IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 10617/2013

DATE: 4 NOVEMBER 2013

In the matter between:

STANDARD BANK Plaintiff

and

RJC TOPPING Defendant

J U D G M E N T

DAVIS, J:

This is an application for summary judgment against the defendant in the amount of R2 500 000,00 based upon two deeds of suretyship executed in Fish Hoek on the 30th of May 2006 and the 15th of March 2007. Insofar as these deeds of suretyship are concerned, the defendant was represented by Mary Elizabeth Topping who was empowered in terms of a general power of attorney executed in Fish Hoek on the 11th of April 2003 to represent the defendant who therefore bound himself as a surety for a co-principal debtor with one Jason Douglas Sole ("the principal debtor"). Plaintiff also claims interest and costs on an attorney and client scale.

This application is opposed by the defendant on a number of grounds which can be divided into *in limine* objections and arguments based on the merits. Insofar as the points *in limine* are concerned these are as follows:

(i) the absence of jurisdiction based on the fact that the defendant has not been resident in the Republic since 2003;

(ii) non-compliance with Uniform Rule of Court 32(2) in that the affidavit relied upon by the defendant in this case has not been made by "a person who can swear positively to the facts verifying the course of action in the amount" and

(iii) non-compliance with Uniform Rules of Court 18(6) and 32(1) in that annexure B to the plaintiff's simple summons, that is the suretyship agreement of 15th March 2007, is incomplete.

THE QUESTION OF JURISDICTION

Mr Harrington, who appeared on behalf of the defendant, submitted that this Court lacked the requisite jurisdiction to hear this application in terms of Section 19(1)(a) of the Supreme Court Act 59 of 1959. Citing Erasmus, Superior

Court Practice at A1-24, Mr Harrington submitted that "the choice of a *domicilium citandi executandi* within the area of jurisdiction of a High Court is not enough to confer jurisdiction upon that court".

In the present case, the suretyships were signed within the area of the court's jurisdiction, that is in Fish Hoek. Relying on the decision in Hay Management Consultants (Pty) Limited v P3 Management Consultants (Pty) Limited 2005 (2) SA 522 (SCA) Mr Sievers, on behalf of the plaintiff, submitted that where a defendant chose a *domicilium* for service in South Africa and undertook that in the event of his changing his chosen domicile, he would provide a physical address within the Republic and agree that South African law would then govern the agreement, this Court was clothed with the necessary jurisdiction.

In the present case, on the basis of the signed suretyships, the *domicilium* chosen was an address within the Republic of South Africa. Clause 20.3 of the suretyship agreement provides that any new address chosen shall also be in the Republic of South Africa. Clause 23 provides that the suretyship shall be governed by and interpreted in accordance with the law of the Republic of South Africa.

By contrast Mr Harrington submitted that the plaintiff could not rely on Hay Management Consultants (Pty) Limited, supra, because, in that case, the defendant being a peregrinus (a company) which remained a peregrinus at the time of the conclusion of the relevant contract between the parties, it was clearly contemplated that any possible summons in future would be issued out of a South African court.

In other words, the underlying contract in Hay was entered into on the basis that the *domicilium* clause was regarded as being sufficient to constitute a consent to jurisdiction. In the present case, Mr Harrington contended that no such intention was apparent from the content of the documents relied upon by plaintiff. On the contrary, the relevant sureties were concluded by the defendant's agent, neither without defendant's knowledge and/or consent and despite a wholesale absence of authority to do so.

At no stage could it be said defendants possessed the same level of knowledge and intent as the defendant had possessed in Hay. But this submission, as is apparent from its summation, is dependent upon the applicability of the suretyship agreement to plaintiff's claim. In turn, the question of the validity of the suretyships so signed goes to the merits of the defendant's defence. If the suretyship applies in this

case, then the jurisdictional point must fail, but, on its own, it cannot be a sufficient basis to resist this application because it has to be tested in terms of a defence on the merits; that is the validity of the suretyship agreement to the particular claim.

Accordingly I am unable to determine this point in limine without a consideration of the substantive questions to which I shall turn presently.

UNIFORM RULE OF COURT 32(2):

This rule of Court requires a deponent to an affidavit in support of a summary judgment to be a person "who can swear positively to the facts verifying the cause of action and the amount". In other words, it is generally required that these facts must be within the deponent's personal knowledge. See Erasmus op cit at B1-215 and the cases cited therein. In addition the mere assertion by way of a reproduction of the wording of the rule is insufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words.

Information by way of belief on the part of the deponent will be insufficient to grant an order for summary judgment. See Erasmus at B1-215 and the authorities cited therein. In this

case the deponent to the plaintiff's affidavit, one Neliswa Reuben, describes herself "as a manager legal in the plaintiff's national home loans credit control department". Reuben avers that she is employed by the plaintiff in "the section dealing with the monitoring of bond repayments and the failure to make such payments" and furthermore that she "has access to the records of the principle debtor's home loan account with the plaintiff".

Mr Harrington, in order to support his submission that there has been non-compliance with the Rule, noted that she failed to make mention whatsoever of any knowledge, personal or otherwise, of the actual cause of action in this case, namely the deed of suretyship signed by the defendant's late mother in terms of a general power of attorney issued in her favour. In other words, defendant's argument runs thus: although the deponent may profess to have knowledge of the principal debtor's account (Mr Sole's account), she does not even refer to nor does she have personal knowledge of the deed of suretyship relied upon by the plaintiff.

In Mr Harrington's view the plaintiff's difficulty is compounded by the contents of the simple summons where the plaintiff is described as carrying on business at its regional home loan office in Cape Town while the deponent to an affidavit confirms

that she is in fact employed in the plaintiff's national home loan credit's control department. In the circumstances, it did not follow that the plaintiff's representative at national level would necessarily have personal knowledge of events taking place at the regional level.

In this connection a considerable debate ensued during the hearing as to the applicability of the judgment in Absa Bank Limited v Le Roux and 2 Others (Case number 5842/13); judgment in the Western Cape High Court). Binns-Ward, J, who refused summary judgment for lack of compliance with Rule 32(2), reasoned as follows at para 15:

> "In the result it follows on the construction of the sub rule given in Maharaj that unless it appears from a consideration of the papers as a whole that the deponent to the supporting affidavit probably did have sufficient direct knowledge of the salient facts to be able to swear positively to them and verify the cause of action, the application for summary judgment is fatally defective and the court will not even reach the question whether the defendant has made out a *bona fide* case."

But what is sufficient knowledge? The debate to unlock this question has perennially turned on the meaning and scope of *dicta* of Corbett, JA (as he then was) in Maharaj v Barclays National Bank Limited 1976 (1) SA 418 (A) at 423 E-H. In this connection the learned judge of appeal said the following:

> "The mere assertion by a deponent that he "can swear positively to the facts" (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 these words .. In my view this is a salutary practice. 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 has often been judicially emphasised ... The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable, 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 fact". 423 E-H.

But a careful examination of this passage reveals that it says far less than might and has been claimed. In order to understand what Corbett, JA had in mind, there is a need to look at the facts of Maharaj, *supra*. In that case, the personal knowledge required to substantiate the basis of an oral agreement of overdraft, clearly required some greater knowledge than would be the case when a standard written contract forms the basis of the cause of action. It was critical for Corbett JA to consider carefully where the assistant to the branch manager had acquired sufficient knowledge of the defendant's financial standing with the bank and the state of his current account to determine the parameters of an oral agreement. The following passage in the judgment is instructive:

> "This is to some extent reinforced by the fact that in para 4 of his opposing affidavit .. the defendant merely puts in issue the deponents ability to depose to the oral agreement of

> overdraft entered into with the manager, Mr Rees: he does not deny that deponent's ability to speak of the current state of his (the defendant's) account. Moreover the affidavit does not specifically allege that Mr Mason was not present when the arrangements were made or that he could not have acquired firsthand knowledge of the arrangements in the course of his duties, e.g., from discussions with the defendant himself. Finally it appears from the rest of defendant's affidavit that the real dispute relates not to the fact that the overdraft facilities were granted him but to the amount, if any, actually owed by him on overdraft".

For this reason, it is important that the judgment in Maharaj be read in its proper factual context so as to gain a proper understanding of the scope of any guidelines provided in the judgment for determining the precise meaning of Rule 33(2). Two further observations are necessary. Firstly, in Joob Joob Investments v Stocks Mavundla Zek 2009 (5) SA 1 (SCA) at para 32 Navsa, JA said:

> "The rationale for summary judgment proceedings is impeccable. The procedure is not intended to

deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case Corbett, JA was keen to ensure first an examination of whether there have been sufficient disclosure by the defendant of the nature and grounds of his defence and the facts upon which is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett, JA also warned against requiring of a defendant, the precision apposite to pleadings. However the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor".

This dictum highlights two features:

(a) In contrast to the dicta in Maharaj supra, summary judgment should not be considered to be an extraordinary procedure.

(b) A balance must be struck between ensuring that a recalcitrant debtor pay what is due to a creditor and that a debtor with a *bona fide* and good defence should not precluded from access to justice.

The law including the interpretation of Rule 33(2), is surely required to be construed, if at all possible, with contemporary, economic and financial reality. In this case, when dealing with the financial sector, courts should be wary of embracing a rigid formalism which relationship to commercial and financial reality is so tenuous as at best to be coincidental. This concern was clearly in the mind of Van Heerden, AJ (as she then was) in Standard Bank of South African Limited v Secatsa Investments (Pty) Ltd and Others 1999 (4) SA 229 (C) at 235A-B:

> "It is clear from the case law that firsthand knowledge of every fact which goes to make up the plaintiff's cause of action is not required and that where the plaintiff is a corporate entity the deponent may well legitimately rely for his or her

> personal knowledge of at least certain relevant facts and his or her ability to swear positively to such facts on records in the company's possession".

This judgment was delivered some 14 years ago. How much more so is it applicable when it must be common knowledge that credit departments of national banking institutions have become more centralised, as technology develops exponentially. Contrast further present banking operations to those that operated some 40 years ago when Maharaj were decided in which the branch was the centre of the credit world! To circumvent what he saw as a major problem with Rule 33(2) and credit transactions, Binns-Ward, J provided a novel and imaginative suggestion in his instructive judgment as to the provisions of information in the required affidavit by reference to the Electronic Communications and Transaction Act 25 of 2002 (see paras 20 to 21 of the judgment).

I remain uncertain as to whether that which Binns-ward, J proposes as forming part of the supporting affidavit for summary judgment will cure what the learned judge perceives as the present problem as opposed to an interpretation based on sound commercial reality and the facts of a particular case and where the threshold for meeting the test in Rule 32 may be

less onerous. In other words, in Maharaj the court dealt with an oral contract. Clearly more knowledge was required of the existence and details thereof than is the case with a standard contract which was signed by parties in good faith, and where the threshold for meeting the test set out in the Rule 32 may be less onerous.

Be that as it may, these paragraphs cited from the judgment in Le Roux supra are obiter. The essential finding in the Le Roux case is distinguishable from the present case. In Le Roux the limit of the suretyship was different and significantly less than the amount set out in the simple summons. One of the defendants had provided an unlimited amount guaranteed in the surety and this was not specified Binns-ward, J correctly observed:

> "The deponent carelessly purported to confirm the inaccurate content of a carelessly drafted summons". (at para 9)

In the present case the cause of action is stipulated as the payment of an amount of R2.5 million being the amounts due in terms of the two deeds of suretyship. They are attached to the summons. They are both duly signed. The deponent, Ms Reuben, confirms:

(1) The cause of action. The cause of action is the suretyship. That is plainly ascertained from the summons and the attached documents. It does not require any further knowledge.

(2) The amount claimed is set out in the summons.

These are the core facts underpinning the plaintiff's claim. Of course, the defendant now develops his defence in an opposing affidavit. But the case of the plaintiff is clear and simple. Ms Reuben had access to the records of the principal debtor's home loan account with plaintiff. This information was available to her in that she was part of the home loans credit control department. She had access to the information that the principal debtor was liable in the sum of R2 693 278.17 (I leave aside the further question as to whether documents provided by plaintiff were signed in Cape Town which would have given Ms Rueben greater physical access to this information).

The primary debt being due and payable, the suretyships, which were signed, are now triggered. Unless one conflates the question of the merits of the defence which is raised against the application for summary judgment with the initial conclusion based upon the summons and the attached

suretyships, there has been compliance of Rule 33(2). The Rule requires a verification of the cause of action and the amounts so claimed. Both of these aspects are of a nature which Ms Reuben would have been able to confirm. There is no basis to sustain the second point *in limine*.

The third point *in limine*, is that defendant contends that the document attached to the plaintiff's simple summons as annexure B was incomplete. Accordingly any reliance placed thereon by the plaintiff is unsustainable. In this regards, it is noted that the document is reflected in the plaintiff's index as spanning from pages 11 to 14 of the bundle, which page numbers correspond to the franked page numbers appearing at the top right hand corner of the document itself.

However, if regard is had to the bottom right hand corner of the document, it is apparent that the suretyship is a six page document, not a four page document. In other words, the plaintiff has failed to attach two pages (pages 4 and 5) of the suretyship. In the circumstances, the defendant contends that, to the extent that the plaintiff may have sought to rely on annexure B to the summons as being a liquid document as envisaged by Rule 32(1)(a), an incomplete document which was attached does not comply with the Rule.

Rule 18(6) requires that a plaintiff who, in her pleading relies upon a contract to state whether the contract is written or oral and when and whereby and whom it was concluded and, if the contract is written, a true copy thereof or the part relied upon in the pleading shall be annexed to the pleading. The present action was instituted by way of a simple summons. A simple summons does not constitute a pleading and accordingly it is doubtful whether Rule 18(6) is of application. See Icebreakers 83 v The Medicross Health Care Group 2011 (5) SA 130 (KZN).

Furthermore in Absa Bank Limited v Van Rensburg and Another (2012; WCC case number 16071/12) Griesel, J on behalf of a full bench, noted at paragraph 16:

> "[I]t should no longer be required of a plaintiff who in applying for default of summary judgment as a matter of course to hand in the original document unless called for by the presiding judge where circumstances so require. In my experience, this practice has fallen into disuse in this division. Secondly to the extent that Rule 18(6) requires of a plaintiff relying on a written document to annexure a true copy thereof or of a part relied on in the pleading it would be incongruous to have a more onerous requirement

> in respect of a simple summons ;in other words it should be open to a plaintiff who relies on portion only of a voluminous written agreement only to attach such portion to the summons and not the whole document.
>
> Apart from the authority and precedents referred to above, there are important considerations of principle and policy supporting such an approach. In this regard, it should be borne in mind that the purpose of a simple summons is not merely to inform the defendant of the nature of the claim being instituted by the plaintiff, but also and perhaps more importantly to enable a court to decide whether judgment should be granted".

It does not appear, on the basis of this judgment, that a party who in his pleading relies on a contract should annexe the entire contract as opposed to the part upon which he, she or it relies. In the present matter even without the two pages missing, plaintiff has a cause of action and accordingly this third point *in limine* also stands to be dismissed.

On this basis, I must turn to the substantive issues which have been raised by the defendant. It is trite law that what is

required of a defendant in terms of Rule 32 the defendant sets out in his or her affidavit facts which if proved at the trial will constitute an answer to the plaintiff's claim. (Erasmus at B-221; B-222)

All that is required in this case is for the court to determine whether the defendant has set out the following:

(1) the nature and grounds of his or her defence.

(2) On the facts so disclosed, does the defendant appear to have, either as a whole or in part a defence which is *bona fide* and good in law.

(3) In addition it is also been held that "it will be sufficient if the defendant swears to a defence valid in law in a manner which is not inherently or seriously unconvincing". Expressed differently, are there averments in his or her affidavit of a nature that raises a reasonable possibility that the defence he or she advances may succeed at trial? See Erasmus at B1-224 and the authorities referred to at footnote 3.

Viewed with this context, there are two issues which require examination. In the first place, the defendant has contended that it is highly doubtful that the holder of the defendant's general power of attorney, that is the defendant's aged mother,

possessed the requisite capacity to contract at the time of signing the suretyships in question.

Secondly, defendant contends that the holder of the defendant's general power of attorney, being the defendant's aged mother, was never authorised by the defendant to encumber his estate by signing the suretyships. The authority conferred by the power of attorney is limited by its own wording to the extent that it excludes the authority to conclude suretyships which are the subject matter of the present dispute.

The question of whether the defendant limited the general power of attorney because he never authorised the encumbering of his estate by way of the signing of the suretyship is a key concern. The further question then concerns the state of mind of the defendant's aged mother and her capacity to contract; that is, had the defendant limited the general power of attorney as alleged? Further should it be found that the defendant's mother lacked the requisite capacity to contract, it would follow that this finding would constitute a sufficient defence to the plaintiff's claim.

Defendant contends that the authority conferred by the power of attorney was limited by its own wording to the extent that it

would seem to exclude the authority to conclude suretyships. The face of the document is headed “general power of attorney” as opposed to “power of attorney in respect of a specific act” and records further, defendant’s mother is hereby appointed “for managing and transacting business in the Republic of South Africa .. with full power and authority from me .. and in my name .. and for my account and benefit and on my behalf”.

Mr Harrington contends that these words cited are consistent with a general power of attorney granting broad powers unrelated to specific transactions. Despite being headed general power of attorney, that is despite the broad powers referred to in paragraphs 1 to 17 of this general power of attorney, without expressly saying so, the document proceeds, in his view, to limit the ambit of authority conferred to the more specific Acts listed therein. See paragraphs 1 – 17. Hence the authority conferred on the defendant’s mother by the power of attorney was limited to the authority conferred in respect of specific acts and matters listed in these paragraphs.

Although the last paragraph of the power of attorney, being paragraph 17, was headed “general”, Mr Harrington submitted that this provision was also limited by the contents of the preceding paragraph, that is 1-16, due to the fact that the

opening sentence records that the authority conferred is "to do, perform, execute and suffer any such act, deed, matter or thing whatsoever". (My emphasis)

The word "such", in his view, qualified the words listed thereafter to the acts, deeds, matters or things listed in paras 1 – 16 of the general power of attorney. That being the case, the general power of attorney was limited to the powers specifically listed in the earlier paragraphs. Mr Harrington thus submitted that, in order to ascertain whether the general power of attorney authorised defendant's mother to sign the suretyship, it becomes necessary to examine these paragraphs for the source of the authority to enter into the suretyships.

If the power of attorney does not expressly confer on the defendant's mother, whether directly or indirectly, the power to bind the defendant as surety for the debts of the third party, the suretyships may then be unenforceable as against the defendant. To an extent these defences are related and raise the following concerns:

(1) Does the general power of attorney bear the weight for authorising the suretyships?

(2) Did the defendant's mother have the necessary capacity to understand that which she signed and

accordingly the obligations that she incurred on behalf of the defendant.

If defendant's mother did not comprehend the nature of that which she signed or that the authority given to her was sufficiently restrictive, these are issues that can only be determined at trial. I am unable to conclude that either of these questions is so inherently unconvincing that it stands to be rejected summarily as neither being good in law nor *bona fide*.

FOR THESE REASONS THEREFORE THE APPLICATION FOR SUMMARY JUDGMENT MUST DISMISSED. THE DEFENDANT IS THEREFORE GRANTED LEAVE TO DEFEND THE ACTION. THE COSTS OF THE APPLICATION FOR SUMMARY JUDGMENT SHALL BE COSTS IN THE CAUSE IN THE ACTION.

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DAVIS, J