



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: **D946/2023**

In the matter between:

SANLAM LIFE INSURANCE LIMITED

PLAINTIFF

and

**AFRICHICK TRADING (PTY) LTD t/a AFRICAZ
(REGISTRATION NUMBER: 2018/201023/07)**

FIRST DEFENDANT

**YAGAMBARAM NAIDU
(ID NO: ...)**

SECOND DEFENDANT

DEVAR REALTY (PTY) LTD

THIRD PARTY

Coram: Mossop J
Heard: 18 April 2024
Delivered: 18 April 2024

ORDER

The following order is granted:

1. The application for summary judgment against the first and second defendants is refused.

2. The first and second defendants are granted leave to defend the action.
3. The costs are reserved for determination by the trial court.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] The plaintiff owns certain commercial immovable property known as the Chatsworth Mall (the Mall), located in Joyhurst Street, Chatsworth, Durban. It lets business premises within the Mall to tenants who wish to trade from the Mall. The plaintiff claims that it let certain business premises (the leased premises) within the Mall to the first defendant, and because the first defendant has not paid the monthly rental that it agreed to pay it, summary judgment is sought against both it and the second defendant, who stood as surety for the obligations of the first defendant to the plaintiff, for payment of the amount of R227 947.21.

[3] There is a third party who has been joined to the action by way of the third party procedure prescribed by the Uniform Rules, but as no relief is sought against it in these proceedings by the plaintiff its involvement in the matter need not detain us. When I refer therefore to 'the defendants' in this judgment, it should be understood to be a reference to the first and second defendants.

[4] Uniform Rule 32(2)(a) reads as follows:

'Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.'

[5] The person who has made such an affidavit on behalf of the plaintiff is a Ms Annestia Steyn (Ms Steyn). I should at this juncture be able to confidently describe

who she is employed by and what she does, but I regret that I cannot do so. Why this is so will soon become apparent.

[6] In the first paragraph of her affidavit, Ms Steyn states the following:

'I am an adult female employed by the Plaintiff's managing agents, being Excellerate Real Estate Services trading as JHI, as a Legal Advisor, with its offices situated at 3A Summit Road, Dunkeld West, Johannesburg.'

So far, so good. From this self-description, it is evident that Ms Steyn is not employed by the plaintiff and is not based at the Mall, or in Durban for that matter, but in Dunkeld West, Johannesburg.

[7] But the first inkling of a developing problem for the plaintiff appears in the following further extract from Ms Steyn's affidavit:

'I am involved in the day-to-day management of the Chatsworth Mall in which the premises, described more fully below, are situated.'

The obvious difficulty arising from this statement is in understanding how Ms Steyn could possibly be involved in the day-to-day management of the Mall from her offices in Dunkeld West, Johannesburg. With the advent of modern digital communication methods, it is conceivable that the distance between Chatsworth and Dunkeld West has been bridged. This is, however, simply speculation on my part because nothing is stated in the affidavit that explains how this day-to-day management is effected. It is also not clear why a legal advisor would be involved in the day-to-day management of a shopping centre.

[8] What is clear from Ms Steyn's affidavit is that she makes no positive averments of ever having had any dealings with the defendants. The knowledge that she has of any facts pertinent to this matter is a derivative knowledge and not an original knowledge, because she explains that she acquired it in the following manner:

'21. I have under my control the tenant/debtor transactions running balance and specifically have access to all records relating to the first and second defendants and particularly the facts on which the present claim is based.

22. I have familiarised myself with the aforementioned documents and records and books of account ...'

The inference to be drawn from the statement that she has 'familiarised' herself with the documents seems to be that had she not done so, she would have no knowledge of this matter at all. She makes no assertion that she has any knowledge that originates from any source other than the documents that she has perused. She does not even state that she was involved in the events that led to the creation of those documents.

Unfortunately, Ms Steyn merely refers to 'all records relating to the first and second defendants' and does not indicate what those documents comprise.

[9] A consideration of Uniform rule 32(2)(a), quoted previously, makes it plain that a person who makes the affidavit used in support of an application for summary judgment must be able to swear positively to the facts contained in that affidavit. In other words, hearsay allegations cannot be relied upon, for it is not possible to swear positively to something beyond one's direct knowledge. As was stated in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another*:¹

'Thus where 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 can swear positively to the facts giving rise to the claim.'

These words would seem to apply to the method that Ms Steyn has employed to gain her professed knowledge of this matter. There is, therefore, the beginning of a suspicion that Ms Steyn is not a person who can swear positively to the facts.

[10] It is conceivable that information may legitimately be acquired indirectly during the course of one's employment whilst performing one's official duties. A bank manager may thus know the state of a client's overdraft facility although he may not have had any direct dealings with the client on a regular basis.² This was acknowledged by Wallis J in *Shackleton*, but he went on to state the following:

'However, I do not understand any of the cases as going so far as to say the deponent to an affidavit in support of an application for summary judgement can have no personal

¹ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another* [2010] ZAKZPHC 15; 2010 (5) SA 112 (KZP); [2011] 1 All SA 427 (KZP) para 7 (*Shackleton*).

² *Barclays National Bank Limited v Love* 1975 (2) SA 514 (D).

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 cause of action and the facts giving rise to it.³

The summary judgment application is at the precipice of failure in the absence of any indication of any direct personal knowledge of the facts by Ms Steyn.

[11] The uncertainty as to whether Ms Steyn has any personal knowledge of the facts is exacerbated by a further statement that she makes in her affidavit, namely: 'As the financial manager of the plaintiff, I am familiar with the accounts and financial affairs of the plaintiff in relation to the first and second defendants.'

[12] It is difficult to understand how Ms Steyn became the plaintiff's financial manager, employed as she claims to be by Excellerate Real Estate Services (Excellerate). She does not allege any employment with the plaintiff. Her statement that she is employed by the plaintiff is accordingly confusing and concerning. The significance of this statement does not end there, because not only has she changed employer, she has now also changed her job description: she is no longer a legal adviser but is now a financial manager. How this is at all possible is not explained. It ought to have been.

[13] The two varying statements as to whom Ms Steyn works for creates uncertainty about who her employer is and in what capacity she is employed. This is why I stated earlier that I am not able to say by whom Ms Steyn is employed and what she actually does. Her ability to swear positively to the facts is accordingly brought directly into question. I asked Ms Gouws, who appeared for the plaintiff this morning, to address me on the approach I should take to these two conflicting statements and how I should regard them. She very correctly indicated in my view that there was a contradiction in Ms Steyn's affidavit.

[14] In my view, that contradiction renders the application defective because of the uncertainty that it creates. A similar view was taken by Wallis J in *Shackleton*. In dealing with a situation where it was not clear against which defendant summary judgment was being sought, he stated:

³ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another*, supra, para 13.

'Accordingly where the applicant's affidavit is confusing and does not make clear against whom judgment is being sought and on what basis, the application is defective and must fail.'⁴

That logic commends itself to me and in my view applies no less to a situation where there is confusion as to the position held by the deponent to the affidavit used in support of summary judgment and the source of his or her knowledge about the matter.

[15] Summary judgment is often characterised as being a drastic remedy because, if it is granted, it deprives a defendant of the opportunity to raise its defence in trial proceedings. However, as was stated by Navsa JA in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*:⁵

'It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.'

He went on to conclude that:

'Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are "drastic" for a defendant who has no defence.'⁶

[16] In my view, for summary judgment to be granted, there must be strict compliance with the prerequisites of Rule 32 (2) (b).⁷ In *Maharaj v Barclay's Bank Ltd*,⁸ Corbett JA stated that:

'... 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.'⁹

There should be no uncertainty over the status of the person deposing to the affidavit used in support of the judgment sought.

[17] It may well turn out at the end of the day that the defendants have no defence to the plaintiff's action. They may have raised a sham defence

⁴ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another* [2010] ZAKZPHC 15; 2010 (5) SA 112 (KZP); [2011] 1 All SA 427 (KZP) para 26.

⁵ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA) para 31.

⁶ *Ibid* para 33.

⁷ *Gull Steel (Pty) Ltd v Rack Hire BOP (Pty) Ltd* 1998 (1) SA 679 (O) at 683 H.

⁸ *Maharaj v Barclays Ltd* 1976 (1) SA 418 (A)

⁹ *Infra* page 423E-F.

that was contemplated by Navsa JA in *Joob Joob*. But that cannot be determined at this stage because of the inadequacies in the plaintiff's application. Ms Steyn's ability to swear positively to the facts is rendered non-existent when she cannot even clearly explain by whom she is employed and what her duties are. In *FirstRand Bank Limited v Beyer*,¹⁰ Ebersohn J made the following observation:

'An analysis and consideration of rule 32(2) clearly show the court must, from the facts set out in the affidavit itself, before it can grant a summary judgement, be able to make a factual finding that the person who deposed 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 be 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.'

[18] I am generally in agreement with that statement save that there can be no need to consider a defence raised by a defendant if the summary judgment application is itself defective. For as Wallis J further stated in *Shackleton*:

'The proper starting point is the application. If it is defective then *cadit quaestio*. Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons.'¹¹

[19] In my view, the application is defective for the reasons stated. That summary judgment is not at this stage entered in favour of the plaintiff is not due to the adequacy of the defence raised by the defendants but rather due to the inadequacies of the plaintiff's application. The difficulties that the plaintiff now experiences could have been avoided with a little more care and more attention to the detail in the affidavit. It follows that summary judgment cannot be granted.

[20] In the circumstances, I grant the following order:

1. The application for summary judgment is refused.

¹⁰ *FirstRand Bank Limited v Beyer* 2011 (1) SA 196 (GNP)

¹¹ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another* [2010] ZAKZPHC 15; 2010 (5) SA 112 (KZP); [2011] 1 All SA 427 (KZP) para 25.

2. The first and second defendants are granted leave to defend the action.
3. The costs are reserved for determination by the trial court.

MOSSOP J

APPEARANCES

Counsel for the plaintiff	:	Ms F Gouws
Instructed by:	:	Kritzinger Elish Attorneys 2 nd Floor, Suite 5 72 Richefond Circle Mhlanga Ridge
Counsel for the first and second defendant	:	Mr C Athman
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