

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
RULING

CASE NO.: HC-MD-CIV-ACT-CON-2020/03329

In the matter between:

BANK WINDHOEK LIMITED

APPLICANT

and

KOCK INVESTMENTS

FIRST RESPONDENT

JESAYA AMUNYELA

SECOND RESPONDENT

EDWARD SHIVELA

THIRD RESPONDENT

Neutral Citation: *Bank Windhoek Limited v Kock Investments* (HC-MD-CIV-ACT-CON-2020/03329) [2020] NAHCMD 574 (7 December 2020)

Coram: **RAKOW, J**

Heard: 13 November 2020

Delivered: 04 December 2020

Reasons: 07 December 2020

Flynote: Civil Practice – Summary Judgment – Requirements in terms of Rule 60 of the High Court rules – Affidavits in support of Summary Judgment Applications – personal knowledge – Rule 45(7) - Requirement of a “true copy”- Justices of the Peace and Commissioners of Oaths act 16 of 1963 - Commissioner of Oaths.

Summary: This claim is based on a loan agreement which was entered into between the plaintiff and the first defendant for an amount of N\$ 2 300 000. The terms thereof were that the said amount would be repayable to the plaintiff at an agreed term and that failure to meet the payment obligations would entitle the plaintiff to demand immediate payment of all amounts owing in terms of the agreement. The second and third respondents bound themselves as sureties and co-principal debtors *in solidum* with the first respondent. The plaintiff alleges that the first defendant has failed to honour the agreement and as a result instituted action against the defendants.

The defendants defended the action and the plaintiff proceeded to file an application for summary judgment. The respondents’ opposition to the summary judgement application raised a number of *points in limine*.

Held that, the court must, from the facts set out in the affidavit itself be able to make a factual finding that the person who deposed to the affidavit, was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, and was able to form the opinion that there was no bona fide defence available to the defendant and that the notice of intention to defend was given solely for the purpose of delay.

Held further that, a Commissioner of Oaths cannot administer an oath or affirmation or certify documentation relating to a matter in which he has an interest or that he/she has produced.

Held that, it is the duty of legal practitioners or any litigating party to ensure that the documents uploaded in support of their case on the electronic court file are properly scanned and legible. The purpose of producing a certified copy of a document is certainly

so that the content of the document could be relied upon. It should therefore be a good, clear copy with the content legible.

ORDER

1. The point *in limine* is upheld that the papers do not meet the technical standard needed and therefor the summary judgement application is strike from the roll.
2. Cost of this application is awarded to the defendants, of which costs are limited in terms of the provisions of Rule 32(11).
3. The parties are ordered to file a joint status report by no later than 21 January 2021 at 15h00.
4. The case is postponed to 26 January 2021 at 15h30 for Status hearing.

JUDGMENT

RAKOW, AJ:

Introduction

[1] The applicant in this matter (the plaintiff in the main matter) is Bank Windhoek Limited, a public company duly incorporated as such and registered as a commercial bank in terms of the applicable laws of Namibia. The first respondent (first defendant) is Kock Investment cc, a close corporation with limited liability, duly incorporated in terms of the Namibian law. The second and third respondents (second and third defendants) are Jesaya Amunyela and Edward Shivela who are both natural persons.

[2] The applicant, represented by a certain J Sheehama and the first respondent represented by the second respondent, entered into a loan agreement on 17 October 2017 for the amount of N\$ 2 300 000 and some fees and stamp duty fees being added. The terms of the loan agreement was that this amount should be repaid in 120

installments of N\$33 793.08 each. It was further a term of the agreement that should the first respondent fail to make a payment, the applicant would be entitled to demand immediate payment of all amounts owing in terms of the agreement. The allegation is that the first respondent failed to make payments for the period May 2020 to July 2020 in the amount of N\$69 003.15.

[3] On 12 June 2020 the applicant demanded the first respondent to remedy its breach within 14 days of the notice, failing which the agreement would terminate and legal action will be instituted. The first respondent failed to remedy the said breach and legal action was then instituted for recovery of the amount of N\$2 121 084, 34 which is the amount according to the balance certificate.

[4] The second and third respondents bound themselves as sureties and co-principal debtors *in solidum* with the first respondent. These sureties are both for an unlimited amount, including interest, commission, legal costs, stamps and all other necessary or usual charges. The applicant is further the holder of mortgage bonds executed in its favour by both the second and third respondents. These bonds were passed by the second and third respondents as security in favour of the applicant in respect of the second and third respondents' indebtedness in terms of the above sureties.

[5] When served with the combined summons, the respondents chose to defend the matter and the plaintiff then indicated that it intends to bring a summary judgement application as it was of the opinion that the respondents do not have a triable defense. The respondents opposed the summary judgement application and also raised a number of *points in limine* which the court will have to deal with first.

Points in limine

[6] The first point *in limine* raised by the first and second respondents is a four-fold contention that the description of the deponent's actual position is vague and embarrassing and it is not clear what his actual duties are; also that the deponent of the applicants' affidavit states that he is duly authorized to make the said affidavit but fails to

state from where he obtained the said authority, he further does not state that he actually has the authority to represent the applicant in these proceedings as well as indicate from where such authority has been obtained. As the deponent is not a director of the Plaintiff and has not provided any resolution taken to grant him the required authority, it is not clear that he indeed has any authority to act on behalf of the applicant and to depose any affidavit on behalf of the applicant.

[7] This was raised in the opposing affidavit of the second respondent and although so raised, not addressed in a subsequent replying affidavit by the applicant. The affidavit of Anton de Wit says the following:

'1. I am the Head: Legal Collections of the applicant and I am duly authorized to make this affidavit.

2. All the data and records, relating to the Applicant's/Plaintiff's action against the Defendants are under my control in my capacity as head of legal collections. The facts contained herein are within my personal knowledge and are both true and correct.

3. I have knowledge of the facts hereinafter stated, either personally or because of my access to all relevant computer data and documents pertaining to the Defendants commercial mortgage loan, account number CL 4000 053 915.

4. I hereby verify the facts and cause of action stated in the Summons and the Particulars of Claim to the Summons as true and correct and verify in particular, that the Respondents/Defendants, jointly and severally, the one to pay the other to be absolved, are indebted to the Plaintiff on the grounds stated in the Summons and confirm that the Plaintiff has a valid claim for:

4.1 Payment of the amount of N\$2 121 084, 34

4.2 Payment of compound interest calculated daily and capitalized monthly on the amount of N\$2 121 084.34 at Plaintiff's prime rate of interest from time to time, currently 7.75% per year plus 3% calculated from 28 July 2020 (to) date of final payment.

4.3 Costs of suit on a scale as between Attorney and own Client, as agreed.

5. I verily believe that the defendants have no bona fide defence to the action and that appearance to defend has been entered solely for purposes of delay.
6. Wherefore I humbly pray that it may please this honourable Court to grant summary judgement as prayed for against third defendant.'

[8] The statement was then signed by Anton de Wit in the presence of Wolfgang Horst Pfeiffer, a commissioner of oaths although it seems that both parties initialed only the first page of the statement, with the deponent also initialing the second page but not the last page and the commissioner of oaths only initialing the third page and not the second page.

[9] The first and second respondents contended that the remarks in *FirstRand Bank Limited v Beyer*¹ by Ebersohn AJ should be applicable. He said the following:

'It seems to me, from the many similarly worded affidavits filed in support of applications for summary judgment which come before this motion court, that plaintiffs nowadays apparently are of the opinion that an affidavit deposed to by anybody in the employ of a plaintiff firm, who mechanically goes through the motions and make an affidavit "verifying" the cause of action and amount owing, would suffice to obtain summary judgment

[9] An analysis and consideration of Rule 32(2) clearly shows that the court must, from the facts set out in the affidavit itself, before it can grant summary judgment, be able to make a factual finding that the person who deposed to the affidavit, was able to swear positively to the facts alleged in the summons and annexures thereto and be able to verify the cause of action and the amount claimed, if any, and was able to form the opinion that there was no bona fide defence available to the defendant and that the notice of intention to defend was given solely for the purpose of delay.'

[10] The second point *in limine* which was raised is that Mr de Witt, the person who deposed to the affidavit and under whose control these documents are, is the same person who certified and commissioned the documents annexed to the Particulars of Claim. Mr. de Witt is also the author of the certificate of indebtedness. It was argued that

¹ 2011 (1) SA 196 (GNP) (29 September 2010).

the certification and Commissioning of documents by the Deponent is irregular and as such, the documents relied upon cannot be used. A Commissioner of Oaths cannot administer an oath or affirmation or certify documentation relating to a matter in which he has an interest or that he/she has produced. This point was not addressed by the applicant in their heads of argument.

[11] What was further raised by the third defendant is that the plaintiff indicate that the agreement was entered into at Windhoek bay and no such place exists. They also pointed out that the plaintiff relies on a written commercial loan agreement and indicated that the said document was attached to the Particulars of Claim as Annexure A. They pointed to the fact that the court will not be able to make out the comprehensive terms of the said loan agreement because Mr de Witt imposed a stamp on each page of the loan agreement which stamp and signature effectively cancels out or covers the term of the loan agreement. They also raised the issue that Mr. de Witt certified the copies of the plaintiff's documents that is relied upon for summary judgement.

[12] For the plaintiff it was argued that the principle in *Maharaj v Barclays National Bank Lt* is applicable where Corbett JA states as follows²:

'The principle is that in deciding whether or not to grant summary judgement, the Court looks at the matter "at the end of the day" on all the documents that are properly before it.'

[13] Regarding the contention that the annexures are not legible it is argued that rule 45(7) provides that a party who relies on a contract must state whether the contract is written or oral and when, where and by whom it was concluded and if the contract is written a true copy thereof or of the part relied on in the pleading must be annexed to the pleading. The certification was therefore done in compliance with rule 45(7). They argue that the parts relied on are legible.

The applicable law and legal arguments

² 1976 (1) SA 418 (AD) at 423 H and 424.

[14] Van Niekerk, Geyer and Mundell in Summary Judgement – A practical guide³ said the following:

‘Departing from the premise that the remedy is drastic, our courts have laid down three rules for summary judgement applications. Firstly, that there is a *numerous clausus* of instances in which a plaintiff may apply for summary judgement in the sense that no application is possible which falls outside the strict ambit of rule 32(1); secondly, that, before a court will entertain an application for summary judgement, a plaintiff must present a clear case on technically correct papers while complying strictly with the rule and thirdly, that, in cases which are doubtful, summary judgement must be refused. (See Art Printing Works Ltd v Citizen (Pty) Ltd 1957 2 SA 95 (SR) 97H; Davis v Terry 1957 4 SA 98 (SR) 100 in fin 101A; and others)

The drastic nature of the remedy has also prompted the courts to draw the conclusion that the plaintiff's compliance with rule 32(2) must be judged more strictly than the defendant's compliance with rule 32(3). (See JNOG Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd 1968 (4) SA 371 and others).’

[15] The court will therefore first deal with the points *in limine* raised against the papers of the applicant to determine whether it is indeed technically correct papers.

[16] When dealing with who can depose to the verifying affidavit on behalf of a plaintiff bringing a summary judgement application, the learned authors Van Niekerk, Geyer and Mundell in Summary Judgement – A practical guide⁴ said the following when summarizing the requirement of personal knowledge in the case of banks:

‘A legal manager at regional level who confirms that he is duly authorized to depose to the verifying affidavit and also confirms that the facts fall within his personal knowledge is a competent deponent as he has, by virtue of his office, access to the bank's records and qua legal manager *prima facie* has knowledge pertaining to the conclusion of the contract, its terms and effect.’

[17] The authors referred to *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd* 1980 1 SA 929 (SE) and *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* and

³ LexisNexis, Durban 1998, at page 5-4.

⁴ LexisNexis, Durban 1998, at page 5-4.

Another 2009 (3) SA 384 (T). The requirement for the person making the verifying affidavit is that such person must have personal knowledge of the said transactions and must as such give detail regarding the knowledge he or she has. In this instance the court is satisfied with the explanation of the personal knowledge set out by Mr de Witt.

[18] In dealing with the point *in limine* raised regarding the fact that Mr. de Witt also certified the documents attached to the Particulars of Claim and deposed to the verifying affidavit raises a bigger concern. It seems that Mr. de Witt as the head of legal collections for the plaintiff has all the documents attached to this specific case under his personal control or available to him because of his access to the plaintiff's computer system. These documents belong to his employer, the plaintiff and by virtue of authority conveyed upon him in terms of the Justices of the Peace and Commissioners of Oaths act 16 of 1963 he is a Commissioner of Oaths. It is not clear whether he holds this appointment because of the fact that he is an admitted legal practitioner or because of his employment in the bank.

[19] The requirement of a "true copy" originates from the rules of court and specifically rule 45(7). A true copy carries an inscription, usually affixed by a stamp, certifying the document as a true copy. This certificate is then signed by a person authorized to do so by the Justices of the Peace and Commissioners of Oaths act. A certified copy is a copy (often a photocopy) of a primary document that has on it an endorsement or certificate that it is a true copy of the primary document. It does not certify that the primary document is genuine, only that it is a true copy of the primary document.

[20] The purpose of the requirement that a true copy of the contract or the parts relied upon surely in addition also relates to the fact that the plaintiff must be in possession of the original contract when he or she institute proceedings. In affixing his or her signature to the true copy with the certification, the Commissioner of Oaths indicate that he indeed saw and compared the copy with the original and it is in fact a true, unaltered copy of the said original document.

[21] The position has changed slightly in recent years with the implementation of the electronic case management system. Currently the certified document is uploaded on the system and form part of the electronic documents attached to the case and can be viewed electronically. This however does not override rule 45(7) that it must be a certified copy and as such, the document must be available to indeed show that it is such a copy. In matrimonial proceedings a similar arrangement is present with the certified copy of the marriage certificate that is uploaded on the electronic system. In matrimonial proceedings the original marriage certificate is produced during court proceedings for comparison to the document that it uploaded.

[22] When uploading documents on the system however, legal practitioners should take care that the whole document is properly scanned and legible. In the current instance it is for example impossible to read the content of the List of Registered Items, which was also attached to the summons to proof that a Final Notices of Demand were indeed sent to the Defendants. The quality of this document was questioned by the court during the proceedings and the legal practitioners of the plaintiff were not in possession of the original document. In terms of the defense raised by the first and second defendant as a *lex commissoria*, the time frame when these reminders were sent became of importance clause 14.4.2.1 contained in the contract between the plaintiff and the first defendant reads that:

‘any correspondence shall be deemed to have been given, if posted by pre-paid registered post , 10 (ten) Business days after the date of posting thereof.’

[23] In terms of regulations published under the Justices of the Peace and Commissioners of Oaths Act, Regulation R 1258 published on 21 July 1973 with the title Regulations Governing the Administrating of an Oath or Affirmation under regulation 7 specifically reads that “A commissioner of oaths shall not administer an oath or affirmation relating to a matter in which he has an interest.” There is however no regulations made specifically regarding the certification of documents. I agree with the arguments put forward by the first and second respondents that this should be indeed the position when certifying documents too. You cannot certify a document in which you have an interest; it

is simply not ethical, similarly to the position that you cannot commission a statement in a matter where you have interest in.

[24] In *Dyani v Minister of Safety and Security and Others*⁵ the following is stated in paragraphs [19] and [20]:

‘[19] Mr Lusu objected to the use of such affidavits in these proceedings on the ground that they were not properly attested as the commissioners of oath were all employees of first respondent and could not have been independent and impartial in relation to the subject-matter. Reliance for this submission was based on the cases of *R v Brummer* 1952 (4) SA 437 (T); *Master v Benjamin* NO 1955 (4) SA 14 (T) and *Radue Weir Holdings v Galleus Investments CC* 1998 (3) SA 677 (E).

[20] It is now settled that a commissioner of oaths is required to be independent, impartial and unbiased in relation to the subject-matter of the affidavit brought before him for the purposes of having it attested (*Radue Weir Holdings* case supra at 680 - 1). In *Papenfus v Transvaal Board, Peri-Urban Areas* 1969 (2) SA 66 (T), Marais J described the requirement in the following terms at 70B - F:

“[T]he commissioner of oaths should be independent of the office in which the affidavit to be attested by him is drawn. He cannot be regarded as independent if his partner, employee or employer is the draughtsman or deponent . . . it is clear that both the solemnity of the occasion and the need for complete understanding by the deponent of the import of his act require that an independent party should administer the oath and ensure compliance with the requirements of an oath. . . . So much the more it is necessary, I think, that, where a commissioner of oaths attests an affidavit at what is usually a private and informal occasion, the weightiness of the act should be impressed upon the deponent. This can best be done by a commissioner who regards himself as free to refuse to administer the oath if he feels either that the deponent does not fully appreciate the seriousness of the oath or that he does not unreservedly subscribe to what is contained in the statement he has to swear to.”

[25] In this matter, Mr de Witt is the Head Legal Collections for the plaintiff. From the inscription of the stamp used when certifying the annexures which form part of the

⁵ 2001 (1).
SACR 634 (Tk).

Particulars of Claim, he is also a non-practicing legal practitioner. In these proceedings he however carries a number of hats. He is the ex-officio Commissioner of Oaths who certified the true copies of the various contracts and sureties used in support of the claim. He is also the person who issued the Balance Certificate on behalf of the plaintiff which serves as proof of the outstanding balance. He further deposed of the verifying affidavit. It can therefore be said that he definitely has an interest in this matter. And in line with the determination in the regulations stated above, he should not be the person who certified the agreements as true copies for the purpose of complying with rule 45(7).

[26] The third respondent raised the issue that the placement of the stamped affixed by Mr de Witt obscure in some instances the text of the agreement that it cannot be read. This is indeed the case on almost every page of the initial agreement and the two surety agreements. The court enquired from the legal practitioners whether they have the original agreement available in court to see whether we could resolve the issue with a better copy but unfortunately they did not. The purpose of producing a certified copy of a document is surely so that the content of the document could be relied on. It should therefore be a good, clear copy with the content legible. In this instance it is not. For example important clauses like the one dealing with Events of Default – clause 11's initial wording cannot be read. Similarly, the definition of a surety, clause 6.1.1 dealing with the alternation of interest rate, clause 9.1 dealing with positive undertakings etc.

[27] The first and second defendants further argued that, if successful, the cost order should not be capped in terms of the rules. The court however is not inclined to make a special cost order and the cost order is therefore made in line with rule 32(11).

[28] Accordingly:

1. The point *in limine* is upheld that the papers do not meet the technical standard needed and therefor the summary judgement application is strike from the roll.
2. Cost of this application is awarded to the defendants, of which costs are limited in terms of the provisions of Rule 32(11).

3. The parties are ordered to file a joint status report by no later than 21 January 2021 at 15h00.
4. The case is postponed to 26 January 2021 at 15h30 for Status hearing.

E RAKOW

Judge

APPEARANCES:

APPLICANT:

Ms de Plooy
Weder, Kauta and Hoveka

Windhoek

1st and 2nd RESPONDENTS:

Ms Lardelli
KarstensLegal Practitioners

Windhoek

3ND RESPONDENT:

Mr. Amoomo
KadhilaAmoomo Legal Practitioners
Windhoek