



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

Case No: 1274/2020

In the matter between:

ABSA BANK LIMITED

PLAINTIFF

And

PRO TRADING ENGINEERING (PTY) LTD

1st DEFENDANT

Registration Number: 2014/023033/07

DAVID KLEYNHANS

2nd DEFENDANT

Identity Number: [...]

IZAK JOHANNES NIENABER

3rd DEFENDANT

Identity Number: [...]

Heard: **19 August 2021**

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.

The date for the hand-down is deemed to be **25 October 2021**.

ORDER

The following orders are made:

- (a) The application for summary judgment is dismissed.
- (b) The defendants are given leave to defend the action.
- (c) The costs of the application for summary judgment, shall be costs in the cause.

JUDGEMENT

KGABI AJ

INTRODUCTION

[1] This is an Application for Summary Judgement for an amount of R639, 452.32 arising out of an action brought by the Plaintiff against the Defendants.

[2] For the sake of convenience, the parties are referred to as in the main pleadings i.e. as 'Plaintiff' and 'Defendant(s)' respectively.

- [3] The Plaintiff claims the above amount against the First Defendant (the alleged Principal debtor) on the basis of alleged overdue overdraft facility.
- [4] Summary Judgement is also sought against Second Defendant (Director in the first Defendant/company) and Third Defendant (Spouse of the second defendant) jointly and severally with the First Defendant, on the basis of suretyship allegedly entered into by them.
- [5] The Defendants oppose the Application for Summary Judgement, and submit that the application be dismissed with costs.

BACKGROUND:

- [6] The Plaintiff issued summons on **22 July 2020**, against the Defendants for an amount of R639, 452.32. This was pursuant to an overdraft facility, with an Account number: 4081971434. The facility was reviewable from time to time, and the latest facility letter was signed in Klerksdorp on **19 October 2018**.
- [7] The Defendants filed a Notice of Intention to Defend the matter on **21 August 2020**.
- [8] On **01 October 2020**, the Plaintiff filed a Declaration in support of the Simple Summons issued, in order to outline the Particulars of Claim.

[9] On **09 December 2020**, the Plaintiff filed a Notice of Bar, calling upon the Defendant to file his Plea.

[10] The Notice of Bar was followed by the Defendant's Plea which was filed on **05 January 2021**. The Defendant denies owing the Plaintiff, and alleges that the overdraft facility was declined. Defendant further alleges that there was no resolution from the company authorizing the second defendant to enter into an overdraft facility agreement, and therefore the agreement was irregular in terms of company law. The Plea further states that the surety was signed for another credit facility in **2016**, and not for the **2018** facility.

[11] On **26 January 2021**, the Plaintiff filed a Summary Judgement Application based on the fact that the Plea does not raise any issue for trial.

[12] On **08 February 2021**, the Defendant filed a Notice of Intention to Oppose.

[13] On **23 February 2021**, the Defendant filed an Affidavit Opposing Summary Judgement which raises the following facts:

13.1 First Point in Limine - Affidavit in support of Summary Judgement not duly commissioned

13.2 Second Point in Limine – Deponent not Authorised

13.3 Third Point in Limine – Non Adherence to the National Credit Act

13.4 That there is no resolution from the company authorizing the Director to enter into any credit facility

13.5 That the suretyship was signed in **2016**, and the credit facility in dispute was granted in **2018**, and therefore the suretyship cannot be effective before the facility is granted.

13.6 That the first defendant applied for a loan, and the loan was never approved

13.7 That the Turquand rule should absolve the Third defendant from liability in terms of the law of contract.

[14] Following the Court's Practice Directive the Plaintiff filed their Practice Note and Heads of Argument on **27 July 2021**. The Defendants filed their Heads of Argument on **04 August 2021**.

[15] Application for Summary Judgement came before this court on **19 August 2021**. Both parties argued the matter in terms of their Heads of Arguments.

ARGUMENTS OF DEFENDANT FOR SUMMARY JUDGEMENT

POINTS IN LIMINE

First Point in Limine - Affidavit in support of Summary Judgement not duly commissioned

- [16] The Defendant contends that the affidavit in support of Summary Judgement was made by one ME Camacho, but it is irregular as it does not comply with the requirements of affidavits in terms of the Regulations.
- [17] The Defendant contends further that it is not clear whether this person is a male or female, as required but the affidavit in Paragraph 1 reads: "I am an adult manager employed by the Plaintiff, employed as such at Absa Towers West, 7th Floor, 15 Troye Street, Johannesburg, Gauteng".
- [18] The deponent is based in Absa Towers West, Johannesburg whereas the affidavit was signed in Alberton.
- [19] It is also questionable as to whether he/she does have the personal knowledge of the facts relating to this matter, because the Defendant also entered into an overdraft facility and suretyship in Klerksdorp, not Johannesburg.
- [20] The Commissioner of oaths, further failed to state their designation, or area for which he holds appointment of his/her office, if the appointment is held *ex officio*.

Second Point in Limine- Deponent not Authorised

- [21] The Respondents raise a point that since the applicant is a legal persona such as a company, evidence must be placed before the court that the deponent was given authority to depose the affidavit.

ARGUMENTS OF PLAINTIFF FOR SUMMARY JUDGEMENT

[22] Counsel for the Plaintiff argued that the application is brought in terms of Rule 32 in its amended form. It was further argued that the Defendants' argument that the Plaintiff's affidavit in support of the summary judgement is irregular, as per the first and second *point in limine* is not correct. According to the Plaintiff the affidavit should be accepted by the court.

[23] Plaintiff's counsel further argued that the overdraft limit of the First Defendant was R100 000.00 and therefore it is impossible that the bank could have authorized an overdraft facility of R639,452.32.

[24] According to Plaintiff, they gave an explanation that the Suretyship was signed in **2016**, as it provides for future debts, and hence the debt itself was incurred in **2018**.

EVALUATION AND APPLICATION OF THE LAW TO THE FACTS

[25] The Affidavit which supports a summary judgement is supposed to represent the evidence of the Plaintiff, and therefore it should be in accordance with the Regulations relating to affidavits.

[26] In **Absa Bank Limited v Botha NO Others 2013 (5) SA (GNP)** Kathree-Setiloane, J held as follows:

“The verifying affidavit represents the cornerstone of the summary judgment procedure under Rule 32(2), which permits the grant of a final judgment or order in a defended action without full pleadings or a trial.² The deponent to the verifying affidavit is required to swear positively to the facts verifying the cause of action, and the amount claimed, if any, and that in his or her opinion, the defendant does not have a bona fide defence to the action and, that the notice of intention to defend has been delivered solely for purposes of delay. The purpose of the verifying affidavit is to satisfy the court that the plaintiff’s cause of action is not only valid but also unimpeachable and, that any defence to it is likely to be spurious and raised solely for the purpose of delay. Courts are, therefore, reluctant to grant summary judgment unless satisfied that the plaintiff has an unanswerable case.

[27] The verifying affidavit must satisfy the general requirements for affidavits as contained in the Regulations (“the Regulations”) promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act, 16 of 1963 (“Justices of the Peace and Commissioners of Oaths Act”). In terms of the Regulations the oath or affirmation is administered by a commissioner of oaths. Before a commissioner of oaths administers the prescribed oath or affirmation, the commissioner of oaths is required to ask the deponent:

(a) Whether he knows and understands the contents of the declaration;

(b) Whether he has any objection to taking the prescribed oath;

and

(c) Whether he considers the prescribed oath to be binding on his conscience.

[28] If the deponent answers the above questions in the affirmative, the commissioner of oaths must administer the oath. The deponent is required to sign the statement in the presence of the commissioner of oaths and, if unable to write, he or she must affix his mark in the presence of the commissioner of oaths at the foot of the statement. In terms of Regulation 4 (1) the commissioner of oaths is required to certify that the deponent has acknowledged that he or she knows and understands the contents of the declaration. Regulation 4(1) reads as follows:

“Below the deponent’s signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration.”

The commissioner of oaths is, thereafter, required to sign the declaration, print his full name and business address below his signature, and state his designation and the area for which he holds his appointment or his office if he has been appointed ex officio.”

[29] On the second *point in limine* it is indeed questionable whether the deponent has personable knowledge of the facts, as he/she seems to have never personally dealt with the Defendants in the matter.

[30] In **Absa v Le Roux 2014(1) SA 475 (WCC)**, Binns-Ward J emphasized that *“ordinarily, only a witness with direct knowledge of the facts is competent to testify to their existence. It was for that reason that the word ‘positively’ has generally been construed in the manner explained in the passage from Maharaj quoted earlier. But what is the position when, by way of an exception to the general rule, hearsay evidence is admissible to prove the facts*

in issue? If the hearsay evidence would be admissible to prove the facts at the trial, why should a deponent who is qualified to produce the hearsay evidence not be able to depose to an affidavit in support of summary judgment on the basis of such evidence? Provided that he is appropriately qualified to give the evidence, why should he be regarded as disabled from swearing positively to the facts?"

[31] The test still remains what it always was namely: Has a defendant disclosed a *bona fide* (i.e. an apparently genuinely advanced, as distinct from sham) defense? The defence raised relates to the Turquand rule. The parties' marriage in community of property is also raised and on the other side Plaintiff therefore argues that if suretyship was entered into in the normal course of business, an approval of spouse could not be sought, meaning spousal consent is not a requirement.

[32] The other defence states that the facility limit was R100 000, and therefore it was not possible for the Defendant to get more debt, whereas Plaintiff argues that according to Clause 21 of the Suretyship, the amount of indebtedness is not limited to R100,000.00.

[33] Therefore we cannot rule out that there are issues raised in law, confirming that there are triable issues.

CONCLUSION

[34] Defendants argued that the overdraft limit of the First Defendant was R100 000.00 and therefore it is impossible that the bank could have

authorized an overdraft facility of R639, 452.32. Defendants further states that Suretyship was signed in **2016**, because it relates to another debt and not the debt incurred in **2018**. Turquand rule, Companies Act and Matrimonial Law were also raised to exclude the third defendant from liability. All the above points will be ventilated in the trial as they are triable issues.

[35] I am inclined not to go further, but agree with the Defendants on the *First Point in Limine*, in that the Founding Affidavit is clouded with irregularities. The verifying affidavit represents the cornerstone of the summary judgment procedure under Rule 32(2), which permits the grant of a final judgment or order in a defended action without full pleadings or a trial, and in this case the court is reluctant to use the affidavit to give a judgement.

ORDER

[36] The following orders are made:

- (a) The application for summary judgment is dismissed.
- (b) The defendants are given leave to defend the action.
- (c) The costs of the application for summary judgment, shall be costs in the cause in the action.

M KGABI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAFIKENG

APPEARANCES

DATE OF HEARING : 19 AUGUST 2021

JUDGMENT RESERVED : 06 AUGUST 2021

DATE OF JUDGMENT : 25 OCTOBER 2021

COUNSEL FOR THE PLAINTIFF : R RAUBENHEIMER

COUNSEL FOR THE RESPONDENT : ADV. HITGE