

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

8/9/2011
CASE NO. A377/2010

In the matter between:

HENDRICK GIDEON VAN DER MERWE t/a FLAME First Appellant
AND GRILL QUEENSWOOD

DAVID DANIEL VAN DER MERWE t/a FLAME & Second Appellant
GRILL QUEENSWOOD

and

MEONDO TRADING 445 CC Respondent

JUDGMENT

GOODEY AJ:

[1] **INTRODUCTION:**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED: ✓	
08/09/11 DATE	 SIGNATURE

[Reference is also made to the parties' heads of argument. This is acknowledgement thereof].

(1.1) This is an appeal against a summary judgment granted in favour of the Respondent who was the Plaintiff in the summary judgment application before the Honourable Magistrate Dr L.T. Mkanzi, handed down on the 25th March 2010.

(1.2) This is an appeal against the whole of the order and judgment handed down as aforesaid.

[2] THE GIST OF THE MATTER:

(2.1) The Appellants (Respondents in the Court *a quo* founded their appeal on 3 grounds).

(2.2) The Respondent submits that all 3 grounds are technical in nature and hold no water.

[2] THE LAW:

It is trite law:

- (3.1) Summary judgment was labelled as being very extraordinary and very stringent.
- (3.2) Although still in principle extraordinary and strict, these elements (labels) have been watered down (at least to some extent). **See: ERASMUS – Superior Court Practice** on B1 – 206 and 206A:

"The object of rule 32 is very much the same as that of the English Order. The rule was designed to prevent a plaintiff's claim, based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court. In certain circumstances, therefore, the law allows the plaintiff after the defendant has entered appearance, to apply to court for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from laying his or her defence before the court.

The remedy provided by the rule has for many years been regarded as an extraordinary and a very

stringent one in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. **In Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture [2009(5) SA 1 (SCA) at 11G – 12D]** the Supreme Court of Appeal, in holding that the time has perhaps come to **discard labels such as 'extraordinary' and 'drastic'**, stated:

*'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the **Maharaj case [9] 1976(1) SA 418(A) at 425G – 426E** at 425G-426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded.*

The second consideration is that the defence so disclosed must be both bona fide and good in law. A

court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment."
(My emphasis)

- (3.3) A **bona fide defence** should be disclosed – the **defence** should be *bona fide* not the **defendant** – See **ERASMUS** at B1 – 223:

"Bona fide defence." *All that the court enquires, in deciding whether the defendant has set out a bona fide defence, is: (a) whether the defendant has disclosed the nature and grounds of his or her defence, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.*

Bona fides in the subrule cannot be given its literal meaning; the subrule does not require the defendant to establish his or her bona fides; it is the defence which must be bona fide..."

- (3.4) If there is a defence made out, the Court **MUST** give leave, in all other instances the Court **MAY** still give leave.
See **ERASMUS** B1 – 231.

"Subrule (6): 'The court shall give leave to defend.' It has been held that in terms of this subrule a superior **court has no discretion to grant summary judgment** if the defendant is otherwise entitled to defend; **there is only a discretion to refuse.** The purpose of subrule (6)(b)(ii) is that the plaintiff's claim is not to be defeated by what is only a partial defence. The affidavit by a defendant resisting a claim to summary judgment should - where defendant knows the amount by which the plaintiff's claim should be reduced - indicate the amount payment whereof is to be resisted. The plaintiff will then be entitled to summary judgment for the undisputed balance."
(My emphasis)

- (3.5) It must be valid in law and an attack on the language will not do, neither will technical defences – See **ERASMUS** at B1 – 225 and B1 – 226.

[4] GROUNDS OF APPEAL:

(4.1) First ground:

- 4.1.1 The first and second appellants aver that in the affidavit in support of the application for summary

judgment, the respondent referred to the appellants in singular form instead of plural.

4.1.2 No reference to this point has been made in the affidavit resisting summary judgment.

4.1.3 I find in view of paragraph (3.5) above, that it holds no water.

(4.2) Second ground:

4.2.1 The second ground of appeal raised by the first and second appellants is in respect of the fact that the respondent has subsequent to the launching of the application for summary judgment supported by the relevant affidavit confirming the facts filed an application to amend particulars of claim to the effect that the name of the first appellants in paragraph 2 was merely spelled incorrectly in paragraph 2 of the particulars of claim, and paragraph 17 of the particulars of claim referred to second and third defendants whilst it should have referred to first and second defendants.

4.2.2 This ground is in my view merely cosmetic and not material.

4.2.3 In any event, during no point in time could or have the first and second appellants been prejudiced by the miss spelling of two digits in the first appellants name, or the reference to second and third defendants.

4.2.4 Thus, I find no merit in this ground.

(4.3) Third ground of appeal:

4.3.1 As a third ground of appeal the first and second appellants raised the point that the lease agreement properly signed by all parties concerned and relied on by the respondent was subject to the condition that the lease agreement between the respondent and the previous owner of the business, Mr Ehrich would prevail until such time as the appellants had duly performed in terms of the purchase agreement towards Mr Ehrich.

4.3.2 Clause 30 of the lease agreement only deals with
**WAIVER, CONCESSION AND
REPRESENTATIONS.**

4.3.3 The respondent has at no point in time ever been involved in any agreement of Mr Erich's sale of business to the appellants, has never been a party thereto and could never been bound thereby in any manner, so the argument goes.

4.3.4 However, there are at least prima facie indications that some negotiations / dealings / conversations were going on with Mr Erich.

4.3.5 The letter is convincing enough persuading me that at the very least, the discretion to grant leave should have been exercised.

[5] **CONCLUSION:**

(5.1) I am of the view that the appeal should be upheld.

(5.2) Therefore I suggest that the following order should be made:

" (i) The appeal is upheld *with costs* 

(ii) The magistrate's order is substituted with the following:

(a) Leave is granted to the *defendants* ~~respondent~~ to defend; 

(b) Costs will be costs in the cause."


GOODEY A.J.

I agree and it is so ordered


PRINSLOO J

Heard: 08/09/2011

Judgment: 08/09/2011

On behalf of the Appellants:

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