REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT,
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 7089/09

In the matter between:

SHACKLETON CREDIT MANGEMENT (PTY) LTD Applicant

and

MICROZONE TRADING 88 CC First Respondent

NASHEE SINGH Second Respondent

J U D G M E N T

Delivered on 4th May 2010

WALLIS J

[1] On 30 December 2008 the applicant, Shackleton Credit Management (Pty) Ltd, took cession of a number of claims from Absa Bank. The deed of cession lists twelve agreements concluded between Absa and Microzone Trading 88 cc, the first respondent, as being among the listed debts covered by the cession. In addition it took cession of the rights of Absa under a deed of suretyship provided by Mr Singh, the second respondent.

[2] Thereafter on 19 August 2009 Shackleton commenced the present action against both respondents. Having pleaded the cession, it set out in twelve

separate claims details of written lease agreements concluded between Absa and Microzone in respect of various motor vehicles. It alleged that Microzone breached the agreements by failing to pay instalments timeously and that Absa cancelled the agreements, retook possession of the vehicles and caused them to be sold. In respect of each claim Shackleton seeks to recover an amount by way of damages calculated as the difference between the balance outstanding under the lease agreement at the date of cancellation less unearned finance charges and the proceeds of the sale of the vehicle. Mr Singh is cited as the second defendant. On the basis of the deed of suretyship judgment was claimed against him jointly and severally together with Microzone in respect of each of the twelve claims.

[3] Notice of intention to defend the action was given and on 14 September 2009 the present application for summary judgment was brought. An affidavit by Mr Lombard the attorney for the applicant was filed in support of the application. Mr Singh delivered an opposing affidavit on behalf of both respondents. In that affidavit he raised a number of defences. It is only necessary to deal with the contention that in two respects, including one not mentioned in his affidavit, the application is fatally defective.

[4] Mr Lombard alleged that the facts deposed to in his affidavit were facts within his 'personal knowledge and belief' as a result of which he claimed to be able to swear positively to the facts giving rise to Shackleton's cause of action. Mr Singh denied that Mr Lombard "has requisite knowledge to positively swear to the cause of action". For the reasons that follow, that point is well taken and the application for summary judgment must accordingly fail.

[5] Rule 32(2) requires an applicant for summary judgment to deliver a notice of application:

"… 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, stating that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay."

The rule has been authoritatively construed as meaning that:

(a) the affidavit should be made by the applicant himself or by any other person who can swear positively to the facts;

(b) it must be an affidavit verifying the cause of action and the amount, if any, claimed; and

(c) it must contain a statement by the deponent that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.

[6] Several judgments have noted that the origin of our rule regarding summary judgment is to be found in the rules of English procedure. Originally the corresponding rule in England provided that the affidavit in support of an application for summary judgment be sworn by the plaintiff in the action. No doubt because of the practical difficulties this occasioned, such as that it precluded a company from seeking summary judgment, the rule was thereafter altered to add the words "or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any) …" What is clear is that the deponent to a summary judgment affidavit was expected to be someone who had knowledge of the facts in relation to the underlying claim. As Theron J pointed out in

Fischereigesellschaft in order to satisfy the requirement that the affidavit be made by a person who can swear positively to the facts it is essential for the deponent to have personal or direct knowledge regarding the facts alleged in the particulars of claim and it is improper for the deponent to make statements based only on his own information and belief.

[7] The requirement that the founding affidavit be deposed to by the applicant or some other person who can swear positively to the facts precludes the affidavit being deposed to by someone whose knowledge of those facts is purely a matter of hearsay. Thus 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. It is for that reason that the application for summary judgment in *Rafael & Co v Standard Produce Co (Pty) Limited* was held to be defective. The deponent to the affidavit was the applicant's Cape Town attorney and the court said (at 245 D):

"There is nothing from the circumstances of his making of this affidavit which can lead the court to the conclusion that it is within his knowledge. The ordinary presumption would be that they are facts which have come within his knowledge through his acting for the applicants in this matter."

An affidavit by an attorney based on information given to the attorney by the client does not comply with the rule because the attorney is not in a position to swear positively to the facts. Such an affidavit is nothing more than an affidavit of information and belief containing inadmissible hearsay. An application founded on such an affidavit is as a result defective.

[8] In the *Fischereigesellschaft* case the court was also confronted with an

affidavit deposed to by an attorney. This is what Theron J said in that regard:

"I venture to add that, when it comes to deal with an affidavit proffered under the Rule which is made by the attorney of record for a applicant, the Court should scrutinise it with particular care. When I say this I do not wish to be misunderstood. Obviously I am not implying that attorneys as a class are less reliable as deponents than other persons: indeed, I have no doubt that the converse is true. But attorneys as a class will be tempted more often than other persons to make affidavits for the purpose of obtaining summary judgment in proceedings in which they are not personally interested; and experience has shown that the line between direct, personal knowledge and knowledge obtained indirectly (as by way of instructions from a client or information gleaned from witnesses) is one which often becomes blurred, resulting in hearsay evidence slipping into affidavits. It is no doubt some consideration, such as this, which prompted van Zyl J to refuse summary judgment in the case of *Rafael & Co, supra,* in spite of the fact that he had before him there an affidavit by the attorney of record in which he stated quite plainly that 'the facts herein stated are within my own knowledge'."

It is not only affidavits by attorneys that have been held not to comply with the requirements of the rule although as Theron J suggested they appear to be particularly prone to this problem. Thus where the deponent did not say specifically that he had personal knowledge of the facts it was held that such knowledge could not be inferred from the fact that he was both a director of the applicant company and a partner in the applicant's firm of attorneys

[9] I have been referred to the judgment in *Bekker v Tivoli (Pty) Limited* where an attorney deposed to the affidavit in support of the application for summary judgment and a challenge to his knowledge of the facts was rejected. However, in that case the respondent did not in its affidavit deny the statement that the attorney had personal knowledge and the point was merely raised in argument. The claim arose on a mortgage bond and the

court held that the attorney might well have been present when the bond was registered or have checked with the Deeds Office in regard to its registration. Similarly it was not inconceivable that the attorney would have personal knowledge of the fact that interest had not been paid under the bond. In the circumstances there was no reason to disregard the attorney's sworn statement that the relevant facts were within his own knowledge. However that situation is a far cry from the present one where on his own affidavit Mr Lombard's knowledge of the facts is not direct but derived from his perusal of documents furnished to him by his client and obtained from Absa and where his personal knowledge of the facts is directly challenged.

[10] Mr Lombard set out in his affidavit the basis upon which he claimed to be able to swear positively to the facts. The relevant portion of the affidavit reads as follows:

"I can swear positively to the facts giving rise to the applicant's cause of action, my personal knowledge having been derived from my having personally inspected the file of Absa Bank Limited (Absa), in relation to the claim against the respondent, which came to be in the applicant's possession by virtue of the cession referred to in the particulars of claim. In the course of my employment at Lynn & Main Inc, the exclusive attorneys for the applicant, the files were, in turn, placed in my possession. I have personally inspected the source documents, computer-generated data, memoranda and correspondence contained in these files and have thus personally investigated the indebtedness of the respondent to the applicant."

[11] It is apparent from this that Mr Lombard has no direct and personal knowledge in relation to these claims. All that he has done is to inspect the documents obtained from Absa Bank in relation to the claims. He is not even in a position to state that these are all the relevant documents. He states

unequivocally that his "personal knowledge" of the facts giving rise to the applicant's cause of action is derived from the documents he has inspected and that this constitutes his investigation of the claim. In other words his affidavit is entirely hearsay when he purports to verify the facts giving rise to the claim and the amount of that claim. He is in no different position from any other attorney who has been given instructions by their client and furnished with documents in support of those instructions. Any resultant affidavit is then nothing more than an affidavit of information and belief. On the authorities referred to above his affidavit does not comply with the requirements of the rule and the application is defective because he is not a person who can swear positively to the facts.

[12] Mr van Rooyen, who appeared for the applicant, sought to rely upon the approach to questions of knowledge of the relevant facts adumbrated by Miller J in *Barclays National Bank Limited v Love* and approved by Corbett JA in *Maharaj v Barclays National Bank Limited.* In *Love* the court had made the point that the manager of a bank would by virtue of his or her office have personal knowledge of the extent to which a client had overdrawn his or her account and would be entitled to rely upon the bank's records in that regard. In *Maharaj* the deponent was the assistant to the manager and in the affidavit said that he had personal knowledge of the facts. This was not challenged and it was not suggested that he was not present when the overdraft arrangements were concluded or during other discussions with the respondent. This was held to be sufficient to justify a conclusion that in the course of his duties he could have acquired the personal knowledge of the respondent's financial standing with the bank to which he deposed. Although the court regarded it as a borderline case it held

that "there is just sufficient to enable the affidavit to pass muster".

[13] It may be that the effect of such cases such as these is, as van Heerden AJ said in *Standard Bank of SA Limited v Secatsa Investments (Pty) Limited*, that first-hand knowledge of every fact which goes to make up the applicant's cause of action is not required and that, where the applicant is a corporate entity, the deponent may well legitimately rely on records in the company's possession for their personal knowledge of at least certain of the relevant facts and the ability to swear positively to such facts. However, I do not understand any of the cases as going so far as to say that the deponent to an affidavit in support of an application for summary judgment can have no personal 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. Mr Lombard's affidavit would have been more accurate if he had not claimed personal knowledge of the facts but said that, according to the documents obtained from Absa Bank, the claims in the present action are well-founded. The facts relied upon by him emerge solely from those documents. However, the moment that is recognised it must also be recognised that the substantive contents of the affidavit consist entirely of hearsay.

[14] There is a further problem confronting Mr Lombard. In the banking cases to which I have referred the deponent was an employee of the plaintiff and claimed knowledge acquired in the course of their duties as such. That at least foreshadows that they could in the ordinary course of their duties have access to and need to work with the records of the business. Equally it is possible that in seeking to recover on the debt they would have had dealings

with the debtor in regard to the contents of those records and would have had the opportunity to confirm their correctness. Mr Lombard is not only the attorney but his client's claim is not a direct claim. It is a claim acquired by way of cession. Accordingly Mr Lombard stands at two removes from the claim itself. That problem is not novel. Where the affidavit in support of an application for summary judgment was signed by a director of the cessionary the court held that, in the absence of anything further to indicate that he had any connection with the cedent and therefore any personal knowledge of the claims, the application was fatally defective. Similarly it has been held that a trustee appointed to an insolvent at a time after the facts giving rise to the claim occur could not have personal knowledge of those facts. That case was stronger than the present one in that it was submitted on behalf of the trustee that he must of necessity have had insight into the books of account dealing with the transaction in question and accordingly in the exercise of his duties he must personally have obtained the information sworn to in the affidavit. Nonetheless the court rejected that contention.

[15] Mr van Rooyen said that in many cases that come before this court the affidavit in support of an application for summary judgment is deposed to by a legal advisor in the employ of the applicant. His suggestion, as I understand it, is that such a person is in the same position as Mr Lombard deriving his or her knowledge entirely from a perusal of documents. If he is correct in that then all I can say is that such an application would also be defective. However there may be reasons connected with such a person's employment that would result in their acquiring sufficient personal knowledge of the facts to depose to an affidavit in support of an application for summary judgment. Each case will necessarily depend upon its own

facts.

[16] In the present case Mr Lombard's affidavit is based entirely on hearsay because he is not a person who could swear positively to the facts and verify the cause of action or the amount owing. Accordingly the application for summary judgment was defective and must be dismissed. In the light of that conclusion it is not strictly necessary for me to canvass either the other technical points that were argued or the merits of the defence raised by the respondents, but in one respect I think I should deal with another defect in the application that I regard as fatal as there seems to be some confusion in that regard.

[17] The problem arises from the fact that there are two defendants in the action who are being sued jointly and severally. Notwithstanding that, both the application for summary judgment and the affidavit of Mr Lombard are couched in the singular referring only to the 'defendant'. In the application there is no mention of judgment being sought 'jointly and severally' but only a request for judgment on the twelve claims against 'the defendant'. In the affidavit he refers to the claim 'against the defendant' and 'the indebtedness of the defendant'; expresses the opinion that 'the defendant' does not have a bona fide defence to the claim and concludes by asking for judgment 'against the defendant, as claimed in the Notice of Motion'.

[18] When the matter was called I asked Mr van Rooyen to identify the defendant against which he was pursuing the application. His response was to say that the application was against both respondents and that it was clear from the opposing affidavit that the respondents had not been misled. He

referred me to the judgment in *Standard Bank of South Africa Ltd v Naude and another* where a similar problem arose, in support of his contention that the court could treat this as being merely an error or oversight and that the intention was clearly to refer to both respondents and to seek judgment against them jointly and severally. In this regard he also relied upon the statement by Corbett JA in *Maharaj* that the court looks at the matter at the end of the day on all the documents that are properly before it.

[19] The problem with this is that looking at all the documents merely highlights the problem with the affidavit and does nothing to resolve it. If one looks at the summons it contains a claim brought against both respondents jointly and severally. When one looks at the application for summary judgment and the supporting affidavit it refers to a claim against 'a defendant'. As I understood the submission it is that I should treat all such references in the application and affidavit as being obviously erroneous and intended to refer to both respondents and to do so on the basis of nothing more than that the claim in the summons is against two defendants and Mr Lombard does say that he verifies 'the cause of action and the amount claimed in the summons'. However it is by no means clear to me that this is permissible. One can readily imagine circumstances in which summary judgment is sought only against one of two defendants in an action. For example where the one is a surety it may be that the surety has defences available to it that are not available to the principal debtor. Alternatively it may be brought only against the surety alone because the principal debtor has gone into liquidation. One cannot simply assume that because two defendants are cited that must mean that summary judgment is being sought against both. The fact that I may suspect that Mr Lombard used an office

precedent and failed to check both the notice of application and the affidavit before signing them does not entitle me to read them as saying something they do not say.

[20] The situation that arose in the case of *Naude* differs from that in the present case. There the claim lay against two defendants and the application was brought against both of them. The affidavit verified the cause of action, the allegations in the summons and the amount owing in respect of both defendants. However the statement of the deponent's opinion was that 'the respondent have' no bona fide defence and that notice of intention to defend had been delivered solely for the purposes of delay. Speaking for myself I would have thought that the fact that the entire application related to both respondents and the fact that the singular reference to 'respondent' was followed by the plural verb 'have' clearly indicated that this was nothing more than an inadvertent typographical error and that appears to have been the approach adopted by the court. In other words the papers properly construed showed that the application was being brought against both defendants and the single reference to 'respondent' did not alter this.

[21] A more pertinent decision is that of *Standard Bank of South Africa Ltd v Roestof* where Blieden J dealt with an affidavit couched in the plural in a case where there was only one defendant, which is the converse of the present case. The learned judge held that a reading of the summons and mortgage bond together with the affidavit (he did not mention the notice of motion in the application for summary judgment) left no doubt that what was being verified was a cause of action against the defendant alone. Of course if that was correct, as a matter of the proper interpretation of the

documents, then the resulting conclusion would necessarily be that the affidavit was not defective because it correctly verified the facts on which the cause of action against the only defendant was based.

[22] Those cases stand in stark contrast to the present one where it is impossible to exclude the possibility that the intention was to seek summary judgment against only one of the defendants. In those cases the court, as a matter of construction of the documents, held that the plural references were inadvertent errors and that properly construed in the light of all the documents they should be construed as singular. However it is easier to construe plural references as being mere error and intending the singular where the only possible claim is against a single defendant than it is to construe singular references as intending the plural where there is more than one defendant. That is the situation in the present case. Similar confusion existed in the case of *Absa Bank Ltd v Coventry*, where the summons cited one person but the affidavit purported to verify a cause of action against two defendants and asked for judgment jointly and severally against both. Whilst one will always suspect in situations such as this that the difficulty is due to carelessness in using a precedent without checking that it was appropriate that cannot in the present case be said with any measure of certainty in view of the possibility that there may have been good reasons for limiting the claim to only one of the respondents.

[23] Although the cases can be explained in this way Mr van Rooyen placed reliance on a passage where Blieden J went further and said:

'A reading of Rule 32 as a whole makes it plain that, once there is an affidavit by the plaintiff, or someone acting on its behalf, who can swear positively to the facts verifying

the cause of action and the amount, if any, claimed, stating that in his opinion there is no *bona fide* defence to the action and that intention to defend was delivered solely for the purposes of delay, the plaintiff is entitled to summary judgment unless the defendant has complied in some way or other with the requirements of Rule 32(3). If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him."

This passage was cited and followed in *Naude*.

[24] Mr van Rooyen urged me to adopt the approach in this passage and to approach the matter on the basis that Mr Singh had dealt with the merits and clearly 'knew what case was being made against the respondents', so that the respondents had not been prejudiced by the shortcomings in Mr Lombard's affidavit. With respect, however, I am unable to agree that this passage is a correct statement of the position under rule 32(2). The learned judge had already held that on a proper reading of all the documents in the case the affidavit in support of the application for summary judgment did verify the cause of action and confirm the facts on which it was based. He said that it was clear that the affidavit referred only to a claim against the only defendant cited in that case. There was accordingly no question of the papers not being technically correct. In those circumstances no question of prejudice to the defendant could arise as the application was technically in order and complied with the requirements of the rule. It follows that these remarks were plainly *obiter*. Should they be followed?

[25] 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 *cadit quaestio.* Its defects do not disappear because the respondent deals with the merits of the claim set out in the summons.

[26] It may well be that the present rule in regard to summary judgment is overly technical and encourages the taking of points by unmeritorious defendants seeking to delay the day of final reckoning. For my part that is a view I hold and there may be merit in relaxing the rule by, for example, permitting affidavits of information and belief, permitting a plaintiff to deliver a replying affidavit or demanding more than is at present the position from the defendant in setting out their defence. However those are matters for the Rules Board for Courts of Law. As the position stands at present it is not for me to ignore the substantial body of authority, endorsed by our highest court in non-constitutional matters, that holds that summary judgment is an exceptional remedy that should only be granted when it is

clear that the claim is good and the defendant has no defence. It is that approach that informs the cases where courts have held that an applicant must properly comply with the requirements of the rule in regard to such applications. 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. In my view and for this reason as well the present application was fatally defective.

[27] There remains only the question of costs. Two counsel appeared on behalf of the respondents. Mr Shaw QC submitted that the amounts in dispute are substantial and the points on the merits of some complexity. That may be so insofar as the questions of interpretation of the National Credit Act 34 of 2005 are concerned as well as in respect of the submissions in regard to the constitutionality of certain provisions of that Act. However, the first point on which I have found in favour of the respondents is one in respect of which there is ample authority and no particular complexity and the second point seems to me to be of much the same character. For those reasons therefore the employment of two counsel was not warranted.

[28] In the circumstances the application for summary judgment is dismissed with costs and the respondents are given leave to defend the action.

DATE OF HEARING	27 APRIL 2010
DATE OF JUDGMENT	4 MAY 2010
APPLICANT'S COUNSEL	MR R M VAN ROOYEN
APPLICANT'S ATTORNEYS	LYNN & MAIN INC

RESPONDENTS' COUNSEL	MR D J SHAW QC with Mr M Manikam
RESPONDENTS' ATTORNEYS ATTORNEYS	CHRISTEL MOODLEY Represented locally by CAJEE SETSUBI CHETTY