G.P.-S.59968—1970-71—2 500 J 219

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

SEOPURSAD POORAN MAHARAJ *Appellant,*

versus

BARCLAYS NATIONAL BANK LTD. *Respondent*

Appellant's Attorney Davidson & Marais *Respondent's Attorney* Hill, McHardy & Hill
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate H.E. Nall *Respondent's Advocate* A. Findlay
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op 7-11-75

2.4.2.a

Coram: Holmes, Wessels, Trollip, Corbett JJA et Galgut AJA.

Nall - 9.45-10.55. 12.25-12.27.
Findlay - 10.55-11.00; 11.15-12.25;

(D.C.L.D.)

C.A.U.

The Court allows the
appeal with Costs.
And sets aside the order of
the trial Court and substitutes
an order in the following terms:-
"Summary judgment is
refused and defendant

P.T.O.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter of

SEOPURSAD POORAN MAHARAJ ..... Appellant

and

BARCLAYS NATIONAL BANK LIMITED ..... Respondent

Coram: Holmes, Wessels, Trollip et Corbett, JJ.A., et Galgut, A.J.A.

Date of Hearing: 7 November 1975.

Date of judgment: 18 November 1975.

J U D G M E N T

CORBETT, J.A.:

This is an appeal against a decision by KRIEK, J., given in the Durban and Coast Local Division, whereby he ordered summary judgment in the sum of R14 112,32, together with interest and costs, against appellant (defendant in the Court below) at the instance of respondent bank (plaintiff

in/.....

in the Court below). The appeal is made direct to this Court, the parties having lodged the required notice of consent. For convenience I shall continue to refer to the parties as plaintiff and defendant.

The application for summary judgment was made on the basis of a simple summons (i.e., not a combined summons). In this defendant is described as "an estate and financial agent" of Stanger and the amount claimed is stated to be R14 112, 32, interest thereon at the rate of 13 per cent per annum calculated from 24 October 1974 and costs. The cause of action is set forth in the summons as follows:

> "At all material times ~~hereof~~ hereto the Defendant has been a customer, keeping a current banking account at the Stanger Branch of the Plaintiff's bank and ... in terms of an oral agreement of overdraft between the defendant and the Plaintiff the latter acting through its duly authorised manager a certain D.A. Rees, the Plaintiff disbursed and paid out on the Defendant's behalf certain sums of money amounting in all to R14 112,32 ..... and ... it was a term of the aforesaid agreement that the Defendant would pay interest at a rate to be determined by the Plaintiff from time to time on all amounts so disbursed/....

disbursed by the Plaintiff and... the Plaintiff determined the interest rate to be at the rate of 13% ....., and informed the Defendant accordingly, and... it was a further term of the aforesaid agreement that all amounts so disbursed and all interest would be payable upon demand, but notwithstanding demand the Defendant has not paid such amount or any portion thereof."

In support of the application plaintiff filed an affidavit deposed to by one William John Mason, the body of which reads as follows:

"1. I am the Branch Manager's Assistant of BARCLAYS NATIONAL BANK LIMITED, Stanger Branch, Jackson Street, Stanger. I am duly authorised to make this Affidavit and I can swear positively thereto.

2. I hereby verify the cause of action as set forth in the Summons and pray that same be read as if incorporated herein, and I swear positively that the Defendant is liable to the Plaintiff on the claim and for the amount as detailed in the Summons and upon the cause of action set out therein.

3. In my opinion the Defendant has no bona fide defence to the Plaintiff's action and the Notice of Intention to Defend has been delivered solely for the purpose of delay."

In the Court below the defendant took the point

in limine that this affidavit did not comply with the requirements of Rule 32 (2) of the Uniform Rules of Court. His complaint with regard to the affidavit is contained in paragraph 4 of his opposing affidavit, which reads:

> "Rule 32 sub-rule 2 of the Uniform Rules of Court requires that the affidavit in summary judgment proceedings has to be made by a person who can swear positively to the facts, verifying the cause of action and the amount claimed. The affidavit of the said MASON does not comply with these requirements. Ex facie the Summons, Plaintiff's cause of action is alleged to be based on an oral agreement concluded between myself and the Plaintiff who was represented by its duly authorised manager, one D.A. REES. The said MASON does not and cannot claim to swear positively to the facts and in the circumstances he cannot verify Plaintiff's cause of action."

The trial Court overruled this point. It now forms the first ground of appeal in this Court.

Rule 32 deals generally with summary judgment. Subrule (2) provides that the plaintiff's notice of application for summary judgment shall be accompanied by -

> "an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of

action/....

> action and the amount, if any, claimed and 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."

In my view, the requirements of this portion of the rule were correctly stated by THERON, J., in Fischereigesellschaft v. African Frozen Products (1967 (4) SA 105 (C), at p 108) as follows:

> "(a) that the affidavit should be made by the plaintiff himself or by any other person who can swear positively to the facts;
>
> (b) that it must be an affidavit verifying the cause of action and the amount, if any, claimed; and
>
> (c) that 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."

(See also Flamingo Knitting Mills (Pty.) Ltd. v. Clemans, 1972 (3) SA 692 (D) at p 694; cf. Pillay v. Andermain (Pty.) Ltd. 1970 (1) SA 531 (T), at p. 535). As regards requirement (b) above, I think that the English version of the rule is quite clear. The rule demands, in my view, that the

affidavit/.....

affidavit, whether made by the plaintiff himself or by another person, should verify the cause of action and the amount, if any, claimed. The history of the rule and its predecessors and of the procedure which it seeks to embody (as described by THERON, J., in the African Frozen Products case, supra, and by TROLLIP, J., in Sand and Co. Ltd. v. Kollias 1962 (2) SA 162 (W)) strongly supports this interpretation. Moreover, the word "verifying" cannot be taken to qualify the word "facts" and to be part of the definition of the "any other person" who may make the affidavit, as has been held in some cases, since this would run counter to the meaning of the word "verifying" and the grammatical construction of the sentence in which these words occur. The relevant meanings of "verify" in the Shorter Oxford English Dictionary are: "to testify or affirm formally or upon oath; ... to testify to, to assert as true or certain". Clearly facts do not verify; a person verifies an alleged state of facts. And where the verification takes the form of a sworn affidavit it may be said, figuratively, that the

affidavit/.....

affidavit verifies the facts. In addition, the words "and stating", appearing later in the same sentence as "verifying", qualify the same subject-matter. Were this not so the word "and" linking the two participles would be inappropriate and redundant. It can hardly be suggested that the word "stating", and what follows thereon as to what must be stated, can have reference to anything but the content of the affidavit. It is therefore, plain that the words "verifying the cause of action and the amount, if any, claimed...." also refer to the content of the affidavit. It is true that the wording of the Afrikaans version of Rule 32 (2) appears to support the construction that "verifying", and the words which follow, qualify "facts", but, as I see it, the two versions are quite irreconcilable. It seems to me improbable in the extreme that "verifying" should have been intended to qualify "facts" as then the affidavit would not be required to contain any verification of the plaintiff's cause of action and the amount, if any, claimed. Bearing in mind the nature of the procedure and

the history of the rule this is an untenable interpretation. I can only conclude that the Afrikaans version is a mis-translation. At some appropriate time this should be remedied by amendment.

Concentrating more particularly on requirement (a) above, I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person "who can swear positively to the facts". In the latter event, such other person's ability to swear positively to the facts is essential to the effectiveness of the affidavit as a basis for summary judgment; and the Court entertaining the application therefor must be satisfied, prima facie, that the deponent is such a person. Generally speaking, before a person can swear positively to facts in legal proceedings they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the

magistrates'/....

magistrates' court), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated (see e.g. Joel's Bargain Store v. Shorkind Bros. (Pty.) Ltd. 1959 (4) SA 263 (E); Misid Investments (Pty.) Ltd. v. Leslie 1960 (4) SA 473 (W); Sand and Co. Ltd. v. Kollias supra, at pp. 165-7; Fischereigesellschaft v. African Frozen Products, supra, at pp. 109-110; Flamingo Knitting Mills (Pty.) Ltd. v. Clemans, supra, at p. 694-5; Barclays National Bank Ltd. v. Love 1975 (2) SA 514 (D), at pp. 515-6).

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 (see African Frozen Products case, supra, at p. 110; Love's case, supra, at p. 515).

In my view, this is a salutary practice. While undue

formalism/.....

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 emphasized (see e.g. Mowschenson and Mowschenson v. Mercantile Acceptance Corp. 1959 (3) SA 362 (W), at p. 366; Arend and Another v. Astra Furnishers (Pty.) Ltd. 1974 (1) SA 298 (C), at pp. 304-5; Shepstone v. Shepstone 1974 (2) SA 462 (N), at p. 467). The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and 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 facts.

Where/....

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court (see Sand and Co. Ltd. v. Kollias, supra, at p. 165). The principle is that in deciding whether or not to grant summary judgment the Court looks at the matter "at the end of the day" on all the documents that are properly before it (Ibid., at p. 165).

It remains to apply these principles to the facts of the present case. Ex facie the summons plaintiff's cause of action is founded upon monies disbursed on defendant's behalf in terms of an oral agreement of overdraft. The relevant facts would, therefore, be the conclusion of the contract, and the terms thereof, the deposits in, and withdrawals from, defendant's current account at the Stanger branch of the plaintiff bank and the interest debits resulting in the debit balance as at the date alleged in the summons, viz. 24 October 1974, and the making of a demand for payment. In regard to certain of

these facts, it would be difficult, if not impossible, for any one person to have first-hand knowledge of every fact that goes to make up the plaintiff's cause of action. In this connection I am in full agreement with the following remarks of MILLER, J., in Barclays National Bank Ltd. v. Love (supra, at pp 516-7), made with reference to an affidavit made by the manager of a branch of the plaintiff bank (oddly enough also the Stanger branch):

> "We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment. It goes without saying that a manager of a bank who claims to have personal knowledge of the extent to which a client has overdrawn his account must needs rely upon the bank records which show the amounts paid into his account and the amounts withdrawn by the client."

In this case the deponent, Mr. Mason, does not specifically state that he has personal knowledge of the overdraft arrangements made by the defendant with the manager of the Stanger branch of the bank and the state of defendant's current account at the relative time. On the other hand, he does say, in paragraph 1 of his affidavit, that he is the assistant to the branch manager of the Stanger branch. It is not clear what the duties or status of the assistant are but, if one reads this averment together with the statement in paragraph 2 that the deponent swears positively that the defendant is liable to plaintiff on the claim and for the amount as detailed in the summons and upon the cause of action as set out therein, there is perhaps enough to justify the conclusion that in the course of his duties Mr. Mason would have acquired a personal knowledge of the defendant's financial standing with the bank and the state of his current account. This is to some extent reinforced by the fact that in paragraph 4 of his opposing affidavit (quoted above) the defendant merely puts in issue the deponent's ability

to depose to the oral agreement of overdraft entered into with the manager, Mr Rees: he does not deny the 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 first-hand knowledge of the arrangement 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 overdraft facilities were granted to him but to the amount, if any, actually owed by him on overdraft.

Viewing the matter "at the end of the day", I consider that, although this is a borderline case, there is just sufficient to enable the affidavit to pass muster. At any rate, I am not prepared to hold that the trial Judge erred in overruling the point in limine.

Alternatively to the point in limine the defendant raised a defence on the merits. He stated that he had been

a/.....

a customer of the plaintiff bank and had operated a current account at its Stanger branch since about 1949. During December 1972 he approached the then manager of the Stanger branch, a Mr Gillbanks, and asked to be given overdraft facilities for about R12 000,00 for a period of about seven days. This was agreed to. During the following April he discovered that his overdraft was in the region of over R6 000. On making enquiries he discovered that a number of cheques, which he had given to one Omar Ebrahim of Pretoria as collateral security for monies lent to Bhishu Bros., had wrongly been presented for payment by Ebrahim and that the bank had met them. He immediately telephoned the bank and gave instructions to stop payment on all further postdated cheques of his that might be presented for payment from time to time. He followed this up with a letter dated 27 April 1973 and addressed to the Manager of the Stanger branch of the bank (Annexure "A" to the defendant's affidavit), the body of which reads:

> "Kindly do not pay any cheques or P.D.C. as at from the 25th April, 1973 as I am making my own arrangements.

The...../

> The Overdraft will be paid off from the 5th May onwards, and this will also be settled within 90 days."

The affidavit proceeds to state that during August 1973 defendant discovered that, despite his instructions in April, the bank had made further payments on post-dated cheques presented to it on his account. He spoke to Mr Chiazzani, the then manager and as a result of this discussion wrote a further letter to the bank, dated 28 August 1973 (Annexure "B" to the affidavit), the material portion of which reads:

> "I request that you kindly stop payment of the post-dated cheques signed by me of various amounts falling due from the 28th August, 1973 to the 28th December, 1974.
>
> The post-dated cheques are in favour of Joe Family Trust; Protea Wigs and Cosmetics; Impala Enterprises; H.S. Ebrahim (Pty;) Ltd. and Joe Africa (Pty.) Ltd. "

The defendant's affidavit concludes (paragraph 11):

> "I have met my obligations to the Plaintiff and I deny that I am indebted to the Plaintiff in any sum whatsoever. If Plaintiff's claim against me is in respect of payments made by it on further postdated cheques presented to it for payment on my account after my final instructions to it in August, 1973,/.....

1973, then I submit that such payments were made despite my specific instructions to it and I am, accordingly, not liable to the Plaintiff for any such payments.

WHEREFORE I humbly pray that Plaintiff's claim against me for summary judgment be dismissed, with costs."

Under Rule 32(3), upon the hearing of an application for summary judgment, the defendant may either give security to the plaintiff for any judgment which may be given, or satisfy the Court by affidavit or, with the leave of the Court, by the oral evidence of himself or any other person who can swear positively to the fact, that he has a bona fide defence to the action. Such affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon therefor. If the defendant finds security or satisfies the Court in this way, then, in terms of Rule 32(7), the Court is bound to give leave to defend and the action proceeds in the ordinary way. If the defendant fails ~~either to find security~~ or to satisfy the Court in this way, then, in terms of Rule 32(5), the Court has a discretion as to whether to grant summary judgment or not (see Gruhn

v. Pupkewitz/.....

v. Pupkewitz and Sons (Pty.) Ltd. 1973 (3) SA 49 (AD), at p. 58). If on the hearing of the application it appears that the defendant is entitled to defend as to part of the claim, then, in terms of Rule 32(6), the Court is bound to give him leave to defend as to that part and to enter judgment against him for the balance of the claim, unless he has paid such balance into Court.

Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has "fully" disclosed the nature and grounds of his defence and the

material/....

material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word "fully", as used in the context of the rule (and its predecessors) has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. (See generally, Herb Dyers (Pty.) Ltd. v. Mahomed and Another 1965 (1) SA 31 (T); Caltex Oil (S.A.) Ltd. v. Webb and Another 1965 (2) SA 914 (N); Arend and Another v. Astra Furnishers (Pty.) Ltd., supra, at pp. 303-4; Shepstone v. Shepstone 1974 (2) SA 462 (N)). At the same time the defendant is not expected to formulate his opposition to the claim

with/.....;

with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See Estate Potgieter v. Elliot 1948 (1) SA 1084 (C), at p. 1087; Herb Dyers case, supra, at p. 32.)

In the present case the trial Judge found that there were material facts which the defendant "could and should have dealt with" in his affidavit and without which the Court was not able to come to a decision that he appeared to have a bona fide defence. "In the result" the application for summary judgment was granted. (I may mention, en passant, that the learned judge does not appear to have considered whether, despite the shortcomings of the affidavit, he should not exercise a discretion in defendant's favour.) It was submitted on appeal that in so finding against the defendant the trial Judge erred.

It must be conceded at once that the defendant's affidavit, in so far as it purports to set forth the defence on the merits (as outlined above), is not a wholly satisfactory document. There is some force in certain of the criticisms levelled at it by the Judge a quo. I shall

consider/.....

consider these in due course. The affidavit does, nevertheless, appear to disclose a defence which seems, on the face of it, to be bona fide. As I understand the position, the defendant's case is that, as a customer of the bank of long standing, he did obtain short-term overdraft facilities from the bank in December 1972. It is true that he does not state whether he availed himself of these facilities and, if so, to what extent. Nor does he say specifically that monies borrowed on overdraft were duly repaid in accordance with the arrangements made. I think, however, that it is to be inferred from the affidavit as a whole and especially from paragraph 11, in which defendant avers that he has met all his obligations to the bank, that any overdraft incurred in December 1972 was duly liquidated. Thereafter, in April 1973, upon discovery that his account was then about R6 000 in debit as a result of certain cheques having been wrongly presented for payment and met by the bank, he in effect "froze" his account by instructing the bank not to pay any cheques or post-dated cheques as from 25

April 1973. At the same time he undertook to pay off the overdraft of R6 000 within 90 days as from 5 May. Very considerable substantiation for the freezing of his account and the undertaking to pay off the overdraft is provided by the letter, Annexure "A". Again, it is true that defendant does not specifically say whether this overdraft was liquidated as arranged but this can also be inferred from the averments in the first sentence of paragraph 11 of the affidavit. Accepting this to be the case, it means that by 5 August 1973 defendant would have paid off the overdraft of R6 000 and had taken proper steps to ensure that as from 25 April 1973 his account would have been "frozen", in the above-described sense. The letter of 28 August 1973 (Annexure "B") and the averments in regard to the discovery in August that, contrary to defendant's instructions, the bank had paid certain post-dated cheques, and defendant's subsequent discussions with the bank manager do not really add anything to the defence. In fact one does wonder why, if at that stage the original "freezing" instruction still held good and the bank had

acted/.....

acted in breach of it, the letter makes no mention of this. Be that as it may, the letter does not really detract from the defence and it provides a measure of corroboration for certain of the factual averments in the affidavit. It also provides some basis for the suggestion in paragraph 11 that the plaintiff's claim may be based upon cheques paid by the bank contrary to defendant's instructions.

One of the difficulties in assessing the merits of the defence raised by defendant is that it is very difficult to measure it against the plaintiff's claim. The two just do not appear to match or correspond. For example, the summons refers to an overdraft agreement made with a Mr Rees, and the defendant's affidavit to one made with a Mr. Gillbanks. It is to be noted, however, that this difficulty is due to a large extent to the fact that plaintiff itself has placed very little information before the Court in regard to its cause of action. The application is made on a simple summons and, for purposes of summary judgment, it lacks particularity as to various matters, such as, when the

overdraft/.....

overdraft agreement was entered into; when plaintiff disbursed monies on defendant's behalf; the amount of such disbursements; when the interest rate of 13 per cent was determined and why it is to be calculated as from 24 October 1974; and how the sum claimed, viz. R14 112,32, is made up. Responsibility for difficulties arising from lack of particularity in the summons cannot be laid at defendant's door; and some account must be taken of this factor when adjudging defendant's affidavit.

Reverting to the criticisms of the affidavit made by the trial Judge, I quote the relevant passage from his judgment.

> "In the present case the defendant admits having used overdraft facilities accorded to him by the bank. He says he met his obligations and is not indebted to the plaintiff. He has not said: (1) what he claims that his obligations were; (2) whether in fact he paid off the admitted overdraft within 90 days after the 5th May, 1973, as he undertook to do in his letter of the 27th April, 1973; (3) whether or not he has been furnished with bank statements because, if he had been, he would have been able to point to the particular cheques which had been met and ought not to have been met; (4) what amounts were involved in the cheques in

respect/.....

> respect of which he instructed that payment should be stopped; and (5) that he has not issued cheques which would have resulted in his account being overdrawn."

As to point (1), I think that defendant has sufficiently stated this: he claims that because of the freezing of his account and the liquidation of his overdraft of R6 000 he was under no obligation at all to the bank. Point (2) I have already considered. As to point (3), I do not think that he was obliged to canvas the question of bank statements and what cheques were met which ought not to have been met. It was not really relevant to his defence and in any event, without knowing what disbursements formed the basis of plaintiff's claim it could prove a fruitless exercise. As to point (4), without knowing the basis of plaintiff's claim this is of uncertain relevance. And as to point (5), this would seem to be implicit in the evidence that he "froze" his account and his averment that he is not indebted to the plaintiff in any way.

Viewing the affidavit as a whole, in the context of the claim set forth in plaintiff's summons, I am of the

view that it does appear to raise a bona fide defence and that it has disclosed this defence and the material facts upon which it is founded with just - and only just - sufficient particularity and completeness in order to comply with Rule 32(3)(b).

The appeal is, accordingly, allowed with costs. The order of the trial Court is set aside and there is substituted an order in the following terms:

> "Summary judgment is refused and defendant is granted leave to defend the action. The costs of the application for summary judgment are left over for decision by the trial Court."

W. A. Corbett.

HOLMES, J.A.)
WESSELS, J.A.)
TROLLIP, J.A.) Concur.
GALGUT, A.J.A.)