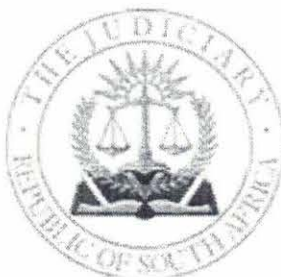


IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ✓

23.2.2018

DATE

SIGNATURE

23/2/18

CASE NO: 57868/17

In the matter between:-

BUSINESS VENTURE INVESTMENTS NO. 1360 (PTY) LTD

Applicant

And

SOFT COFFEE (PTY) LTD T/A HARD ROCK CAFE

1ST Respondent

DOMENICO PICONE

2ND Respondent

SASSI JEAN

3rd Respondent

YARON ASAYAG

4th Respondent

JUDGMENT

MSIMEKI J

- [1] This is a Summary Judgement application by the plaintiff against the defendants. I shall refer to the parties as such. The Summary Judgement application is opposed.
- [2] The plaintiff instituted an action against the first up to the fourth defendants seeking payment in the amount of R343 914, 76; interest thereon to be calculated at the rate of 10.25% per annum a tempore morae; confirmation of cancellation of the lease agreement; eviction of the first and or any other occupant from the premises; postponement sine die of the plaintiff's damages and costs on an attorney and client scale.
- [3] The defendants entered their appearance to defend the plaintiff's action. The plaintiff then brought an application for summary judgement based on its particulars of claim dated 16 August 2017 and on the basis that the defendants had no bona fide defence to its action and that their notice to defend had been delivered solely for the purpose of delay. The first to fourth defendants served and filed an affidavit resisting summary judgement on 27 October 2017 and 30 October 2017, respectively.
- [4] The affidavit resisting summary judgement, seemingly, caused the plaintiff to remove and re-enrol the application for hearing on 18 January 2018. This was done by notice of set down served on 10 November 2017.

- [5] The plaintiff, in the meantime, on 13 December 2017, delivered a Notice in terms of Uniform Rule 28(1). The plaintiff intended to amend its particulars of claim in its entirety and substituting it with the particulars of claim that were attached to the aforesaid notice.
- [6] The defendants contend that the plaintiff's delivery of the notice referred to in paragraph 5 above, after it opposed summary judgement, renders the application for summary judgement incompetent and non-compliant with the Uniform Rules of Court.
- [7] I need to mention that the application for summary judgement was based on the plaintiff's particulars of claim dated 16 August 2017, the unamended particulars of claim.
- [8] The defendants, in their affidavit resisting summary judgement application, contend that they have a bona fide defence in the action and that their Notice of Intention to defend was not delivered solely for the purpose of delay.
- [9] It is significant to mention that the action is based on the lease agreement entered into by and between Menlyn Park Shopping Centre and Business Venture Investments No1360 (PH) LTD referred to in the lease agreement as the

"Landlord" and Soft Coffee (PTY) LTD referred to in the lease agreement as the Tenant (first defendant) on 8 July 2015.

[10] The second up to the fourth defendants are parties in the action in that they signed a Deed of Suretyship binding themselves as sureties and co- principal debtors jointly and severally in solidum to the plaintiff for the due and proper fulfilment of all the obligations of the first defendant arising from or out of or in terms of the agreement renouncing all the necessary benefits.

[11] The plaintiff contends that it complied with all its obligations in terms of the agreement. It further contends that the first defendant materially breached the terms of the lease agreement by failing and / or refusing to make payments to it as and when such payments became due in terms of the agreement. The payments said to be due, owing and payable are said to amount to R343 914, 76. The plaintiff, further, alleges that it has elected to cancel the lease agreement.

[12] The plaintiff, in its particulars of claim, refers to Tyrone Harding as the fifth defendant. It, however, does not cite Tyrone Harding as the fifth defendant in the summons.

- [13] The plaintiff, in the particulars of claim, further, alleges that the second up to the fifth defendants, despite demand, have failed and /or refused to pay the amount of R343 914, 76 or any amount which the first defendant has failed to pay to the plaintiff.
- [14] The defendants raised the issue of non-joinder of Old Mutual, one of the land lords in the lease agreement. The plaintiff filed a Notice of Intention to Amend its particulars of claim to deal with the issues raised in the affidavit resisting the summary judgement application. The plaintiff contends that the defendants did not object to the proposed amendment and that it subsequently filed the amended pages appearing on page 274 to 288 of the paginated papers.
- [15] The plaintiff also filed an amended affidavit in support of the summary judgement application confirming the cause of action and amount claimed as per the amended particulars of claim. The amended affidavit in support of the application for summary judgement is dated 3 January 2018.
- [16] The defendants, represented by Adv. U Lottering, (Ms Lottering), contend that the application for summary judgement has become incompetent in that the plaintiff amended its particulars of claim and the affidavit in support of the application while the application is based on the unamended particulars of claim. Said otherwise, it is the defendants' contention that the plaintiff was not entitled to amend its particulars of claim.

- [17] The plaintiff sees the issues raised by the defendants as technical defences as the amendments, in its view, do not generate and cause any prejudice to the defendants.
- [18] The non-inclusion of the fifth defendant in the summons is again seen by the plaintiff which is represented by Adv GT Avvakoumides (Mr Avvakoumides) as a technical defence which can be condoned.
- [19] On 12 January 2018 the defendants served their notice of objection in terms of Rule 30(A) (1). The notice was filed on 15 January 2018. Defendants' Notice of objection in terms of Uniform Rule 30(2) (b) was handed up to the court when the application for summary judgement application was argued. Ms Lottering submitted that Rule 30 A (1) and 30 (2) (b) had to be adjudicated upon before the summary judgement application was heard. Mr Avvakoumides disagreed, submitting that the summary judgement had been argued, anyway. His submission has merit.
- [20] The defendants, in their Rule 30 A (1) Notice, contend that the plaintiff's application amounts to non-compliance with the Uniform Rules as envisaged by Uniform Rule 30A. The grounds for the defendant's objection are set out in the Rule 30(A) (1) Notice.

- [21] The defendants, in their Rule 30(2)(b) Notice contend that the plaintiff 's amended affidavit in support of the application for summary judgement by *Matibane Olive Ndebele dated 3 January 2018*, constitutes an irregularity as contemplated by Uniform Rule 30. The reasons for the contention are set out in the Rule 30(2)(b) Notice.
- [22] The defendants in the Rule 30(A)(1) Notice threatened to bring an application to have the summary judgement application struck out and that the plaintiff be ordered to pay the costs of the application on a punitive scale unless the grounds of objection mentioned in the notice were removed within 10 (Ten) days of the delivery of the notice.
- [23] In the Rule 30 (2) (b) Notice, the defendants threatened to set the irregularity aside unless the plaintiff removed the grounds of complaint mentioned in the notice within 10 (Ten) days of delivery of the notice.

THE ISSUES

- [24] The issues to be determined are:
1. Whether the summary judgement application needs to be stayed pending the adjudication of Rule 30 A (i) and Rule 30(2) (b) applications.
 2. Whether the amendment of the particulars of claim and the affidavit in support of the summary judgement application has rendered the

summary judgement application incompetent and thereby resulting in the defendants being entitled to leave to defend the plaintiff's action against them.

[25] Rule 32 is key to the determination of the issues.

Rule 32(1) provides:

"32 Summary Judgement

(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgement on each of such claims in the summons as is only-

- (a) 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"

Rule 32(2) provides:

(2) The plaintiff shall within 15 days after the date of delivery of notice of intention to defend, deliver notice of application for summary judgement, together with 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 notice of

intention to defend has been delivered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgement shall state that the application will be set down for hearing on a stated day not being less than 10 days from the date of the delivery thereof". (My emphasis)

Rule 32(4) provides:

(4) No evidence may be adduced by the plaintiff otherwise than by an affidavit referred to in sub rule (2), nor may either party cross examine any person who gives evidence viva voce or on affidavit. Provided that the court may put to any person who gives oral evidence such question as it considers may elucidate the matter."
(My emphasis)

[26] Ms Lottering, after arguing the application for summary judgement, submitted that the application ought to be stayed as the court did not have the power to deal with the Rule 30A (1) and 30 (2)(b) applications and, in the alternative, that the application be dismissed. It is noteworthy that the dismissal of the application presupposes that the application has been argued.

[27] Rule 32(4), which is peremptory, does not permit the adducing of evidence by the plaintiff or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed. The Rule requires the plaintiff or any other person referred to in the Rule to state 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. The Rule, further, does not permit the cross examination of any person who gives evidence viva voce or on affidavit. Only the court is permitted to put to any such person who gives oral evidence such questions as it considers may elucidate the matter.

[28] Ms Lottering's submission is that Rule 32(4) does not permit any document other than those set out in Rule 32(2). The submission is correct.

[29] **Fannin J in *Man Truck and Bus SA (PTY) (LTD) v Singh and Another (1)1976(4)SA264(N)*** agreed with the dissenting judgement of Erasmus J in the case of **Consolidated Press of SA LTD v Van der Merwe 1951(1) SA 337 (C)** and disagreed with the decision of Van Zyl J. In ***the Consolidated Press of SA Ltd V Van der Merwe***, the court had permitted the plaintiff to file an affidavit setting up answers to the defence that the defendant had raised.

[30] **Fannin J in *Man Truck and Bus (SA) (PTY) Ltd v Singh (supra)*** clearly stated that the provisions of Rule 32(4) are indeed peremptory. It, according to Fannin J, matters not whether a defendant sets up a defence which existed as at the date of the issue of summons or a defence which arose subsequent thereto. This, because the only allegations which the plaintiff may make in an affidavit in support of an application for summary judgement are limited to those set out in Rule 32(2) which may not include evidence in support of the plaintiff's case(see

also **All Purpose Space Heating Co. of SA (PTY) Ltd v Schweltzer 1970(3)SA560(N)**
at (563-F-G) and **Venter v Kruger 1971 (3) SA 848(N)** at 851 (B_C)

[31] **In Steeldale Reinforcing (Cape) (PTY) v Ho Hup Corporation SA (PTY) LTD 2010 (2)**
SA 580, Froneman J, in paragraph 15 said:

"(15)it appears to me, with respect that the past underlying justification for allowing amplification of the summons [either in the verifying affidavit, or by delivering a declaration, or by delivering further particulars for the purpose of pleading], namely that it allows for a more comprehensive exposition of the case the defendant has to meet, and thus leads to a better assessment of whether a defendant has disclosed a bona fide defence, is countenance neither by the wording of rule 32(2) and (4), nor by present binding authority. Summary judgement has repeatedly been described as an extraordinary and stringent remedy, **(see Maharaj, above, at 425H; Tesven CC and Another v South African Bank of Athens 2000 (1) SA 268 (SCA) ([1999] 4 ALL SA 396) at 277 H-J; Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd 2004 (6) SA 29 (SCA) at 35 C-D ([2004] 2 ALL SA 366)** and there seems to me to be little remaining reason for extending its scope by allowing 'amplification', in whatever form, of the cause of action as set out in either form of summons.'"

[32] Coming back to the facts of the case, it is common cause that the plaintiff instituted an action against the defendants. It is also common cause that the plaintiff refers to the fifth defendant in detail in the particulars of claim. What is further common cause is that the summons does not cite the fifth defendant. If

the summons was served on the fifth defendant, in my view, the non- citation of the fifth defendant in the summons would not amount to hurdle which would not be overcome.

[33] The plaintiff, after receipt of the defendant's appearance to defend, brought the summary judgement application. The defendant, in terms of Rule 32(3) (b) served and filed an affidavit resisting the application. After perusing and considering the defendants' affidavit, the plaintiff removed the application from the roll. The plaintiff served and filed a notice in terms of Rule 28(1) and amended the particulars of claim, thereafter. The affidavit in support of the summary judgement was also amended to be line with the amended particulars of claim.

[34] The questions that need answers are whether the amendments were permissible and whether this is not one of the applications that Froneman J refers to in **Steeldale Reinforcing (Cape) v Ho Hup Corporation SA (PTY) LTD (supra)**. This, in my view, is one of those applications. Case law referred to above does not countenance this.

[35] The court was referred to the Constitutional Court case **of Kevin John Eke v Charles Henry Parsons** (2015) ZACC 30. I must, at the outset, state that this case is distinguishable from the facts of the case in casu. The case dealt with a settlement agreement which became an enforceable court order. The enforcement of such an order relates to non-compliance with the settlement and not the merits of the original underlying dispute. The lis between the parties

becomes res judicata which means “a matter judged”. (see paragraphs 31 and 32 of **Kevin John Eke case (supra)**)

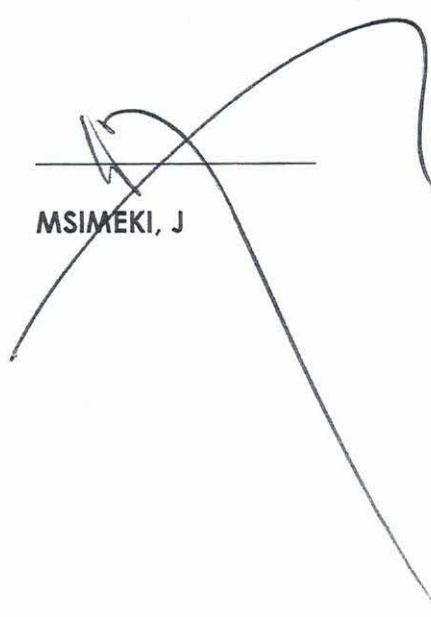
[36] Non-compliance with the court rules, in the interest of justice, may be disregarded by a court (see paragraph 39 of **Kevin John Eke case (supra)**). The court, in the same paragraph, said that the court should not be hamstrung in the performance of the core function of dispensing justice as “the rules exist for the courts, and not the courts for the rules”. However as I said above the facts of this case differ from the facts in the **Kevin John Eke case (supra)** where the parties had agreed to regulate their case in a particular way.

[37] It seems to me that I will perfectly be exercising my discretion judicially if I deal with the application, seeing that the parties have argued the matter and sufficiently ventilated the issues involved in the matter. This, in my view, is common cause.

[38] Applying Rule 32(4) and the case law I referred to above, it becomes clear that the application for summary judgement, for non-compliance with the Uniform Rule, is non-suited. The defendants, therefore, are entitled to leave to defend the plaintiff's action.

[39] I, therefore, make the following order:

1. The defendants are granted leave to defend
2. The costs of this application are reserved for decision when the action is finally determined.



MSIMEKI, J