TIME BANK OF ZIMBABWE LIMITED
versus
NKOSANA MOYO

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 16 January and 6 February, 2002

Mr *P Nherere* for applicant
Mr *W Makuyana* for respondent

SMITH J: The plaintiff (hereinafter referred to as "Time Bank') issued summons claiming from the defendant (hereinafter referred to as "Moyo") payment of $5 084 702,46, with interest thereon at 71,5% *per annum* with effect from l February 2001 to date of payment, and an order declaring property in Bluff Hill to be executable. Moyo filed notice of opposition. Time Bank then applied for Summary Judgment.

The founding affidavit was deposed to by Mr Dzirutwe, the Chief Internal Auditor of Time Bank. He said that he had been duly authorised to make the founding affidavit and that the contents thereof were personally known to him. He deposed as follows. In June 2000 Time Bank and Moyo entered into a contract of employment. In pursuance thereof Moyo assumed duty as Manager, Accounting Department, at Head Office. One of the conditions of appointment was that Moyo was to be on a probationary basis for 6 months, beginning on l August 2000. In his capacity as Manager, Moyo was eligible to obtain motor vehicle, housing and personal loans at a concessionary rate of 7.5% *per annum*. Moyo was given a housing loan of $3 672 611,99, a motor vehicle loan of $1 390 721,98, a personal loan of $38 250 and a further personal loan in the form of an overdraft in the sum of $52 303,69. In terms of the rules of Time Bank governing loans to members of staff, upon termination of employment the bank was entitled to increase the rate of interest to the prevailing lending rate at the date of termination and

immediately call up the full amount owing. In January 2001 Time Bank gave notice to Moyo of its intention to terminate his employment on l February 2001 and increase the rate of interest on his loans to 71,5% *per annum*. In addition, full repayment of the loans, amounting to $5 084 702,64, was demanded on or before l February 2001. When Moyo failed to pay the amount he owed, summons was issued. Appearance to defend was lodged in order to delay repayment as Moyo has no good defence to the claim. As security for the repayment of the loans Moyo permitted the registration of a mortgage bond over property he owned in Bluff Hill.

Moyo filed a voluminous opposing affidavit in which he made the following submissions and averments. *In limine,* he submits that the application was fatally defective because it did not comply with subrules (1) and (2) of rule 64 of the High Court Rules. Firstly although Mr Dzirutwe averred that the facts were personally known to him, he is not, in fact, able to swear positively to the facts. Secondly, he did not verify the cause of action and the amount claimed. Thirdly, he does not state that "in <u>his</u> belief, there is no *bona fide* defence to the action". As regards the merits, Moyo averred as follows. As Mr Dzirutwe was not present at any point during the negotiations leading to, and at the signing of, the contract of employment, he is not qualified to comment on its contents, nor is he qualified to place it before the court. The contract of employment was novated in September 2000 when he was promoted from his initial position of Finance Manager to that of Corporate Finance Manager. At that point his salary was increased from $100 000 a month to $120 000. Neither he nor Time Bank negotiated for, or agreed to, a probationary period, with the result that he became a permanent employee. Moyo filed a copy of the letter he received from Time Bank giving notice of its intention to

terminate his employment on 31 January 2001 and his letter in response, which was dated 10 January 2001. He claimed that his services were terminated because he had filed a report in which he gave details of a significant number of abuses by the Managing Director of Time Bank. This report soured relations between him and the managing director, a situation which was made worse by his continuing investigations and unearthing of yet more unprofessional, unethical and improper practices in the way the Managing Director was running the business of Time Bank.

Moyo does not dispute that he was advanced the amounts specified in the summons but says that the dates they were advanced are not specified. That is necessary for the purpose of calculating the interest due. When the loans were granted he signed an agreement with Time Bank. That agreement constituted the entire contract and therefore any rules of the bank are not applicable. In terms of the agreements he signed, on termination of his employment the rate of interest could be increased to the Bank "prime rate". As regards the termination of his employment, Mr Dzirutwe is not able to comment, as he was not involved in the discussions and had nothing to do with the events leading up to the termination of his services. Therefore, his averments are hearsay and inadmissible.

Moyo claims that he has a counter-claim in both delict and contract. In delict, he has a claim for $500 000 for general damages for emotional and psychological stress, anguish, pain and suffering, altering his chosen career path and harm to his professional good name and integrity. In contract he has a claim for $5 357 411,75 in respect of loss of salary, loss of earnings from January 2001 to December 2002, loss of pension, loss of

benefits, loss of loan benefits and expenses incurred in employing a security guard because he feared for his safety.

Time Bank filed an answering affidavit and applied for leave to do so. Moyo objected. After hearing argument, I granted leave for the additional affidavit to be filed - see HC 212-2001. That affidavit was also deposed to by Mr Dzirutwe. He said that, as Chief Internal Auditor, he is able to liaise directly with all departments of Time Bank and is fully informed of, and involved in, all development throughout the Bank. On that basis he has direct knowledge of the operations of Time Bank. Mr Dzirutwe went on to say that Moyo had engaged in activities well outside his area of responsibility. He is being investigated for spying for information concerning the Bank and passing it on to a syndicate of persons who are suspected to be wanting to take over the Bank or to remove it from the scene. Mr Dzirutwe went on to say that Moyo was a manager in the Accounting Department and reported to the Assistant General Manager, Finance. On 2 October 2000 he was transferred, laterally, to the Business Development Department and reported to the Assistant General Manager of that Department. Mr Dzirutwe denied that the contract with Moyo had been varied or novated when he was transferred from one department to another in October. He was the manager of one and was then transferred to the manager of the other. The increase in salary was because Time Bank effected a general cost of living adjustment for all members of staff.

Mr *Nherere* submitted that, as a juristic person, Time Bank cannot personally depose to its founding affidavit. It must of necessity rely on agents. Time Bank's case is based on documentary evidence. As the Chief Internal Auditor, Mr Dzirutwe is in a position to swear positively to the facts set out in the summons and in the founding

affidavit. Furthermore, the founding affidavit does substantially comply with the requirements of rule 64(2) of the High Court Rules, despite the fact that Mr Dzirutwe does not actually say that he "verifies the cause of action". He also states that there is no good defence to the claim, which is as good as saying "in his belief, there is no *bona fide* defence to the action". As regards the merits, Mr *Nherere* argued that Moyo does not raise even a *prima facie* defence to the summons. He admits that the loans were made in the amounts specified. His defence that the termination of his employment on 31 January 2001 was unlawful is not tenable. The contract of employment provided for a probationary period of 6 months, which terminated on 31 January 2001. Whether he was promoted or laterally transferred in September 2000, neither would have meant that his contract was novated. Therefore all the loans became due on l February 2001 and there is no basis for Moyo's counter-claim.

Mr *Makuyana* argued that the application is fatally flawed on three grounds. Firstly, Mr Dzirutwe is not able to swear positively to the facts set out in his affidavit since they are not personally known to him, notwithstanding his assertion to the contrary. Secondly, he did not satisfactorily verify the cause of action and the amount claimed by Time Bank. Thirdly, he failed to aver that, in his belief, there is no *bona fide* defence to the action. As regards the merits, Mr *Makuyana* argued that Moyo, at the time of his purported dismissal, had become a permanent employee, with the result that his dismissal amounted to a repudiation of the contract of employment. Furthermore, the purported cancellation of the contract of employment is a legal nullity, as it was motivated by bad faith. In addition, Time Bank had failed to stipulate when the various loans were

advanced, and so it was not possible to determine the exact sum due. Finally, he argued that Moyo had a counter-claim, both in delict and in contract.

In *Barclays National Bank Ltd* v *Love* 1975(2) SA 515 (D), which also dealt with an application for summary judgment, the defendant had also queried the competence of the employee of the bank, who was the manager of the branch concerned, to depose to the founding affidavit. At pp 515-516 MILLER J said -

> "Regarding the second point *in limine*, it is clear that a deponent's ability to swear positively to the facts is a *sine quo non* to the effectiveness, for purposes of summary judgment, of any deposition he may make (*Fischereigesellschaft F. Busse & Co Kommanditgesellschaft v African Frozen Products (Pty) Ltd*, 1967 (4) SA 105 (C) at p 108). Mr Meskin is therefore correct in saying that one who does not have personal knowledge of the facts to which he deposes but merely believes them to be the facts because of information which he has obtained from others, is not a person such as is visualised in Rule 32 (2). Whether the deponent is a person able to swear positively to the facts will depend largely upon what he says in the affidavit but the *ipse dixit* of the deponent will not necessarily be sufficient to establish the necessary qualification. *Lagos* v *Grunwaldt*, (1910) 1 K.B. 42, to which Mr Meskin referred me and upon which he relied, is an example of such a case. Notwithstanding the assertion of the deponent that the facts were within his knowledge the Court found, *ex facie* his own affidavit, that the circumstances indicated that his professed knowledge stemmed from what he had been told. The case is clearly distinguishable from the one now before me. Although it is not necessary for the deponent to state reasons in the affidavit for his assertion that the facts are within his own knowledge he should, where he is not the plaintiff himself, at least give some indication of his office or capacity which would show an opportunity to have acquired personal knowledge of the facts to which he deposes (*cf. Sand & Co Ltd* v *Kollias, supra* at p 166, *Sekretaris van Landboukrediet en Grondbesit* v *Loots*, 1973 (3) SA 296 (N.C.) at pp 297-8). It must be remembered that there is nothing in Rule 32 which requires the deponent to use a formula or to confine himself to specific words in qualifying himself as a person able to swear positively to the facts".

Then at p 516 H-517 A the learned judge continued -

> "We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that

> he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment. It goes without saying that a manager of a bank who claims to have personal knowledge of the extent to which a client has overdrawn his account must needs rely upon the bank records which show the amounts paid into his account and the amounts withdrawn by the client. When such a manager says that he knows or believes that the client is indebted to the bank in a specified sum of money, it is implicit in what he says that he has had regard to the bank records and that he accepts (or 'believes') that they give a true reflection of the state of the client's account".

Time Bank is a juristic *persona*. In itself, it cannot hold opinions and beliefs. Any opinions and beliefs can only be held by one or more of its employees. Mr Dzirutwe clearly holds a position with Time Bank that gives him access to the relevant documentation on which he can obtain the knowledge or form the beliefs set out in the founding affidavit. It is not necessary, as argued by Mr *Makuyana*, that Mr Dzirutwe must be the author of the relevant documents on which he has made his determination or based his knowledge. Mr *Makuyana* referred the Court to *Misid Investments (Pty) Ltd* v *Leslie* 1960(4) SA 473 (W) where an objection had been raised to the founding affidavit in an application for summary judgment, because it contained hearsay evidence. At p 474 E-G MUNNIK AJ said -

> "In so far as the approach of the Court is concerned when objections are raised on technical grounds to an applicant's application for summary judgment, it was pointed out by MARAIS, J, in *Mowschenson and Mowschenson* v *Mercantile Acceptance Corporation of SA Ltd* 1959 (3) SA 362 (W) at p 366 -
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> > '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'.
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> That being so, the applicant in summary judgment proceedings must, in my view, comply strictly with the requirements laid down in the Rule 42 *bis*. One of the requirements of the Rule as set out in sub-rule (2) thereof is that the plaintiff must deliver with the notice

'an affidavit made by himself or by any other person who can swear positively to the facts'.

In other words the affidavit, if not made by the plaintiff himself, must be deposed to by a deponent who belongs to a particular class of persons, namely, persons who can swear positively to the facts. It must appear from the affidavit itself that the deponent in fact does belong to such a class of persons".

As Time Bank cannot, itself, depose to an affidavit, one of its senior employees must do so on its behalf. It seems to me that Mr Dzirutwe is a member of the class of persons who is in a position to swear positively to the facts set out in his founding affidavit.

In *Maharaj* v *Barclays National Bank Ltd* 1976(1) SA 418(A), which also concerned an application for summary judgment, CORBETT JA, at p 422, referred to the corresponding rule in the South African rules of court dealing with summary judgments and then said -

"In my view, the requirements of this portion of the Rule were correctly stated by THERON, J, in *Fischereigesellschaft F. Busse & Co. Kommanditgesellschaft* v *African Frozen Products (Pty) Ltd*, 1967 (4) SA 105 (C) at p 108, as follows:

'(a) that the affidavit should be made by the plaintiff himself or by any other person who can swear positively to the facts;

(b) that it must be an affidavit verifying the cause of action and the amount, if any, claimed; and

(c) that it must contain a statement by the deponent that in his opinion there is no *bona fide* defence to the action and that notice of intention to defend has been delivered solely for the purpose of delay.

(See also *Flamingo Knitting Mills (Pty) Ltd* v *Clemans and Others*, 1972 (3) SA 692 (D) at p 694; cf. *Pilley* v *Andermain (Pty) Ltd*., 1970 (1) SA 531 (T) at p 535). As regards requirement (b) above, I think that the English version of the Rule is quite clear. The Rule demands, in my view, that the affidavit, whether made by the plaintiff himself or by another person, should verify the cause of action and the amount, if any, claimed. The history of the Rule and its predecessors and of the procedure which it seeks to embody (as described by THERON, J, in the *African Frozen Products* case, *supra*, and by TROLLIP J, in *Sand and Co. Ltd* v *Kollias*, 1962 (2) SA 162 (W) strongly supports this interpretation. Moreover, the word 'verifying' cannot be taken to qualify the word 'facts' and to be part of the definition of the 'any other person' who may make the affidavit, as has been held in some cases, since this would run counter to the

meaning of the word 'verifying' and the grammatical construction of the sentence in which these words occur. The relevant meanings of 'verify' in the *Shorter Oxford Dictionary* are -

> 'to testify or affirm formally or upon oath;…to testify to, to assert as true or certain'.

Clearly facts do not verify; a person verifies an alleged state of facts. And where the verification takes the form of a sworn affidavit it may be said, figuratively, that the affidavit verifies the facts. In addition, the words 'and stating', appearing later in the same sentence as 'verifying', qualify the same subject-matter. Were this not so the word 'and' linking the two participles would be inappropriate and redundant. It can hardly be suggested that the word 'stating', and what follows thereon as to what must be stated, can have reference to anything but the content of the affidavit. It is, therefore, plain that the words,

> 'verifying the cause of action and the amount, if any, claimed…'

also refer to the content of the affidavit".

The learned Judge of Appeal, as he then was, went on to cite with approval, extracts from the *Barclays National Bank* v *Love* case *supra*. Similar views were expressed in *Standard Bank of S A Ltd* v *Secatsa Investments (Pty) Ltd & Ors* 1999 (4) SA 229 (C). At p 235 C-I VAN HEERDEN AJ said -

> "Regarding the second point *in limine*, Mr Fitzgerald relied heavily on the decision of the Full Bench of the Transvaal Provincial Division in the case of *Van den Bergh* v *Weiner* 1976 (2) SA 297 (T). In that case the plaintiff had stated in his affidavit annexed to his application for summary judgment that 'the first defendant is truly and lawfully indebted to the plaintiff on the grounds as set out in the summons'. It is interesting to note that these words are almost identical to the words used by Mr Green in his affidavit. CILLIERS JP, with whom BOSHOFF and ELOFF JJ concurred, said at 299G:
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> > 'The words of the Rule have not been followed meticulously, and it is said that there should have been a specific statement that the amount as such is also verified and confirmed. Because of the cryptic statement it is contended that the provisions of the Rule had not been complied with. This Court is of the opinion that the affidavit complies substantially with what is required under the Rule, namely verification of the cause of action and the amount claimed. By reference to the combined summons and the grounds set out therein, the respondent is in effect referring to and confirming the cause of action and the amount. The affidavit is not irregular…'
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> The decision in the *Van den Bergh* case has been referred to with approval in subsequent decisions of the same Division, notably *Lohrman* v *Vaal Ontwikkelingsmaatskappy (Edms) Bpk* 1979 (3) SA 391 (T) at 395; *Joubert, Owens, Van Niekerk Ing* v *Breytenbach* 1986 (2) SA 357 (T) at 359; and *Kruger* v

Standard Krediet Korporasie Bpk 1988 (1) SA 570 (T) at 573. The *Van den Bergh* case was regarded by Mr Fitzgerald as conclusive of the second point *in limine*.

The decision in the *Van den Bergh* case is, in my view, clearly good law *on the facts of that case*. As CILLIERS JP pointed out at 300C-D:

> 'Rule 32 gives a Court power to grant judgment without trial even though notice of the defendant's intention to defend had been properly given. This power must be exercised with great care, which is achieved, *inter alia*, by ensuring that the plaintiff brings his case within the scope of the Rule. It does not mean the effect will be given to any insubstantial technicality that may be set up by way of objection to the grant of summary judgment'.

See too *Chiadzwa* v *Paulkner* 1981(2) ZLR 33 (S).

Mr Dzirutwe says, in his affidavit, that Moyo has no good defence to Time Bank's claim. Admittedly he was not say that, in his belief, Moyo has no *bona fide* defence, as required by rule 64 (2). However, when he says that Moyo has no defence surely he is stating what he believes to be the case. Consequently, he has substantially complied with the requirements of rule 64 (2). As CORBETT JA said in the *Maharaj* case, *supra*, undue formalism in procedural matters is always to be eschewed. As regards rule 64(2), it is important that an applicant should, in substance, do what the rule requires of him. I consider that that is what Time Bank has done in this case. Moreover, the facts on which its claim is based are admitted by Moyo. He admits that the loans, in the amounts specified, were advanced to him. He does not allege that he has repaid any of the capital of the loan. Irrespective of when the loans were advanced, Time Bank is only claiming interest with effect from l February, 2001. Even as regards the actual termination of his employment. Moyo does not dispute that he was required to serve a probationary period of 6 months, which commenced on l August 2000, and that Time Bank wrote to him to say that his services were being terminated with effect from 31 January 2001.

The basis of Moyo's defence is that when he was promoted in September 2000, his initial contract of employment was, *ipso facto*, novated and he became a permanent employee. He does not allege that he was advised of that fact, either verbally or in writing, by the General Manager or any other senior employee of Time Bank. Mr Dzirutwe says that Moyo was laterally transferred, not promoted, and that the increase in salary that Moyo received was as a result of an across-the-board, cost-of-living, adjustment that was granted to all employees. To my mind, it is irrelevant whether Moyo was promoted or merely transferred from one Department to another. Neither would have had the effect of novating his contract of employment. That could only have been done by a deliberate act on the part of Time Bank. Such a novation would not automatically flow from a promotion or transfer to another Department. When Moyo received the letter dated 29 December advising that his employment was being terminated, he responded in a letter dated 10 January 2001. In that letter he said that he was very concerned, as it inferred that he had not proved himself during his probation. He then went on to suggest that he be retained as an employee for a maximum period of 6 months "from the end of my probation period". Clearly, therefore, at that stage Moyo believed that he was still on probation.

Moyo claimed that the termination of his employment was motivated by bad faith. As he was still serving his probationary period, Time Bank was entitled to terminate his services at any time within the probationary period merely by giving Moyo the requisite notice. Its motives are irrelevant.

Moyo's counter-claim is founded on the basis that the termination of his service was unlawful. As I have found that Time Bank acted lawfully, within its rights, it follows that the counter-claim is not soundly based.

Summary judgment is therefore granted against Moyo. An order in terms of the draft is issued.

Ziumbe & Mtambanengwe, legal practitioners for applicant
Mawere & Sibanda, legal practitioners for respondent