT: 02 July 2016
PLAINTIFF'S COUNSEL: ADV. J. Janse Van Rensburg
PLAINTIFF'S ATTORNEYS: Tim Du Toit & Co Inc
SIXTH DEFENDANT'S COUNSEL: ADV. A Nel
SIXTH DEFENDANT'S ATTORNEY: Philip Du Toit Attorneys