THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

REPORTABLE
Case No: 676/2013

In the matter between:

STAMFORD SALES & DISTRIBUTION (PTY) LIMITED **APPELLANT**

and

METRACLARK (PTY) LIMITED **RESPONDENT**

Neutral citation: *Stamford Sales & Distribution v Metraclark* (676/2013) [2014] ZASCA 79 (29 May 2014)

Coram: Lewis and Mhlantla JJA and Swain AJA

Heard: **23 May 2014**

Delivered: **29 May 2014**

Corrected: **4 June 2014**

Summary*:* Claim for summary judgment by cessionary of claim – verifying affidavit – knowledge by deponent of all of facts of cause of action by cedent against debtor not required – fact-based enquiry whether positive assertion by deponent reliable.

ORDER

On appeal from the South Gauteng High Court, Johannesburg, (Victor J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Swain AJA (**Lewis and Mhlantla JJA** concurring):

[1] Summary judgment was granted by the South Gauteng High Court (Victor J) in favour of the respondent, Metraclark (Pty) Ltd (Metraclark), against the appellant, Stamford Sales and Distribution (Pty) Ltd (Stamford) for payment of the sum of R700 000.00 together with interest and costs.

[2] The present appeal, which is with the leave of the court a quo, requires for its determination the resolution of two issues.

(a) Whether the verifying affidavit in support of the application for summary judgment by Metraclark complies with the requirement in rule 32(2) of the Uniform Rules of Court (the rules), that it be made by a person 'who can swear positively to the facts verifying the cause of action'; and

(b) whether Stamford's affidavit opposing the grant of summary judgment discloses a bona fide defence to Metraclark's claim, as required by rule 32(3)*(b)* of the rules.

[3] Metraclark's claim against Stamford is based upon a cession by Quali Cool CC (the cedent) of its book debts to Metraclark. It is alleged by Metraclark in its particulars of claim that the cedent is indebted to it in the sum of R1 621 694.60 which the cedent has failed to pay.

[4] Metraclark's claim against Stamford is pleaded as follows:

'The Defendant is indebted to the cedent in the sum of R700 000.00 (seven hundred thousand rand) for services rendered and/or goods supplied by the cedent to the Defendant, at the Defendant's special instance and request during or about the period October 2010 to January 2011, which amount is due, owing and payable by the Defendant to the cedent.'

[5] Metraclark advised Stamford of its rights in terms of the cession and that Stamford was obliged to make payment of all sums owing by Stamford to the cedent directly to Metraclark. On this basis Metraclark alleges that the sum of R700 000.00 is due, owing and payable by Stamford to Metraclark.

[6] As a consequence of Stamford's failure to make payment to Metraclark, summons was issued which Stamford defended, giving rise to Metraclark's application before the court a quo for summary judgment.

[7] Metraclark's cause of action against Stamford, based upon Metraclark's locus standi as a cessionary of the claim of the cedent against Stamford, gave rise to the challenge (raised only when leave to appeal against the judgment was argued) that the deponent to the verifying affidavit in the summary judgment application was unable to swear positively to the facts verifying the cause of action. In others words, the deponent as a representative of Metraclark (the cessionary) did not have personal or first-hand knowledge of the claim of the cedent as against Stamford.

[8] The verifying affidavit reads as follows:

'I, the undersigned

JANE WILLIS-SCHOEMAN

do hereby make oath and state:

1. I am the National Credit Manager of the Applicant herein and I am duly authorised to depose to this affidavit on behalf of the Applicant.

2. The facts contained herein are both true and correct and are within my personal knowledge and belief.

3. The Applicant's file pertaining to the above-captioned matter which contains, *inter alia,* a cession of book debts in favour of the Applicant, proof of the Applicant's claim against Quali Cool CC and all correspondence entered into by the Applicant and/or its attorney with the Respondent, is currently in my possession and under my control and I am fully conversant with the content thereof.

4. I have read the Combined Summons in this action and can and hereby do swear positively to the facts and verify all the causes of action and the total amount claimed by the Applicant therein.

5. I verily believe that the Respondent does not have a *bona fide* defence/defences to any of the Applicant's causes of action, and that Notice of Intention to Defend has been entered solely for the purposes of delay.

WHEREFORE I pray that the Court will grant Summary Judgment against the Respondent in favour of the Applicant in terms of the Notice to which this Affidavit is annexed.'

[9] As pointed out in *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 423G-H one of the aids to ensure that the claim of the plaintiff is unimpeachable and that the defendant's defence is bogus or bad in law is that the verifying affidavit should be deposed to by the plaintiff 'or by someone who has personal knowledge of the facts'. If however, '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. . . 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. . .'

[10] This court in *Dean Gillian Rees v Investec Bank Limited* (330/13) [2014] ZASCA 38 (28 March 2014), in dealing with the issue of whether personal knowledge of all of the facts forming the basis for the cause of action, had to be possessed by the deponent to the verifying affidavit, said the following in para 15:

'As stated in *Maharaj*, "undue formalism in procedural matters is always to be eschewed" and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a *fact-based enquiry*. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj*.' (My emphasis.)

In my view, as long as there is direct knowledge of the material facts underlying the cause of action, which may be gained by a person who has possession of all of the documentation, that is sufficient.

[11] The enquiry, which is fact-based, considers the contents of the verifying affidavit together with the other documents properly before the court. The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is sufficiently reliable to justify the grant of summary judgment. Those high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this court in *Maharaj*.

[12] An insistence upon personal knowledge by a deponent to a verifying affidavit of all of the material facts forming the basis for the cause of action, where the cessionary of a claim seeks summary judgment against the debtor, in most cases would effectively preclude the grant of summary judgment. The consequences of this narrow approach is illustrated by the decision in *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W). It was held that it had to appear from the verifying affidavit that the facts relating to the claim of the cedent against the debtor were within the knowledge of the deponent who was able to swear positively thereto. The deponent in such a case was prima facie making the affidavit on behalf of a cessionary and there was nothing in the affidavit to indicate that the deponent had any connection with the cedent, which presumably would have enabled him to acquire this knowledge. To insist on personal knowledge by the deponent to the verifying affidavit on behalf of the cessionary of all of the material facts of the claim of

the cedent against the debtor, emphasises formalism in procedural matters at the expense of commercial pragmatism.

[13] In the present case the deponent who is the National Credit Manager of Metraclark states that she is in possession of the file relating to this matter, which contains inter alia the cession of books debts, which is Annexure A to the plaintiff's particulars of claim. The cession provides in clause 5.5 as follows:

'The Customer undertakes on a quarterly basis, commencing on the first day of the month following its signature of this Agreement, to deliver to the Company its current age analysis reflecting all moneys owed to the Customer by the Debtors and on demand to deliver all relevant information in documentary form or otherwise to the Company to enable the Company to claim moneys owed to the Customer from the Debtors.'

[14] From the allegations made by Metraclark in its particulars of claim as set out in para 4 supra, it is clear that in accordance with this provision in the cession Metraclark obtained details from the cedent of the amount of the debt, its nature and the period during which the services and/or goods were supplied to Stamford. The information supplied by the cedent to Metraclark also resulted in the attorneys of Metraclark writing to Stamford (Annexure B to Metraclark's summons) advising them of the cession of its book debts and stating that Stamford was a debtor of the cedent. In this regard the deponent states that included in the file in her possession is all of the correspondence between Metraclark, its attorney, and Stamford.

[15] On the particular facts of this case and on a conspectus of the verifying affidavit together with the other documents referred to, I am satisfied as to the reliability of the statement by the deponent in the verifying affidavit that she is able to 'swear positively to the facts and verify all the causes of action'.

[16] I accordingly turn to the issue of whether Stamford's opposing affidavit discloses a bona fide defence in terms of rule 32(3)*(b)*. What is conspicuously absent from Stamford's affidavit is any attempt to 'disclose fully the nature and grounds of the defence and the material facts relied upon therefor' as required by

rule 32(3)*(b).* This is particularly so as Stamford admits a trading relationship with the cedent.

[17] When faced with the specific claim for payment of R700 000.00 for goods and/or services supplied to it during a defined period, namely October 2010 to January 2011 it should have been a simple exercise for Stamford to set out what goods or services it received from Quali Cool CC during this period, together with the payments it made to Quali Cool CC. This would constitute a sufficiently full disclosure of the material facts to persuade a court that if proved at trial Stamford would establish its defence that it has paid the cedent in full: *Maharaj* supra at 426A-D.

[18] However, Stamford simply makes the bald allegation that it was informed by the cedent that no money was owed by Stamford to the cedent. In support of this assertion a copy of an email allegedly received from the accounts department of the cedent is attached without any verification. Why Stamford seeks to rely entirely upon assertions by its creditor, the cedent, and not its own records, to support its defence that it has paid the cedent in full, is not explained. I am accordingly satisfied that Stamford has failed to disclose a bona fide defence to the claim of Metraclark.

[19] The following order is made:

The appeal is dismissed with costs.

K G B SWAIN

ACTING JUDGE OF APPEAL

Appearances:

For the Appellant:	A P J Els
	Instructed by:
	Van der Merwe & Associates, Johannesburg
	Honey Attorneys, Bloemfontein
For the Respondent:	K Bailey SC
	Instructed by:
	Hooker Attorneys, Johannesburg
	Webbers Attorneys, Bloemfontein