IN THE COURT OF APPEAL FOR THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE

CIVIL APPEAL NO. 8/96
HIGH COURT CIVIL CASE NO. 1723/95

In the matter between:

ECONOMY INVESTMENTS (PTY) LTD	-	First Appellant
WEBSTER NDODA MASENYA	-	Second Appellant
YOLINDA MASENYA	-	Third Appellant

and

FIRST NATIONAL BANK OF BOTSWANA LIMITED (PREVIOUSLY NAMED AND KNOWN AS FINANCIAL SERVICES COMPANY OF BOTSWANA LIMITED)	-	Respondent

Advocate A. Gautschi for the Appellants
Mr. Attorney B.B. Tafa for the Respondent

J U D G M E N T

CORAM: AGUDA, J.A.
TEBBUTT, J.A.
LORD COWIE, J.A.

TEBBUTT J.A.:

The granting of an order for summary judgment in favour of the respondent against the three appellants in the High Court is the reason for this appeal. In the High Court respondent, to whom I shall refer as "the Bank", was the plaintiff and the three appellants first, second and third defendants respectively. On 1 September 1995 the Bank issued summons against first appellant for payment of two amounts (a) P121,319.35 and (b) P1,648,457.23 together with interest and costs based upon two claims A and B. It also prayed that the right, title and interest of first appellant in certain properties mortgaged by it to the Bank be declared executable. In the same summons the Bank claimed as against second and third appellants, jointly and severally with first defendant payment of the sum of P1,000,000 and costs based upon certain suretyships to which second and third appellants had bound themselves.

As particulars of the two claims are important for this judgment, I cite the relevant portions of them in full.
They read thus:

"**CLAIM A**

2. 2.1 During or about July 1991 and at Gaborone, the Plaintiff represented by its then General Manager or other duly authorised representative, and the First Defendant represented by Second Defendant, entered into a written Agreement in terms whereof the Plaintiff agreed to lend and advance to First Defendant an amount of P115,532.47 (One Hundred and Fifteen Thousand Five Hundred and Thirty Two Pula and Forty Seven Thebe) to enable First Defendant to acquire Lease Area No. 153-KO, situate on Portion 29 of Crocodile Pools No. 15-KO in the South East

Administrative District.

2.2 The said Agreement had the following express or tacit terms:-

2.2.1 that First Defendant shall effect repayment of the said loan, together with accrued interest in the manner set out in the Agreement;

2.2.2 that the Plaintiff shall charge First Defendant interest on the sum advanced, at the rate of 13% per annum, calculated monthly in advance on the residual balance of the amount owing by the First Defendant to Plaintiff by way of capital and interest;

2.2.3 that the Plaintiff may alter the rate of interest charged in terms of the Agreement upon one month's written notice to First Defendant;

2.2.4 that in the

event of First Defendant failing to effect payment of any instalment of capital and interest payable to the Plaintiff timeously and in full, the whole amount owing by First Defendant in terms of the Agreement shall immediately become due and payable.

2.3 The Plaintiff duly advanced the agreed amount of the loan to First Defendant in terms of the aforesaid Agreement.

2.4 Following written notice to First Defendant, Plaintiff has duly revised the rate of interest accruing on the residual balance of the capital sum advanced to First Defendant to the current rate of 15% per annum, calculated as aforesaid.

2.5 In breach of the above stated terms and conditions, the Defendant failed to effect payment to the Plaintiff of amounts due and payable timeously, or at all. In the premises, the total balance of the Defendant's account became immediately due and payable and, notwithstanding demand, the Defendant has failed and/or refused to pay said amount, which as at 14 August 1995 totalled P121,319.35 (One Hundred and Twenty One Thousand Three Hundred and Nineteen Pula and Thirty Five Thebe) inclusive of accrued interest.

CLAIM B

3. 3.1 During or about June 1992, and at

Gaborone, the Plaintiff, represented by its then General Manager or other duly authorised representative, and the First Defendant, represented by Second Defendant entered into an Agreement in terms whereof the Plaintiff agreed to lend and advance to First Defendant an amount of P1,225,820.71 (One Million Two Hundred and Twenty Five Thousand Eight Hundred and Twenty Pula and Seventy One Thebe) to enable First Defendant to acquire Tribal Lot 969 and Tribal Lot 970 Tlokweng.

3.2 The said Agreement had the following express or tacit terms:-

3.2.1 that First Defendant shall effect repayment of the said loan, together with accrued interest in the manner set out in the Agreement;

3.2.2 that the Plaintiff shall charge First Defendant interest on the sum advanced,, at the rate of 14% per annum, calculated monthly in advance on the residual balance of the amount owing by the First Defendant to Plaintiff by way of capital and interest;

3.2.3 that the

Plaintiff may alter the rate of interest charged in terms of the Agreement upon one month's written notice to First Defendant;

3.2.4 that in the event of First Defendant failing to effect payment of any instalment of capital and interest payable to the Plaintiff timeously and in full, the whole amount owing by First Defendant in terms of the Agreement shall immediately become due and payable.

3.3 The Plaintiff duly advanced the agreed amount of the loan to First Defendant in terms of the aforesaid Agreement.

3.4 Following written notice to First Defendant, Plaintiff has duly revised the rate of interest accruing on the residual balance of the capital sum advanced to First Defendant to the current rate of 15% per annum, calculated as aforesaid.

3.5 In breach of the aforesaid terms and conditions, First Defendant failed to effect payment to the Plaintiff of amounts due timeously, or at all. In the premises the total balance of First Defendant's account became immediately due and payable and, notwithstanding demand, First Defendant has failed and/or refused to pay said amount, which as at 14 August 1994 totalled P1,648,457.23 inclusive of interest."

The particulars of claim, in paragraphs 4.1 to 4.7 inclusive, allege that first appellant registered a series of seven mortgage bonds in favour of the Bank over its right, title and interest in certain properties as "continuing security and covering bonds" for the amounts owing by it to the Bank. In regard to these bonds paragraph 5 of the particulars of claim, where relevant, reads as follows:

> "5. The said Mortgage Bonds, being Nos. 1078/91, 1303/93, 381/92, 461/92, 1477/92, 909/93 and 679/93 expressly provide _inter alia_:
>
> 5.1 ....
>
> 5.2 ....
>
> 5.3 that all amounts advanced by the Plaintiff shall become due and payable on demand;
>
> 5.4 that in the event of default in the payment of any amounts due and payable to the Plaintiff, the payment of which is secured by the said Bonds, or in the event of a breach of any other obligation imposed by the said Bonds, all amounts secured by the bonds shall, at the Plaintiff's option, forthwith become

legally claimable and due without notice and the Plaintiff may forthwith proceed for the recovery thereof;

5.5 That a Certificate signed by the Manager of any branch of the Plaintiff shall be sufficient evidence for the purpose of obtaining provisional sentence/judgment in any competent Court or law for the amount owing by First Defendant to Plaintiff."

Paragraph 6 of the particulars of claim refers to second and third appellants alleging that on or about 8 July 1992 they guaranteed and bound themselves as sureties for the repayment on demand of all sums of money which first appellant may owe to the Bank with a limit of P1,000,000. Paragraphs 6.2.5 and 7 then read as follows:

"6.2.5 that the amount of the indebtedness of the First Defendant and of

Second and Third Defendants shall be determined and proved by a Certificate signed by any authorised official of the Plaintiff and shall constitute proof of the amount of the indebtedness of Second and Third Defendants to the Plaintiff.

7. A Certificate signed by the Manager of First National Bank of Botswana Limited, setting out the indebtedness of First Defendant to the Plaintiff as at 14 August 1995, and the rate of interest accruing thereon, and further setting out the indebtedness of Second and Third Defendants to the Plaintiff in terms of their guarantees, is annexed hereto marked "A"."

A certificate from one John Anderson "in my capacity as General Manager of First National Bank of Botswana Limited" that as at 14 August 1995 first appellant was indebted to the Bank in the amounts of P121,319.35 and P1,648,457.23 with interest at the rate of 15% per annum and second and third appellants jointly and severally with first appellant in the sum of P1,000,000 respectively, was filed with the particulars of claim.

The summons was served on 14 September 1995 and on 25 September 1995 the three appellants entered appearance to defend. On 3 October 1995 the Bank launched an application for summary judgment against the appellants for the amounts claimed by it and for an order declaring the properties mentioned executable and attached an affidavit from the aforesaid Anderson in support of it. As this affidavit was the subject of an attack by the appellants both in the Court a quo and in this Court, I set it out in extenso. It reads:

"1. I am an adult male, resident at Gaborone.

2. I am employed by the Plaintiff in the capacity of General Manager, Property Division and I am duly authorised to make this Affidavit on the Plaintiff's behalf.

3. All the facts herein contained are within my personal knowledge by virtue of:-

   3.1 my involvement in this matter; and

   3.2 my control of the file which contains the documents relating to this matter.

4. I can and do swear to the facts verifying the cause of action and the amount claimed in the Plaintiff's Particulars of Claim and I annex hereto true copies of Mortgage Bonds registered by First Defendant in favour of

the Plaintiff, being numbers 1078/91, 1303/93, 381/92, 461/92, 1477/92, 909/93 and 679/93.

5. It is my opinion that there is no **bona fide** defence to the action and that entry of an Appearance to Defend has been delivered solely for the purpose of delay."

Copies of the bonds were annexed and form part of the record but nothing turns on them or their contents at this stage.

The three appellants opposed the application and filed an affidavit by second appellant, Webster Ndoda Masenya, ("Masenya") in support of such opposition. Third appellant confirmed the contents of that affidavit in so far as they related to her and confirmed that second appellant, her husband, was authorised to oppose the application on her behalf.

Masenya is the managing director of first appellant. His wife is its other director. He averred that the application for summary judgment was fatally defective for five reasons. I shall set out in more detail those reasons and his averments in regard to them when I come to consider whether the application for summary judgment, for those reasons, was fatally defective or not. Suffice at this stage merely to say, in precis form, what they are. They are these. Firstly, Masenya averred that Anderson had no personal knowledge of the facts upon which the causes of action were based and was therefore unable to swear positively to them. Secondly, Masenya averred that Anderson failed to verify all the causes of action and the amounts claimed in them. Thirdly, Anderson had wrongly annexed the mortgage bonds, they not being liquid documents. Fourthly, Anderson had not annexed copies of the agreements on which the two claims were based in the summons and, in view of the allegations in the summons based on them, the failure to do so rendered the summons probably excipiable as being vague and embarrassing. Fifthly, the Bank relied for the amounts of its claims on a certificate of indebtedness. Such certificates are contra bonos mores and therefore the suretyships were null and void and unenforceable.

It will immediately be appreciated that the appellant's never dealt at all with the merits of the case or set out what their defence or defences were to the claims, contenting themselves merely with an attack on the validity of the summary judgment application.

The matter came before Gaefele Ag.J. in the High Court who, in a written judgment delivered on 9 January 1966, granted summary judgment against the appellants with costs. It is against that judgment that appellants now come on appeal to this Court.

In his approach to appellant's objection to the application for summary judgment, the learned Judge obviously felt that as they had merely set out to impugn the validity of the application without setting out their defence to the claims, they could not resist summary judgment. This appears clear from the following remarks by him.

> "The basis of the defendants' defence (if it could be called that) is that the application for summary judgment is fatally defective.........However, no fatal defect was shown to exist in the application at the time of hearing."

Then again:

> "This is a matter where the nature and grounds of the defence are not disclosed."

Dealing with the contentions raised by the appellants as to why the application was defective, the learned Judge said:

> "There is simply no defence raised in so far as the above contentions by the defendant are concerned. I call these "contentions", because they do not disclose a defence to the plaintiff's claim. If the contentions could be said to be defences, they appear to me to be, for want of better description, "porcupine defences", i.e. defences made by the defendant for purposes of buying time and protecting itself from the claim by the plaintiff, without more, because should the defendant expose itself it will be harmed."

In regard to Masenya's affidavit, the learned Judge said:

> "It contains no facts upon which the defendants could be said to rely. The affidavit raises, as I said earlier, only technical defences. I cannot help the

defendants."

In adopting this approach to the matter, the learned Judge erred. As I shall show in more detail later, a defendant can successfully resist summary judgment by merely attacking the validity of the application if he can show that it does not meet the requirements of the relevant Rule of Court or is fatally flawed in some other respect. He does not, in such circumstances, have to set out his defence. Indeed, he can resist the application without filing any affidavit at all.

Because of the erroneous approach in this case and lest it be repeated in other matters, it is necessary I feel, despite the fact that they have been set out in several decisions of this Court in the past, to set out again the principles that should guide the courts of Botswana when considering applications for summary judgment. In doing so it is also useful to refer to decisions in South Africa (where the relevant Rule of Court (Rule 32) is couched in exactly the same terms as the Rule of Court in Botswana) and in which principles enunciated in regard to the South African Rule are persuasive as to the guidelines which our courts should follow in applying the Botswana Rule for summary judgment. To do so, it is convenient to set out again that Rule. It is Order 34 of the High Court Rules and the main and relevant part of it reads as follows:

"**ORDER 34**

SUMMARY JUDGMENT

1. Where the defendant has entered an appearance to

defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-

(a) based on a liquid document;

(b) for a liquidated amount in money;

(c) for delivery of specified movable property;

or

(d) for ejectment,

together with any claim for interest and costs.

2. (1) The plaintiff shall within 14 days after the date of entry of an appearance to defend, deliver notice of such application, accompanied by 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 entry of appearance to defend has been delivered solely for the purpose of delay.

(2) If the claim is founded on a liquid document, a copy of the document shall be annexed to such affidavit.

(3) Such notice of application shall state that the application will be set down for hearing on a stated day not being less than seven days from the date of delivery thereof.

3. Upon the hearing of an application for summary judgment, the defendant may-

(a) give security to the plaintiff to the satisfaction of the Registrar for any judgment including costs which may be given;

or

(b) satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or, with the leave of the court, by oral evidence of himself or of any other person who can swear positively to the fact that he has a bona fide defence to the action, such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

It has been repeated over and over that summary judgment is an extraordinary, stringent and drastic remedy in that it closes the door in final fashion to the defendant and permits a judgment to be given without a trial (see **Erasmus: Superior Court Practice B1-206** and cases cited in note 6 esp. **Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 423F; Du Setto (Sunny Side II) PTY Ltd and Others v Financial Services Company of Botswana Ltd Civil Appeal 19/94 (unreported) at p.17** and cases there referred to.) It is for that reason that in a number of cases in South Africa, it was held that summary judgment would only be granted to a plaintiff who has "an unanswerable case". In more recent cases that test has been expressed as going too far (see e.g. **Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226T at 227F; Diesel Power Plant Hire CC v. Master Diggers (Pty) Ltd 1992 (2) SA 295 (W) at 298J-299B)**.

In **Du Setto**'s case supra, this court came to a similar conclusion and I repeated that view in **Fashion Enterprises (Pty) Ltd v. Image Botswana (Pty) Ltd Civil Appeal 24/93 (an unreported judgment delivered on 14 July 1994 at p.12)**. As set out in **Du Setto**'s case at p.17 the purpose of summary judgment is well-known. It is aimed at a defendant who, although he has no **bona fide** defence to an action brought against him, nevertheless gives notice to defend solely in order to delay the grant of judgment in favour of the plaintiff. It therefore serves a socially and commercially useful purpose, frustrating an unscrupulous litigant seeking only to delay a just claim against him. However, even although the plaintiff need not have to have "an unanswerable case",, it is clear that before a court will close its doors finally to a defendant it must take care to see to it that the plaintiff's claim is unimpeachable. Because of the drastic consequences of an order granting summary judgment, the courts must be astute to ensure that the procedure is not abused by a plaintiff who may wish either to secure, by the procedure, a judgment against a defendant when he knows full well that he would ordinarily not be able to obtain such a judgment without a trial or who may use the procedure as a means of embarking upon a "fishing expedition" to try to ascertain prematurely what a defendant's defence is and to commit him to it by having him testify to it on oath.

It is for this reason that the courts have insisted on strict compliance with the Rule applicable to the obtaining of summary judgment viz Order 34 (2), (see **Maharaj**'s case, supra at 423 E-H;

Du Setto's case, supra at p.18 of the judgment). If there is not a sufficient compliance with that Rule or if the application is fatally flawed in any other respect, summary judgment should not be granted. For that reason a defendant is entitled to attack the validity of an application without having to set out his defence. In **Mowschenson and Mowschenson v. Mercantile Atlas Corporation of SA Ltd 1959 (3) SA 362 (W) at 366B**, it was stated that a defendant's remedies are not confined to the three alternative courses specified in sub-rule (3) but he is entitled to dispute the validity of the verifying affidavit or the application itself on any aspect (at 366 D-E). In that case (at 366 E-F) **Marais J.** said:

> "If it is reasonably possible that the plaintiff's application is defective ..... the issue must, in my view, be decided in favour of the defendant."

In the **Maharaj** case **Corbett J.A.** at p.423 E-F said in regard to strict compliance with the Rule:

> "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."

He added

> "The grant of the remedy is based upon the

supposition that the plaintiff's claim is unimpecheable. One of the aids in ensuring that this is the position is the affidavit in support of the application."

(See also **Joel's Bargain Store v Shorkend Bros (Pty) Ltd 1959 (4) SA 263 (E) at 265; Barclays National Bank Ltd v Love 1975 (2) SA 514 (D) at 517F; Pillay v Andermain (Pty) Ltd 1970 (1) SA 531 (T) at 534 F-G.**)

It is for these reasons that it has been held that the validity of the application or of the verifying affidavit can be assailed by a defendant in order to resist summary judgment even without his filing an affidavit. (See **Transvaal Spiceworks and Butchery Requisites (Pty) Ltd v. Coopen Holdings (Pty) Ltd 1959 (2) SA 198 at 200 B-D; Fischereigesellschaft F. Busse & Co Kommanditgesellschaf v. African Frozen Products (Pty) Ltd 1967 (4) SA 105 (C); Pillay v. Andermain (Pty) Ltd (supra) at 533A; Northern Cape Scrap and Metals (Edms) Bpk v. Upington Radiators and Motor Graveyard (Edms) Bpk 1974 (3) SA 788 (NC) at 793 E-H; Cape Business Bureau (Pty) Ltd v. van Wyk and Another 1981 (4) SA 433 (C); Jagger and Co Ltd v. Mohamed 1956 (2) SA 736 (C) at 738**). In the **Fischereigesellschaft** case **supra**, **Theron J.** said in regard to the verifying affidavit in that case (at 111c):

"The affidavit did not comply with the requirements of the Rule and summary judgment should not have been granted upon it even if no opposing affidavit had been

<u>filed</u>." (my emphasis)

And in **<u>Cape Business Bureau v. Van Wyk</u> supra Baker J.** said at 439.

> "A defendant can attack a summary judgment application on any ground. He can do this without filing an opposing affidavit merely by confining himself to the defects in plaintiff's verifying affidavit, summons, declaration and any further particulars furnished."

That statement of a defendant's ability to resist summary judgment purely on defects in the plaintiff's application has also found expression in this Court. In **<u>Nicola Jane Letsholo v. Botswana Housing Corporation</u> Civil Appeal 13/1993 (unreported) Aguda J.A.** referring to the decision in **<u>H.K. Gokal (Pty) Ltd v. Multhambi</u> 1969 (3) SA 88(T) at 90** to the opposite effect, said:

> "If by this the Court in that case is suggesting that a summary judgment application cannot be refused unless the defendant files an affidavit setting out a defence, with due respect, cannot be held to represent the law in this country nor can the opinion to the effect that an affidavit

> should be filed even if only a legal objection to the application for summary judgment are raised be held to reflect the proper interpretation of Order 34 Rule 3 of our Rules. In my opinion what is important is that the defendant must give notice to the plaintiff that he intends resisting the application on stated grounds."

The appellants **in casu** clearly complied with the latter requirement set out by **Aguda J.A.**

If a defendant chooses to attack the validity of an application for summary judgment without setting out a bona fide defence to the plaintiff's claim he, of course, seeks the risk of the application being granted if he should fail in his attack because he would then have put nothing before the court to satisfy it that he has a bona fide defence to the action. What a defendant must do to comply with that part of Order 34 has been set out fully in **Du Setto**'s **supra at pp 19-20** and dealt with equally fully by **Lord Cowie J.A.** in **First National Bank of Botswana Ltd v. Valley Sci Construction (Botswana) (Pty) Ltd and Others Civil Appeal 52/1995 (unreported)**, and also by him in **Sidney Tshepiso Pilane v. First National Bank of Botswana Limited and Another Civil Appeal 16/1994 (unreported)**. I need not repeat them here.

What then must a plaintiff do in order to comply with the requirements of Order 34 Rule 2? That has been most succinctly set out by **Theron J.** in the **Fischereigesellschaft** case in regard to the South African Rule of Court 32 and followed in a large number of cases in South Africa since then. (See e.g. **Maharaj**'s case **supra at 422 B-C** and cases there cited.) It provides guidelines which I feel are equally apposite to this country's Order 34 (2). **Theron J.** said thus at 107 H to 108 B, after citing Rule 32 (2) which is exactly the same as Order 34 (2):

> "On an ordinary, straight-forward, grammatical interpretation of the words used here, the requirements of the affidavit would appear to consist of the following:
>
> (a) that the affidavit should be made by the plaintiff himself or 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.

A court will have to be satisfied that each of these three requirements has been fulfilled before it can hold that there is an affidavit before it which is in proper compliance with the Rule."

Some difficulty has in the past arisen in regard to the words in sub-rule (2):

> "......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......"

In one case it was held (by **Herbstein J. in <u>Wright v. McGuiness</u> 1956 (3) SA 184(C)**) that "the phrase 'who can swear positively to the facts verifying the cause of action' is a qualification of 'any other person'." This view has since been dissented from and that if the language of the Rule is considered carefully, it is clear that it should be read as if a comma had been inserted after the word "facts" in order to effect a plain separation between it and the word "verifying" following upon it (see the

<u>Fischereiigesellschaft</u> case at 108E--109C; **<u>Maharaj</u>**'s case at 422 D-H **Erasmus op.cit. B1-217** note 7 and cases there cited). In the **<u>Fischereigesellschaft</u>** case, **Theron J.** traced the origin and history of the Rule from the corresponding Order in England pointing out that there was a comma in that Order between the words "facts" and "verifying". As pointed out further by **Corbett J.A.** in the **<u>Maharaj</u>** case, "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 verifies the facts." It is also significant that in an exactly similarly worded Rule in the Rules of the Magistrates' Courts Act in Botswana made in terms of the Magistrates' Courts Act (Cap 04:04) viz Order XIV, a comma appears between the words "facts" and verifying the wording being

> "......swear positively to the facts, verifying the cause of action....."

I agree that sub-rule (2) should be read as set out by **Theron J.** and that the deponent to the affidavit in support of summary judgment must "verify the cause of action and the amount, if any, claimed."

Has the Bank in this case complied with those requirements or is the application for summary judgment fatally flawed in any other respect?

In view of the incorrect approach of **Gaefele Ag.J.**, he did not deal in any depth with the application in order to see if it was defective. This court must therefore consider afresh the reasons advanced by the appellants as to why they say the application is so defective as to be unable to sustain a granting of an order for summary judgment. I shall deal with them seriatim.

Appellant's aver that in regard to the first requirement outlined by **Theron J.**, the verifying affidavit by Anderson does not comply with it, in that Anderson did not have personal knowledge of the facts set out in the summons and that where doubt is cast upon the ability of the deponent to speak with personal knowledge as to those facts, summary judgment must be refused (see **Mowschenson**'s case **supra at 366E-367A**; **Barclays National Bank Ltd v. Love** **1975 (2) SA 514 (D) at 515-516**; **Maharaj**'s case **at 423 D-E**).

It will be recalled that Anderson said that he was the General Manager, Property Division of the Bank and that he had personal knowledge of the facts by virtue of his involvement in the matter and his control of the file which contains the documents relating to it. Masenya denied those averments. Anderson, he said, was not in any of the agreements, mortgage bonds or suretyships either in the negotiation or execution of them. In my view, this is irrelevant. The negotiations leading to the loan agreements, the registration of the bonds or the suretyships are not germane to the Bank's cause of action or in any way relevant. It is on those agreements or documents themselves that the claims are founded. They would obviously be found in the file relating to the appellants which Anderson says is in his control. As General

Manager he would also be aware of any default by appellants of any of their obligations. What those obligations are and if any default in regard to them have been sufficiently set out is a different matter but that Anderson is a person who can swear positively to them is, in my view, beyond doubt. Similar objections to a verifying affidavit were raised in the cases of **Barclays Bank v. Love supra, Maharaj, Du Setto supra,** and in **Nedperm Bank Ltd v. Verbri Projects CC 1993 (3) SA 214 (W)**. In the **Love** case the affidavit was made by the Manager of the branch of the Bank at which the defendant had an overdraft on which the bank claimed; in the **Maharaj** case it was the assistant to the branch manager; in the **Nedperm** case it was the regional manager (housing and repossessions) in the Eastern Transvaal of a bank; and in the **Du Setto** case, the managing director of the company which was the present Bank's predecessor. In all the cases it was held that there was sufficient compliance with the first requirement.

As stated by **Miller J.** in the **Love** case, the nature of the deponent's office in itself suggested very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the Bank. He might not know personally of every entry made in the bank's records but he could rely on those records, if he had personal control of them, to say that he had personal knowledge of the facts of the defendant's account. The same was said of the deponents in the **Maharaj** case and the **Nedperm** case where **Zulman J.** said, after referring to the **Love** case,

> "The position is no different in the case with which I am dealing, which also concerns a plaintiff bank and a statement by an obviously senior official in the bank who says that he has control of records and that he has access to them, and that he can swear positively to the matters contained therein."

The same thing applies in the instant case, and as in the **Du Setto** case, where the managing director of the company, in addition to his control of the relevant file, also said that he had personal knowledge because of his involvement in the matter - an averment made similarly by Anderson. I am of the view that the Bank has adequately complied with the first requirement set out in Order 34 (2).

The first objection to the application must therefore fail.

The second, third and fourth arrows in the quiver of the appellants for their attack on the validity of the application are to large measure associated with one another. They are, to repeat them, that in "verifying the cause of action and the amount claimed in the Plaintiff's Particulars of Claim" it is not clear which cause of action or amount claimed Anderson was seeking to verify, the action being based on two claims and causes of action. Secondly, that in failing to annex the relevant loan agreements or to set out their terms and conditions it was not clear which obligations appellant's had breached therefore (i) creating uncertainty as to what facts Anderson was verifying and (ii) possibly rendering the particulars of claim excipiable. Thirdly, by annexing the mortgage bonds was Anderson seeking to found as a cause or causes of action any of the Bank's claims on them? If so, his verification was vague as it could not, in such circumstances, be ascertained with certainty what he was verifying.

From what I have set out above in regard to the strict compliance with the Rules by a plaintiff in order to obtain summary judgment, the requirement in respect of the verification of the cause of action and the amount claimed also demands strict compliance. As stated by **Baker J.** in **Cape Business Bureau v. van Wyk supra at 439E**: "If the plaintiff fails to verify his cause of action with clarity and exactitude, it is defective and his claim will fail". (See also **Mmabatho Food Corporation (Pty) Ltd v. Fourie en Andere 1985 (1) SA 318 (T) at 321 (G)**. Has the Bank met that test?

Turning to the appellants' attack on the verification part of Anderson's affidavit, it is convenient first to deal with their objection to the annexing to his affidavit by Anderson of the mortgage bonds. I can find nothing objectionable in this. In my view what the Bank is seeking to rely upon for its claims against the appellants are the two loan agreements set out in Claims A and B in the Particulars of Claim which I have set out above. The amounts of those loans were secured by the mortgage bonds. The position is similar to that in the case of **Nedperm Bank v. Verbri Projects supra**, the decision in which was heavily relied upon by **Mr. Tafa**, who appeared for the Bank in this Court. There, too, the plaintiff's claim was in respect of moneys lent and advanced by it to the defendant pursuant to agreements concluded with the defendant, the indebtedness thereby created being secured by way of various mortgage bonds registered over immovable properties. There, too, the plaintiff claimed payment of the amount of the loan allegedly owing by the defendant and for an order declaring three immovable properties, the subject of the bonds, executable. There, too, the deponent to the plaintiff's verifying affidavit annexed to it copies of the bonds. It was argued that summary judgment could not be granted on a claim for an order declaring property executable, Reliance for that was placed on the decision of **Heyns J.** in **Allied Building Society v Malic Construction and Development Co C.C. and Another 1991 (4) SA 432 (T)**. **Zulman J.** in the **Nedperm Bank** case, concluding that that decision was wrong, declined to follow it. He found (at 219D) as follows

> "It seems to me that the relief of declaring property executable is ancillary relief, it is a procedural matter and is not to be dealt with on the basis that it is a claim which is impermissible merely because of the provision of Rule 32(1) or

indeed at all."

A similar conclusion was arrived at by **Didcott J.** (as he then was) in **First National Bank of S.A. Ltd v. Ngcobo and Another** 1993 (3) SA 490 (D) where the learned Judge accepted the argument of Counsel that the claim that property be declared executable did not amount in the true sense to a claim of any kind.

In a judgment delivered in the High Court of Botswana on 9 March 1995 in the matter of **Barclays Bank Botswana Limited v. M.I. Ebrahim and Others Civil Case No. 1728/93** (also an application for summary judgment) **Gyeke-Dako J.** also declined to follow the judgment of **Heyns J.** and also held that the relief of declaring property executable is ancillary relief and is a procedural matter. I agree with **Zulman J., Didcott J.** and **Gyeke-Dako J.** As the claim for the declaring of the properties in question in this case executable was relief ancillary to the Bank's claims on the loan agreements, the annexing of the mortgage bonds to Anderson's affidavit would neither offend against the provisions of Order 34 nor, as contended by appellants, create claims separate from Claims A and B, thus creating uncertainty as to which claims Anderson was verifying and thus rendering his affidavit fatally defective. I accordingly find that this attack on the affidavit must fail.

In regard to the other attacks on the verification portion of Anderson's affidavit, there are indeed, as submitted by **Mr. Gautschi** for the appellants, two claims involving two amounts. The two claims involved two causes of action: one based on a written agreement in July 1991 and one on "an agreement" in June 1992. Anderson swore "to the facts verifying the cause of action and the amount claimed in the Plaintiff's Particulars of Claim". **Mr. Gautschi** submitted that this rendered the affidavit fatally defective as it was uncertain which of the two claims and which cause of action he was verifying. **Mr. Tafa** countered this by arguing that while it would have been more correct for Anderson to have verified the "cause<u>s</u>" of action and "amount<u>s</u> claimed" (I emphasise the plurals), the defect, if such it be, was cured by the addition of the words "in the Plaintiff's Particulars of Claim". Assuming for the purposes of this judgment that **Mr. Gautschi** is correct and that there were two causes of action giving rise to two claims for two amounts, I am of the view that the affidavit does nevertheless comply with the requirements of the Rule. In **Maharaj**'s case at 423 H-I **Corbett J.A.** stated that in considering whether or not to grant summary judgment the Court looks at the matter "at the end of the day" on all the documents before it (see also **<u>Sand & Co Ltd v. Kolliag</u> 1962 (2) SA 162 (W) at 165**). One of the documents in this case is the particulars of claim. It is, of course, commonplace in affidavits in matters of litigation to refer back to what is set out in a summons or particulars of claim without having to repeat what is there set out in such affidavit. This is what Anderson did in this case. He was also the only person, on the facts of this case, who could positively testify to the two claims set out in the particulars of claim. He obviously intended so to do. It would, as Mr. Tafa conceded, have been more correct for him to have referred to causes of action and amounts claimed rather than using the singular "cause" of action or "amount" claimed as he did. However, in my view, the import of what he was saying in his affidavit was clear and viewing the matter "at the end of the day" I cannot find that respondent should be denied summary judgment merely on this point. It is true that in **Pillay v. Andermain (Pty) Ltd supra**, **Moll A.J.** held that a verifying affidavit did not comply with the Rule where there were two claims and the deponent did not verify each one separately. In the verifying affidavit in that case, however, the deponent specifically only verified the R15 claim and said nothing about the ejectment claim whatsoever. That case is therefore clearly distinguishable from the present.

I am therefore of the view that the appellant's attack on the application on this ground must also fail.

The next ground of attack is that the Bank failed to annex the written agreement referred to in Claim A or set out fully the terms and conditions of the agreement referred to in Claim B. Mr. Gautschi conceded that as the claims were not based on a liquid document it was not strictly necessary to attach the agreements to the particulars of claim but he argued that, as the terms and conditions of the agreements were not set out with sufficient particularity, (i) it gave rise to doubt as to what facts Anderson was verifying in his affidavit and (ii) probably rendered the particulars of claim excipiable.

It is, of course, trite that a plaintiff applying for summary judgment must set out his cause of action in his summons or particulars of claim with sufficient particularity as to allow the defendant to know what case he has to meet. What have we in this case? Mr. Gautschi says that the Bank has failed to do so and the appellants do not know what case they have to meet. The Bank refers to a written agreement and to the terms and conditions thereof in Claim A. The appellants say they do not have a copy of the agreement. They cannot, therefore, know what terms or conditions they have breached. The same applies to Claim B but there the position is even worse, so the argument proceeded, because the Bank merely refers in paragraph 3.1 to "an agreement" and does not say if it was a written or oral one and again what terms and conditions the appellants have breached.

I do not think **Mr. Gautschi** is correct. The particulars of claim set out the following:

(a) that the Bank lent and advanced certain amounts as set out in Claims A and B to first appellant in terms of two agreements;

(b) that it was an express or tacit term of the agreements that first appellant would effect repayment of the loans;

(c) that in the event of first appellant failing to effect payment of any instalment "timeously and in full" the whole amount owed by first appellant would immediately become due and payable;

(d) that the first appellant has failed to effect payment to the Bank of amounts due and payable "timeously or at all."

It is true that paragraphs 2.2.1 and 3.2.1 state that first appellant had in terms of the agreement to effect repayment of the loan "in the manner set out in the agreement" and that in breach of the "terms and conditions" the first appellant failed to effect payment and that the terms of repayment are not set out. In my opinion, however the Bank has set out specifically in paragraphs 2.2 and 3.2 the "express or tacit terms" on which it relies. Moreover, the fact that the Bank alleges that payment had to be effected "timeously" and that first appellant failed to effect payment "timeously or <u>at all</u>" (my emphasis) constitutes a sufficient cause of action on which summary judgment can be founded. The appellants, in my view, know with sufficient clarity what the case is that they have to meet. And the fact that the written agreement has not been annexed or the terms of the other one, if it be oral and not written, not set out <u>in extenso</u> cannot avail appellants. I agree with **Zulman J.** in the **<u>Nedperm Bank</u>** case **supra** that a defendant in a summary judgment case cannot, when told that he has failed to repay loans "timeously or at all", simply say that

> "I don't know whether I owe you any money. I might, I might not but don't give summary judgment against me because when it comes to a trial I might from the agreements, be able to find some basis for saying I don't owe you any money anyway."

Appellants know full well what case it is they have to meet. This ground of attack, therefore, also fails.

I turn now to the last prong of appellant's attack on the application, viz that the Bank seeks to rely on a certificate of indebtedness which has been held to be contra bonos mores and therefore its application, certainly in so far as second and third appellants are concerned, must fail. It has been held that a certificate of indebtedness is per se contra bonos mores by the South African Appeal court in **Ex Parte Minister of Justice: In re Nedbank Limited v. Abstein Distributors (Pty) Ltd and Others and Donelly v. Barclays National Bank Ltd 1995 (3) SA 1 (A).**

I cannot say now whether this Court would come to the same conclusion. It is, in my view, unnecessary to do so in this case. Indeed, it would be highly inappropriate for this Court now to do so as the proposition was not argued before us at all. In any event I say it is unnecessary to decide the point because, although the Bank has sought to attach such a certificate, it does not intend to rely on it to establish the indebtedness relied upon in its claims. The Bank's claims are in each instance "a liquidated amount in money". A claim is one for "a liquidated amount in money" if it is based on an agreed sum of money or is so expressed that the ascertainment of the amount is a mere matter of calculation (see **Botha v. W. Swanson and Company (Pty) Ltd 1968 (2) PH F85 (C); Leymac Distributors Ltd v. Hoosen and Another 1974 (4) SA 524 (D) at 527 F; Commercial Bank of Namibia Ltd v. Trans Continental Trading (Namibia) and Others**

1992 92) **SA 66 at 72D-73H)**. In the latter case **Hannah A.J.**, who was also dealing with an application for summary judgment on loans made by a bank, said this at 73H-74A:

> "The Plaintiff's claim is for a specific amount of money allegedly due on an overdraft. Such a claim is usually capable of being ascertained as a mere matter of calculation. In the normal course of events it will require no more than a calculation of credits and debits to the account in question. Indeed, no point at all is made in the opposing affidavit that the amount claimed cannot be ascertained as a mere matter of calculation. No facts are provided from which one can possibly conclude that this is anything other than a simple, straightforward claim for the balance of an overdraft. So far as the certificate proving the amount of the indebtedness is concerned this, in my view, is, at very most, of marginal relevance only in determining whether the plaintiff's claim is for a liquidated amount in money. I therefore hold that the plaintiff's claim is for a liquidated amount in money and, accordingly, it falls within the provisions of Rule 32."

I agree completely with those views.

I find accordingly that the attack on the Bank's application on this ground, too, must fail.

It follows that the appellants have failed in all their objections to the validity of the application by the respondent Bank for an order for summary judgment. They have not chosen to set out any other defence to the application. The respondent is therefore entitled to the order claimed. The appeal is accordingly dismissed, with costs.

Delivered in open court this 19th day of July, 1996.

P.H. TEBBUTT
JUDGE OF APPEAL

I agree.

T.A. AGUDA
JUDGE OF APPEAL

I agree.

LORD W.L.K. COWIE
JUDGE OF APPEAL

I find accordingly that the attack on the Bank's application on this ground, too, must fail.

It follows that the appellants have failed in all their objections to the validity of the application by the respondent Bank for an order for summary judgment. They have not chosen to set out any other defence to the application. The respondent is therefore entitled to the order claimed. The appeal is accordingly dismissed, with costs.

Delivered in open court this 19th day of July, 1996.

P.H. TEBBUTT
JUDGE OF APPEAL

I agree.

T.A. AGUDA
JUDGE OF APPEAL

I agree.

LORD W.L.K. COWIE
JUDGE OF APPEAL