



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Case no: 4975/2017

Reportable:	YES
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In the matter between:

GOLDEN PEANUT AND TREE NUT SA (Pty) Ltd

Applicant

and

JOHANNES URBANUS VERMEULEN N.O.

First Respondent

STEPHEN FOUCHEE N.O.

Second Respondent

JOHANNES URBANUS VERMEULEN

Third Respondent

Coram: OPPERMAN, J

Heard: 12 September 2019

Delivered: 7 October 2019

JUDGMENT

[1] This is an application for an order that the matter be referred to trial in accordance with rule 6(5)(g) of the Uniform Rules of the High Court.¹

¹ “Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the afore-going, it may direct that oral evidence be heard on specified

- [2] The applicant instituted motion proceedings for final judgment against the respondents and for the perfection of a notarial bond registered in favour of the applicant. The applicant maintained that the numerous factual disputes that exist and which are incapable of being determined on papers are now ripe for trial.
- [3] The respondents opposed the application and contended that obvious factual disputes existed when the applicant elected to pursue its claim in terms of motion proceedings and the application should be dismissed with costs.
- [4] The respondents furthermore propose that because the agreement constitutes a credit agreement as contemplated in the *National Credit Act* 34 of 2005 and as a result of the applicant's non-compliance with sections 129 and 130 of said act, the application does not disclose a cause of action and should therefore be dismissed. Even this issue is in dispute on the facts and law as the case is.
- [5] If a court is unable to decide an application on paper, it may dismiss the application or refer the matter for oral evidence or refer the matter to trial. The court should adopt the process that is best calculated to ensure that justice is done with the least delay on the merits of the case.

issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[Substituted by GG 39715 of 19 February 2016 – *Regulation Gazette* 10566, Vol 608.]

- [6] Everybody seeking justice have the right to be heard in a court of law in terms of section 34 of the Constitution of the Republic of South Africa, 1996.²
- [7] Frustration often occurs when motion procedures are elected in the face of severe and clear dispute of facts. Justice is not seen to be done because, among others, the veracity of evidence cannot be adjudicated effectively and evidence cannot be properly weighed. Cases might be tainted with speculation and uncertainty in fact and law.
- [8] Dismissal may follow if the dispute of fact should have been foreseen. The rule may, however, yield to the interest of justice and a resulting referral for trial. A proper costs order may repair an imbalance that was caused by slovenly or negligent litigation if the dispute was foreseeable or the process abused.³
- [9] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162 it was stated that it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits as opposed to *viva voce* evidence. The judgement refers to the fact that the tendency of resorting to affidavits has been denounced ninety years ago by Tindall, J in *Saperstein v Venter's Assignee* 1929 TPD 14, P.H.A at [71] and is still the law.

² 34. Access to courts.

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

³ Harms: *Civil Procedure in the Superior Courts*, Last Updated: June 2019, <https://www.myllexisnexis.co.za/Index.aspx> dated 4 Oct 2019 at B6.42 – B6.51.

- [10] In confirmation of the above; in *The National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) Harms, JP ruled at [26] and [27] that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they, motion procedures, cannot be used to resolve factual issues because they are not designed to determine probabilities.
- [11] A person claiming relief acts at his peril in proceeding by motion action; he cannot by electing to proceed by motion deprive his opponent of a number of procedural advantages. The flip side is that the respondent may not sabotage the proceedings that is established law for expeditious and cost-efficient resolve of civil cases.
- [12] The applicant vehemently denied that any disputes of fact existed on the issue of the summons in 2017. The disputes were realised after settlement negotiations were instituted. Applicant accused the respondents of an attitude that is one of an attempt to strong-arm the applicant for purpose of settlement.
- [13] The decree in section 34 of the Constitution of the Republic of South Africa, 1996 does not propose for the justice system to become a playground for strategic litigatory moves that bends the law like clay into distortions of fairness and truth. Access to justice is to be revered and not battered for strategic litigatory moves. Selby⁴ is correct when he

⁴ <http://advocacyteaching.blogspot.com/2013/01/trial-advocacy-professors-tell-me-that.html>, Friday, January 4, 2013 *Advocacy, Strategy and Fairness: A.S. Dreier Responds to Selby's Review of His Book* We received the following from A.S. Dreier, author of *Strategy, Planning & Litigating to Win: Orchestrating Trial Outcomes with Systems Theory, Psychology, Military Science and Utility Theory*, in response to Hugh Selby's [review of his book](#) published on this blog in December.

stated that: “I decry such an approach when it replaces ‘the interests of justice’ with ‘I must win’.”

[14] After scrutinising the papers and hearing counsel I am convinced that the severity of the claims, disputes and the interest of justice call for the parties to be send to trial.

[15] The facts and the manner in which the case developed over the years directs the court to a ruling that costs must be adjudicated after trial and to follow the cause.

[16] Order

1. The applicant’s application under the above case number is referred to trial.
2. The notice of motion in the application shall stand as the applicant’s simple summons.
3. The respondents’ answering affidavit shall stand as the first to third respondents’ notice of intent to defend.
4. The applicant shall, as plaintiff in the action, within 20 days of the date of this order deliver its declaration.
5. The further exchange of pleadings and pre-trial procedures, including discovery and the request for and provision of trial particulars, shall be regulated by the Uniform Rules of the Court in respect of action proceedings and the judicial case-management practices of this court.
6. Costs occasioned by the application, including the costs relating to the opposed motion, are reserved for determination in the trial.

M. OPPERMAN, J

Appearances

For applicant:	Adv. J.W. Steyn Chambers Sandton
Instructed by:	Cliffe Dekker Hofmeyer Incorporated Sandton Ref: Burton Meyer/01993913
For respondents:	Adv. C.D. Pienaar Chambers Bloemfontein
Instructed by:	Phatsoane Henney Attorneys Bloemfontein Ref: MV/SJ/VER53/0006