***Reportable***

**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 5842/13

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

**ABSA BANK LTD** Plaintiff

and

**LOUWRENS ABRAHAM LE ROUX** First Defendant
**ANDRE VAN VUUREN** Second Defendant
**PSIDEAN FINANCIAL SERVICES (PTY) LTD** Third Defendant

*Summary – Summary judgment – requirements for compliance with Uniform Rule 32(2) – approach stated in Firstrand Bank Ltd v Huganel Trust2012 (3) SA 167 (WCC) disapproved – ability of deponents to supporting affidavits in summary judgment applications to rely on provisions of s 15 of Electronic Communications and Transactions Act 25 of 2002to swear positively to facts considered.*

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**JUDGMENT: DELIVERED: 7 OCTOBER 2013**

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**BINNS-WARD J:**

[1] The plaintiff, which is a registered bank and credit provider, instituted action against the three defendants, jointly and severally, claiming payment of the sum of R7 817 414,13, together with interest thereon. The defendants were sued in their capacity as sureties for and co-principal debtors with O2 Fresh Water Distillers (Pty) Ltd. Notice of intention to defend the action was given by the defendants and the plaintiff thereupon applied for summary judgment.

[2] The application for summary judgment is opposed by the first and second defendants, who are the co-directors of the third defendant. The second defendant has also brought an application in terms of s 165 of the Companies Act 71 of 2008 for leave to represent the third defendant in opposing the application and defending the action. The first defendant has applied for a postponement of the application in terms of s 165 to enable him to deliver an answering affidavit in those proceedings. He hasalso applied for a postponement of the summary judgment application against the third defendant, apparently on the basis that that should await the determination of the application brought by the second defendant in terms of s 165 of the Companies Act. I heard argument on the summary judgment application together with argument on the applications for postponement at the same time. Hardly any time was spent in argument on the postponement applicationsand no time at all on the application in terms of s 165.

[3] Summary judgment is regulated in terms of rule 32 of the Uniform Rules. Sub-rule (2) provides insofar as relevant that '[t]*he plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgment, 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 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*.' The first and second defendants have taken the point that the affidavit in support of the application for summary judgment does not comply with the sub-rule in that it does not appear therefrom that the deponent is a person able to swear positively to the facts verifying the cause of action.

[4] In *Fischereigesellschaft F Busse& Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd* 1967 (4) SA 105 (C), at 111A-B, Theron J held –

> As was pointed out in Misid Investments (Pty.) Ltd v Leslie, [1960 (4) SA 473 (W)] at p. 474, the applicant in summary judgment proceedings must comply strictly with the requirements of the Rules of Court. In his judgment in this case Munnik, A.J. (as he then was), indicated that to his mind the approach of the Court when objections were raised on technical groundsto an application for summary

judgment had been correctly set out by Marais, J., in Mowschenson and Mowschenson v Mercantile Acceptance Corporation of SA Ltd., 1959 (3) SA 362 (W) at p. 366, where he stated:

'The proper approach appears to me to be the one which keeps the important fact in view that

> the remedy for summary judgment is an extraordinary remedy, and a very stringent one, in that it permits a judgment to be given without trial.'

I am in respectful agreement.

[5] In the Appellate Division's subsequent judgment in *Maharaj v Barclays National Bank Limited* 1976 (1) SA 418 (A), Corbett JA in essence endorsed the strict approach propounded by Theron J, stating, at 423 B-H:

> 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' courts), 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. Shorkend 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*[1962 (2) SA 162 (W)], 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 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 (see, e.g., *Mowschenson and Mowschenson v. Mercantile Acceptance Corporation of SA Ltd.*, 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.[1]

[1]The judgment of the Supreme Court of Appeal in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) in which it was suggested (at para 33) that perhaps the time has come to stop describing summary judgment as a 'drastic' remedy did not purport to derogate from the explanation of the proper application of rule 32 set out in *Maharaj*. On the contrary, Navsa JA coupled that suggestion with the enjoinder to defendants that instead of seeking refuge under the labels that suggest a draconian character to the remedy in the hope of making the courts reluctant to grant summary judgment they should '*concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the*

[6] It is generally accepted that a person can swear positively to the facts only if they are within his personal knowledge. As the passage from *Maharaj* quoted in the preceding paragraph illustrates, it is not enough that the supporting affidavit merely parrots the wording of the sub-rule. There must be enough on the papers to satisfy the court that the deponent does indeed possess the requisite knowledge.

[7] The cause of action was set out as follows in the simple summons:

> 1.1 By virtue of the provisions of the suretyships annexed hereto and marked B1-B3 defendant and second defendant and third defendant bound themselves as sureties and co-principal debtors with O2 Fresh Water Distillers (Pty) Ltd ('the principal debtor') in an amount of R7,817,414.13 plus 16.5% interest calculated and capitalized monthly in arrears the entire debt now being owing, due and payable.
>
> 1.2 As will more fully appear from the suretyships, defendant and second defendant and third defendant have agreed that their liability in accordance with the suretyship are individually and jointly with the principal debtor; in respect of all its liabilities inclusive of interest and costs and that a certificate, signed by a manager of the plaintiff, shall be prima facie proof of the amount owing to the plaintiff; the interest rate payable and any other fact relating to the claim. A manager of the plaintiff has certified that the defendants are indebted in the amounts claimed as is evident from the annexed certificates, marked C1.
>
> 2. By virtue of the provisions of Section 4(1)(a) of the National Credit Act, 34 of 2005 ("the Act") the Act has no application as the principle debtor's turnover exceeded R1 million at the time the credit agreement was entered into.
>
> WHEREFORE PLAINTIFF prays for judgment against the defendants, jointly and severally, the one paying the other to be absolved, for:-
>
> Payment of
>
> (i) R7,817,414.13 plus interest from 14 January 2013 at 16.5% p.a. calculated and capitalized monthly to date of payment.
>
> (ii) Costs, as between attorney and client, to be taxed

[8] The body of affidavit made in support of the application for summary judgment by one Ali read as follows:

> 1. I am a manager of the plaintiff, employed at Wholesale Credit Restructuring and Advisory Group.
> 2. All the data and records relating to this action are under my control and I have acquainted myself therewith. The facts contained herein are within my personal knowledge and are both true and correct and I am duly authorised to make this affidavit.

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*Maharaj case at 425G - 426E*'. (Corbett JA was treating of sub-rule 32(3) at the passage referred to by Navsa JA. Rule 32(3) prescribes the requirements that must be satisfied by a defendant that delivers an affidavit in opposiiton to an application for summary judgment.)

3. I have read the summons and verify the cause of action and the indebtedness to the plaintiff in the amounts and on the grounds stated in the summons.
4. In my opinion, there is no bona fide defence to this action and that appearance to defend has been entered solely for the purpose of delay.
6 I accordingly submit that a proper case has been made out for summary judgment as prayed for in the summons and as set out in this application.

[9] The supporting affidavit falls materially short of what the sub-rule requires. The defendants did not bind themselves as sureties and co-principal debtors in the stipulated amounts as the affidavit read with the summons suggests. In the case of the first and third defendants they bound themselves subject to a limitation that 'the amount that the Bank shall be entitled to recover from me/us under this suretyship shall be limited to the maximum of R7 500 000,00 (Seven Million Five Hundred Thousand Rand) together with such further amounts in respect of interest and costs as have already accrued or which will accrue until the date of payment of the amount'. In the case of the second defendant liability in terms of the annexed deed of suretyship was unlimited.The deponent carelessly purported to confirm the inaccurate content of a carelessly drafted summons. Moreover, the supporting affidavit was deposed to in Johannesburg, which is the seat of the plaintiff's registered office, andthe place, one may assume, in the absence of any indication to the contrary,where the deponent is based. Two of the suretyships were executed in Hermanus, in July 2005 and August 2007, respectively, and the other in Bruma in August 2007. It is not evident from any of the content of the affidavit on what basis the deponent would have had personal knowledge of the execution of these deeds of suretyship in disparate places and different times, or of the principal debt to which the defendants' alleged liability is accessory. It appears from the 'Certificate of Balance' annexed to the summons, which was signed by the same person who deposed to the supporting affidavit in the summary judgment application, that the principal debt relates to the debit balance of a specified account in the bank's books in the name of the principal debtor. It does not appear at which branch of the plaintiff bank the account is operated, or on what basis the deponent made the certification.It is inherently improbable on the information before the court that the deponent has direct knowledge of most of the salient facts. Indeed, all that he expressly professes personal knowledge of is '*the facts contained herein*', i.e. the facts described in the supporting affidavit. The only facts set out in the affidavit are the deponent's position in the plaintiff's employ and his control of and reference to the data and records relating to the action. By itself that is not good enough.

[10] There is authority that would suggest that averments of fact based onreliance on records under the control of the deponent might, if weighed with other factors apparent on the papers, be sufficient (*Standard Bank of SA Limited v Secatsa Investments (Pty) Limited*1999 (4) SA 229 (C)), whereas other judgments call that into question (*Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another* 2010 (5) SA 112 (KZP). In the latter case, Wallis J, having noted the approach of van Heerden AJ in *Secatsa*, went on to observe (at para 13) that whereas it might be the effect of such judgments 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'* he did 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 thereto.'*

[11] In *Secatsa*it would appear that van Heerden AJ inferred from the deponent's involvement in settlement negotiations referred to in the papers and the fact that he had signed the certificate of balance that he had sufficient first hand knowledge of the facts for his affidavit, in which he expressly purported to positively swear to the facts verifying the cause of action, to pass muster. It is quite clear from the seminal judgment in *Maharaj*that personal or direct or first hand knowledge of the salient facts is generally expected from the deponent to the supporting affidavit in summary judgment applications. The approach in cases like *Secatsa* does not purport to derogate from that requirement. What the courts do on the *Secatsa* approach is to look at the papers as a whole to ascertain whether there is sufficient assurance to be derived therefrom that the deponent's averment that he is able to positively swear to the facts so as to be able to verify the cause of action and profess the belief that the defendant has no *bona fide* defence is well-founded. It is an approach that mirrors that adopted by Corbett JA in *Maharaj*; that is it entails determining on the probabilities, as they may be assessed on the papers read as a whole ('at the end of the day' as Corbett JA put it, quoting from Trollip J's judgment in *Sand and Co. Ltd. v. Kollias*), whether the deponent did indeed have sufficient direct knowledge of the facts.

[12] The approach manifested in a recent judgment of this court seems, however, if I have correctly understood its import, to take a new and quite different tack. After a review of what appear to have beeninconsistent approaches taken in a number of judgments given in recent

years on the requirements of the sub-rule,[2]it was held as follows in *Firstrand Bank Ltd v Huganel Trust* 2012 (3) SA 167 (WCC)at 176 I – 177E:

> What is one to make of these conflicting judgments which all followed from that of *Maharaj*? It appears to me that there are at least three important points that should be emphasised.
>
> 1 While summary judgment is an order which will prevent a defendant from having his day in court, there are many cases where the plaintiff is entitled to relief on the basis that, *ex facie* the papers which have been filed, there is no justification for concluding that opposition can be regarded as anything other than a delaying tactic.
>
> 2. As Corbett JA emphasised in *Maharaj*, excessive formalism should be eschewed. Hence the substance of the dispute, together with the purpose of summary judgment, needs to be taken into account during the evaluation of the papers which have been placed before court in order to determine whether the summary form of relief should be justified.
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> 3. While a measure of commercial pragmatism needs to be taken into account, in that many of these summary judgment applications are brought by large corporations and, accordingly, it may well be that first-hand knowledge of every fact cannot and should not be required, each case must be assessed on the facts which were placed before the court. It follows therefore that the nature of the defence becomes the starting point. For example, in *Maharaj*'s case Corbett JA found that it was a borderline case but one which fell on the right side of the border insofar as the plaintiff/applicant was concerned. On an evaluation of both the claim and the defence, it could be concluded with justification that the deponent had sufficient knowledge to depose to the affidavit, which formed the basis of the factual matrix to sustain an application for summary judgment.
>
> By contrast, there will be cases where, given the defence raised, some further knowledge is required beyond an examination of the documentation. In other words, knowledge of a personal nature may be required if it is relevant to the contractual relationship as alleged by the defendant and, if the defendant's version is proved, could constitute an adequate defence to the claim.

[13] It seems to me, with respect, that although there might be something to be said from a pragmatic perspective for the approach commended in *HuganelTrust*and (it is the words in the last part of the quoted passage that are of particular interest), it is nevertheless not one that accords either with the wording of the sub-rule, or the approach to the application of the sub-rule explained in *Maharaj*. The judgment in *Maharaj* held that the court could obtain assurance that the deponent to the supporting affidavit had the requisite direct knowledge of the facts from the content of the papers as a whole, and not just from the content of the affidavit read on its own. That is evident from the following dictum at p. 423 *in fine* of the

[2]*Shackleton Credit Management* supra, *First Rand Bank Limited v Beyer* 2011(1) SA 196 (GNP), *Standard Bank Limited v KroonhoekBoerdery CC and others* [2011] ZAGPPHC 132 (1 August 2011) *Standard Bank of SA Limited v Han-RitBoerderyCCand others* [2011] ZAGPPHC 120 and *Chandler Cole (Ptv) Ltd v Fruin* (WCC case 168504/2011).

judgment: '*Where the affidavit fails to measure up to these requirements*[i.e. where it fails to comply strictly with the requirements of the sub-rule], *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).*' The judgment did not hold, however, that direct knowledge by the deponent to the supporting affidavit was not necessary, or might be overlooked unless the defendant's answering affidavit raised an issue that made his apparent lack of direct knowledge relevant.[3]It is not the allegations which the defendant puts in issue that determine the extent of the knowledge that the deponent to the supporting affidavit must have. The deponent must have direct knowledge of most, if not all, of the facts that the plaintiff will have to prove to establish its claim in the action.

[14] In noting the policy of the courts to eschew undue formalism, Corbett JA did not intend to suggest that substantive non-compliance with the requirements of the sub-rule could be overlooked; on the contrary, the learned judge of appeal emphasised that '*in substance, the plaintiff should do what is required of him by the Rule'*. As apparent from the passage from the judgment quoted in paragraph , above, he went on to state '*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*'. (The learned judge of appeal had no cause to consider whether reliance by a deponent on admissible hearsay evidence might in certain circumstances qualify the deponent to swear 'positively' to the facts evinced by such evidence, something about which I shall say more later.)

[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* defence. That is why a contention by a defendant that the supporting

[3]To the extent that the judgment of Hutton AJ in *Investec Bank Ltd v Rees and Another In re: Investec Bank Ltd v Rees and Others* [2013] ZAGPJHC 35 (5 March 2013)atpara 27-30, following *Firstrand Bank Ltd v Huganel Trust*, appears to hold differently, I respectfully differ.

affidavit in a summary judgment application is non-compliant with the requirements of sub-rule 32(2) is properly characterised and dealt with as a point *in limine* in such applications.

[16] Reverting to the detail of the current case, differing in this respect from the conclusion van Heerden AJ was able to reach in *Secatsa*, I find no assurance of direct knowledge of the facts in the signature by the deponent to the supporting affidavit of the certificate of balance attached as an annexure to the summons. The certificate was drawn pursuant to the provisions of clause 13 of the deeds of suretyship, which in the English version provides as follows:

> A certificate signed by any manager of the Bank shall be sufficient proof of any applicable rate of interest and of the amount owing in terms hereof or of any other fact relating to the suretyship for the purposes of judgement, including provisional sentence and summary judgement, proof of claims against insolvent and deceased estates or otherwise and if I/we dispute the correctness of such certificate, I/we shall bear the onus of proving the contrary. It shall not be necessary to prove in such a certificate the appointment or capacity of the person signing such certificate.

The purpose of the certificate is to create an evidential onus on the surety to negate the bank's allegations as to the quantum and the cause of any debt in any proceedings in which it seeks to make a recovery against the surety. The certificate stands as *prima facie* proof of the substance of its contents in any litigation to exact payment under the deeds of suretyship; cf. *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 381H - 383A. It has that effect not as an incident of any law of general application, but only because the parties have agreed in their contract that it should do. There is no requirement in the current matter that the manager who signs such a certificate must have direct knowledge of the matters to which it pertains. There would thus be nothing untoward or remiss in any manager of the bank signing such a certificate on the basis of his perusal and *bona fide* acceptance of the correctness of the relevant information in the bank's records, as distinct from having direct knowledge of the matters in question. In other words the manager could legitimately execute such a certificate in circumstances in which, on the approach described in *Shackleton Credit Management*(which in my view faithfully follows that stated in *Maharaj*), he could not properly depose to an affidavit in support of a summary judgment application. Signature of such a certificate therefore is no warrant of the ability of the signatory to positively swear to the facts.

[17] The plaintiff's counsel also sought a cure for the deficiency in the supporting affidavit in the averments at para 16 of the second defendant's opposing affidavit. Second defendant averred:

> As will be elaborated upon herein below at all material times prior to the beginning of this year, and after this dispute with the plaintiff had already arisen I dealt with Corrie Coetzee, the relationship executive: Commercial Business – ABSA Retail and Business Banking, a certain Tobi Botes and an Elize van Breda in regard to the account relevant to this matter. I had a brief telephonic discussion with Ali [the deponent to the supporting affidavit] during the beginning of this year when Ali phoned me to try and resolve matters since I had requested someone else at ABSA to assist me in resolving this matter. Those discussions were short lived as Ali insisted on a meeting in the Cape with the first defendant and attorneys representing the plaintiff, but the first defendant refused to meet around a table with me.

The plaintiff's counsel submitted that this passage in the opposing affidavit afforded sufficient assurance of the deponent's direct knowledge of the facts and served to cure any deficiency in the supporting affidavit. I do not agree. All that it shows is that Ali felt it necessary to meet the parties. That, to my mind, is more indicative of a need by him to investigate the facts so as to be qualify himself to deal with the matter in the place of Coetzee, Botes and van Breda, who were the bank officials who had previously been handling it.

[18] The plaintiff's counsel furthermore submitted that some of the second defendant's defences were demonstrably contrived. He supported this submission by referring to what he characterised as contradictory averments concerning the indebtedness of O2 Fresh Water Distillers (Pty) Ltd to the plaintiff in affidavits made by the second defendant in support of applications for the business rescue of two companies in which the first and second defendant held an interest. The founding affidavits in the business rescue applications had been annexed to the second defendant's opposing affidavit in the summary judgment application and the content thereof incorporated in the opposing affidavit by reference. As I understood the argument it was to the effect that if it appeared that the defendants' defence was bad, or not advanced *bona fide*, that should militate in favour of overlooking any shortcoming in the supporting affidavit. The argument came down to a plea that substance should be placed before form. It should be clear from what has been said earlier that the argument cannot prevail in the face of an incurable non-compliance with the provisions of rule 32(2). As noted earlier, sufficient compliance by the plaintiff with the requirements of sub-rule 32(2) on the papers considered as a whole is a *sine qua non* to the court's ability to enter into the application.[4]

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[4]Compare the rejection by Roberson J of a similar argument in *Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd v Fantastic View Properties CC* [2013] ZAECGHC 33 (5 April 2013) at para 13-15 and compare also the approach of Southwood J in *Han-Rit Boerdery* supra.

[19] The requirements of rule 32(2) might, on the basis of the approach laid explained in *Maharaj*, and applied in cases such as *Shackleton Credit Management* and *Han-RitBoerdery*, appear on their face to place an impossible burden on institutional plaintiffs such as banks, particularly in the modern age in which much of their business is conducted facelessly on computer networks and recorded electronically. This much was in fact suggested in so many words by Monama J in *Firstrand Bank Ltd t/a Wesbank v Ego Specialised Services CC and Others* [2012] ZAGPJHC 47 (3 April 2012) at para 8-11. I do not believe, however, that this is necessarily so. Electronically stored data falling within the defined meaning of '*data message*' in s 1 of the Electronic Communications and Transactions Act 25 of 2002[5] is admissible in evidence in terms of s 15 of the Act. Section 15(4) of the Act provides: '*A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract*'.Section 15(4) has a twofold effect. It creates a statutory exception to the hearsay rule and it gives rise to a rebuttable presumption in favour of the correctness of electronic data falling within the definition of the term 'data message'.

[20] 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? After all, the evidence he could produce at the trial would, notwithstanding its hearsay character, nevertheless positively establish the facts, subject, of course, to the effect of any rebutting evidence adduced by the defendant. In my view,on a proper construction thereof, sub-rule 32(2) does not preclude the deponent to the supporting

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[5] '*data message*' means data generated, sent, received or stored by electronic means and includes-
(a) voice, where the voice is used in an automated transaction; and
(b) a stored record.
'*Data*' is defined as 'electronic representations of information in any form'.

affidavit from relying on hearsay evidence to swear positively to the facts when he could permissibly, as a matter of law, adduce such hearsay evidence for the purpose of proving the facts at a trial of the action.The case in support of such a construction is made even stronger when there is a statutory presumption in favour of the correctness of such evidence. Thus, if the deponent to a supporting affidavit in summary judgment proceedings were to be able to aver that he is (i) an officer in the service of the plaintiff, (ii) that the salient facts - which should be particularised - are electronically captured and stored in the plaintiff's records (iii) that he had regard thereto (iv) that he is authorised to certify and has executed a certificate certifying the facts contained in such record to be correct and (v) on the basis thereof is able to swear positively that the plaintiff will - having regard to the provisions of s 15(4) of Act 25 of 2002 - be able to prove the relevant facts at the trial of the action by producing the electronic record or an extract thereof, the requirements of rule 32(2) would be satisfied. I think that it would be salutary for the deponent to any such affidavit also to explain why the evidence is not being adduced by means of the affidavit of someone with direct personal knowledge of the facts.

[21] It is not necessary, however, to determinatively decide whether the Electronic Communications and Transactions Act could have been of assistance to the plaintiff in the current matter. The supporting affidavit did not identify the nature and content of the records to which the deponent had reference. It did not identify the facts established by reference to the records, orcontain any averments that would indicate the admissibility of their content in terms of s 15 of Act 25 of 2002. As a result it was inadequate on any approach; its content did not assure the court that the deponent could swear positively to the facts and verify the cause of action and the amount claimed.

[22] In the circumstances the application for summary judgment falls to be dismissed by reason of the plaintiff's non-compliance with sub-rule 32(2). Counsel were agreed that in that event it would not be necessary to deal with the second defendant's application in terms of s 165 of the Companies Act, or the first defendant's application for the postponement thereof.The point *in limine* holds good for all three defendants. The application for a postponement of the summary judgment application in respect of the third defendant therefore obviously falls away.

[23] Although the application for summary judgment has failed because of the plaintiff's non-compliance with the rules, I do not think it appropriate that a costs order against the plaintiff should necessarily follow. The object of the remedy is to discourage defendants who do not have a *bona fide* defence from delaying the determination of claims. The defendants'

point *in limine* may have been good, but it is a not a point that defendants should be encouraged to take in the abstract. A defendant who does not have a *bona fide* defence to a plaintiff's claim should not profit by taking the pointfor technical reasons instead of conceding that he has no defence to the claim. In the circumstances I shall direct that the costs of the summary judgment application shall be costs in the cause in the action.

[24] 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, including the costs incurred in respect of the application for the postponement of the summary judgment application, shall be costs in the cause in the action.

(d) The costs in respect of the application by the second defendant in terms of s 165 of the Companies Act, 2008 and the application by the first defendant for the postponement thereof shall stand over for determination by the court that determines the application in terms of the Companies Act.

**A.G. BINNS-WARD**

**Judge of the High Court**

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| **Matter heard:** | **28 August 2013** |
| **Judgment delivered:** | **7 October 2013** |
| | |
| **Plaintiff's counsel:** | **L.M. Olivier SC** |
| **Plaintiff's attorneys:** | **SandenberghNel Haggard, Bellville** |
| | **Nilands, Cape Town** |
| | |
| **First defendant's counsel:** | **M. Harrington** |
| **First defendant's attorneys:** | **HeroldGie Inc. Cape Town** |
| | |
| **Second defendant's counsel:** | **H. Jansen van Rensburg** |
| **Second defendant's attorneys:** | **Sim&BotsiAttoneys Inc. Johannesburg** |
| | **Smit Rowan Inc. Cape Town** |