

SOUTH AFRICA / JUDGMENT

Phillips v Phillips and Another (292/2018) [2018] ZAECHGHC 40 (22 May 2018)

[2018] ZAECHGHC 40

COURT

Eastern Cape High Court, Grahamstown

BEFORE

H. S. Toni

CASE / FILE NUMBER

292/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

{EASTERN

CAPE DIVISION,

GRAHAMSTOWN}

Case

No. 292/2018

In

the matter between:

JAMES
LADSON PHILLIPS
Plaintiff
And
DAVID
COLIN PHILLIPS
First
Defendant
GILLIAN
PHILLIPS
Second Defendant

JUDGMENT

TONI AJ

Introduction

[1] The question which arises in this application is whether it is competent for a plaintiff to utilise the summary judgment remedy to claim damages for capital contributions it has made to a 'partnership' to which both the plaintiff and the

defendants are partners. Despite these proceedings being in the form of an application, the parties will be referred to in this Judgment as the plaintiff and the defendants, respectively.

[2] In the present application the plaintiff applied for summary judgment for: (a) "Payment of the sum of R1 284 787.11 (sic), the sum of R729 607.31 (sic) as and for the plaintiff's monetary expenditure in the founding of the partnership enterprise; (b) Costs of suit, together with interest on the taxed costs, calculated at the legal rate, from a date one week after judgment to date of final payment, jointly and severally, the one paying, the other to be absolved".

[3] The quest for summary Judgment is based on a trite argument that there are no triable issues of fact and the motion is initiated by a plaintiff that contends that all the necessary factual issues are settled and, therefore, need not be tried. If there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, summary judgment must be refused as to that cause of action. The purpose of the summary judgment procedure is to afford an innocent plaintiff who has an unanswerable case against an elusive defendant a much speedier remedy than that of waiting for the conclusion of an action[1].

Facts

[4] In casu the plaintiff and the defendants are ostensibly partners in a business of manufacturing charcoal and briquettes for their joint benefit, with the object of making a profit. The 'partnership' ensues, so says the plaintiff, from an oral agreement allegedly concluded between the plaintiff and the defendants during May 2017. Consequent to the agreement the plaintiff contributed an amount of R1 284 787.11 to the joint enterprise, comprising a sum of R729 607.31 as the plaintiff's capital contribution for the construction of manufacturing plant and fixtures at Landhoogte farm and R555 179.86 for working capital, purchase of equipment and vehicles.

[5] The object of the partnership business was to retail its product throughout the national territory, their target market being the supermarkets and other retail

outlets, and make profit. The terms of their oral agreement are articulated (albeit as 'express terms') in paragraph 4 of the plaintiff's particulars of claim.

- [6] In due course the grapes went sour between the partners resulting in allegations of fraudulent misrepresentation by the plaintiff against the defendant and counter allegations of unlawful conduct 'in breach of the fiduciary relationship' by the defendants against plaintiff. Consequently, the first defendant, with the second defendant's acquiescence, terminated the agreement which repudiation has been accepted by the plaintiff.
- [7] As a natural corollary the plaintiff instituted action against the defendants for payment of an amount of R1 284 787.11, alternatively, R729 607.31 as and for the plaintiff's monetary expenditure in the founding of the partnership. These damages comprise the plaintiff's capital contributions to the partnership for the construction of the manufacturing plant and fixtures. The other amount claimed by the plaintiff as stipulated in item 4.2 of the plaintiff's heads of argument is a sum of R555 179.86 being the plaintiff's contribution to the partnership in payment of trucks and machinery. According to the plaintiff these are all liquidated amounts. The action is defended by the defendants.
- [8] Having been served with an appearance to defend, the plaintiff launched the application at hand. The application is premised on the fact that the defendant does not have a bona fide defence to the plaintiff's claim and that the notice to defend has been filed solely for the purpose of delay.
- [9] The application is opposed by the defendants and in support thereof the first defendant filed an opposing affidavit, in support whereof, the second respondent filed a confirmatory affidavit. This court is petitioned to determine whether on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment in favour of the plaintiff or whether the facts contained in the defendant's opposing affidavit disclose a bona fide defence which may persuade the court to refuse summary judgment. To make such a determination, it is apposite to critically examine the facts alleged by the plaintiff in his particulars of claim as against the defence raised by the defendants in the opposing affidavit in relation to those facts.
- [10] I will not inundate this Judgment by regurgitating verbatim all such 'express terms' save to highlight only such terms as are relevant for the purpose of this Judgment and to the extent necessary to arrive at a fair and just determination of the current dispute. Such terms are that; each party would contribute something to the 'partnership'

business. It is in keeping with their oral agreement, that the plaintiff contributed the aforementioned sum of R1 284 787.11 as already explain above. It is neither admitted nor denied by the defendants that such capital contribution was made by the plaintiff. The defendants were to contribute towards labour, management, administration and financial skills, the land, the trees and the second hand equipment and vehicles. It does not appear ex facie the particulars of claim or from the opposing affidavit what value defendants' contribution would total. It is also not explicit whether such contributions were, in fact, made.

- [11] The partnership business would trade as DC Phillips, alternatively, DC Phillips Enterprises, alternatively, DJ Phillips Enterprises which would translate into a close corporation at a latter stage, bearing the same acronyms. The share ratio for profit and loss was 50% in favour of the plaintiff and 25% each in favour of the defendants. The terms of the agreement as pleaded by the plaintiff in his particulars of claim also contained a somewhat vague conditional clause which is neither explained by the plaintiff nor specifically rebutted by the defendant in its opposing affidavit. Such clause postulates: “subject, however, to the plaintiff first receiving in monetary value, as soon as the partnership was able to afford same, the payment of monies expended in the founding of the partnership enterprise, in order that the parties’ capital contribution to the partnership would be equated in due course”. The parties never minded explaining the meaning of the above clause and this court will, likewise, inquire no more than what it purports to mean. In any event, its meaning is insignificant for the purpose of this Judgment.
- [12] It is not clear from the pleaded facts when and how payments were to be made by the plaintiff, and how such payments were utilised, if ever they were made. The pleaded facts are as scanty in this regard as they are also economical in relation to whether the partnership did in fact exist beyond its conceptualisation. The parties never bothered taking this court into their confidence regarding this important aspect of their oral agreement. Without a clear averment in this regard, the said oral agreement is susceptible to being a simulated transaction. No proof of payment of the amounts referred to above has been provided by the plaintiff. The plaintiff has not been open enough to state when, how and where such payments were made.
- [13] The plaintiff’s case pivots on fraudulent misrepresentation allegedly committed by the defendants by, inter alia, passing themselves off as the owners of Langhoogte farm, on which the business of the partnership was to be conducted, and undertaking to contribute land and trees to the enterprise which they allegedly failed to provide. These misrepresentations, it is alleged,

were made with the intention of inducing the plaintiff to contribute money to the business and as a result whereof the plaintiff suffered damages amounting to R729 607.31. The plaintiff contends that he is entitled to reimbursement of his contributions, hence the action that has culminated in this application.

- [14] In breach of the agreement, so says the plaintiff, the defendants cancelled the oral agreement which repudiation has been accepted by the plaintiff. Absent from the particulars of claim is an allegation that the partnership has been wound up which would enable the partners to settle the partnership’s debts and entitle them to the division of the remaining assets of the partnership, if any. It is, in fact, apparent from the relief sought that the partnership has not been wound up.

- [15] The alleged material terms of the oral agreement as pleaded by the plaintiff are disputed by the defendants, in support whereof the defendants have raised a point in limine that the plaintiff's claim of R1 284 787.11 is for damages allegedly suffered by the plaintiff for buying trucks, equipment and machinery and does not constitute a liquidated amount and therefore summary judgment should be dismissed with costs.
- [16] The defendants deny that a partnership has been entered into as alleged by the plaintiff in paragraph 3 to 5 of his particulars of claim. The defendants' defence is set out in paragraphs 6 and 8 of their opposing affidavit. In paragraph 6, lines 3-4, the defendants state that, 'I have been advised that the remedy is not available where the plaintiff's claim is based on damages'. In paragraph 8, lines 5-7 the defendants state that, "I have been advised this does not constitute a liquid amount and therefore the application for summary judgment should be dismissed with costs based on this ground".
- [17] The first defendant further goes on to stipulate the defendants' version of the partnership, which is at variance with the plaintiff's version, as follows; that the plaintiff and the first defendant, "the parties", entered into a limited partnership which only concerned a charcoal business conducted at the farm Boeskraal which was occupied by one Ronel. The second defendant was never part of any partnership. During approximately October / November the parties entered into a limited partnership to manufacture and market bricks on the farm Langhoogte. The venture, according to the defendants, never really materialised and it only produced approximately R24 000.00 worth of bricks before the partnership was terminated. During November 2017 the first defendant lawfully terminated the partnership. If the defendants' version is to be believed, this surmises the existence of two separate agreements.
- [18] The defendants further aver that the plaintiff entered into a new agreement with Ronel of the farm Boeskraal in terms whereof the said Ronel would supply wood for the manufacture of the charcoal and not supply the partnership. The plaintiff also enticed the staff of the partnership to resign from the partnership and work for the plaintiff in the production of the charcoal on the farm Boeskraal in direct competition with the partnership. Due to the plaintiff's above unlawful conduct, the first defendant terminated the agreement between the parties. The opposing affidavit concludes by denying everything in the particulars of claim that is in conflict with the opposing affidavit.
- [19] In their opposing affidavit the respondents have not dealt with the plaintiff's alleged monetary contribution to the partnership which is the basis of the plaintiff's claim in the summons and in this application as well as other material terms of the partnership agreement alleged by the plaintiff.
- [20] For the plaintiff to be successful in its application, he has to satisfy the requirements set out in Rule 32 (1) of the Uniform Rules of court. Rule 32 (1) provides:

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

- (a) on a liquid document;
- (b) for liquidated amount in money;
- (c) for delivery of specified movable property;
- (d) for ejectment; together with any claim for in

[21] A defendant wishing to oppose summary judgment has to invoke the procedure set out in Rule 32 (3) which provides it with the following steps to follow, namely; that: (a) he must provide to the plaintiff security to the satisfaction of the Registrar, for any judgment including costs which may be given[2] or (b) he may, upon hearing of an application for summary judgment, satisfy the court by affidavit delivered before noon on a day but one before the court day (which affidavit may by leave of court be supplemented by oral evidence) that he has a bona fide defence to the claim on which summary judgment is sought or he has a bona fide counterclaim against the plaintiff[3].

[22] The affidavit must disclose the nature of defence and the material facts

relied upon[4]. The defendant need not deal exhaustively with the facts and evidence relied upon to substantiate those facts but he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to determine whether the affidavit discloses a bona fide defence or not.

[23] What has not been addressed by both parties, is whether alleged damages are capable of being claimed by the parties inter se whilst the partnership is still in existence and before it is dissolved. To address this issue, I am obligated to interrogate the partnership agreement and discern therefrom if it is legally permissible to do so. I will deal with the question of whether the amounts claimed by the plaintiff constitute a liquidated amount in money as well as the discretion of this court to grant or refuse summary judgment later in this Judgment. I now turn to deal with the relevant legal principles.

The Partnership

[23] A partnership is *stricto sensu* not a *persona iuris*. The courts have over a period of time accepted Pothier's formulation[5] of three essential elements for

the existence of partnership to be a correct statement of our law.[6] I propose to deal with Pothier's three elements *seriatim* as follows: first, each of the parties brings something to the partnership or bind themselves to bring something into it, whether it be money or labour or skill. The second element is that the partnership business is to be carried for the joint benefit of both parties. The third is that the object should be to make profit.[7] Each partner's contribution in a partnership forms part of the assets of the partnership that are held by co-owners in undivided shares. This is so because a partnership, unlike a company or a close corporation, does not have

an existence distinct and separate from its constituent members. In LAWSA 2nd ed, paragraph 285, the following is stated:

“Before realisation and distribution of the partnership assets among the partners, a partner is not entitled to treat any particular asset as being his own, nor is any partner entitled to any specific portion of the partnership assets as a whole. Regardless of the question who the owner of the partnership asset is, every partner is contractually bound towards his co-partner not to appropriate partnership for his own purposes or to regard them as part of his private assets”.

[24] In *Shingadia Bros v Shingadia*[8], the court quoted what Warrington LJ[9], concurring with the exposition laid down by Lord Sterndale, M.R., relative to legal personality of partnerships, said, namely:

“A partner cannot be a creditor or debtor to his firm or sue his firm or be sued by it in as much as the English law does not recognise the existence of a firm as distinct from the members of it, and further in an action by one or more partners, whether using the name of the firm under Order 48 or not, against a co-partner alleging that money is due from the defendant to the plaintiffs in connection with the affairs of the firm, whether the claim arises in respect of transactions during the continuance of the partnership, or in the course of the winding up of its affairs after dissolution, the only relief which the plaintiff could obtain could be an account of the dealings and transactions of the partners.”

[25] Morton, J in *Shingadia* above opined:

“These observations of the learned LORD JUSTICE, based as they are on a principle which is identical to the principle of our own law, are applicable to the present case”[10].

[26] It is clear in my mind that the plaintiff’s claim of his contributions to the partnership before the partnership is dissolved

is like putting the cart before the horse. By analogy the application for summary judgment by the plaintiff to claim his

contributions before the partnership has been liquidated is premature. It is impermissible in law. In *Olivier v Stoop*[11] the court said:

“... although the partnership is dissolved but concerning the accounting between them and the world at large, the partnership will remain in force until it has been finally liquidated. Before the partnership is liquidated there must first be accounting by each partner to the partnership. If the parties cannot agree, then there must be a liquidator appointed who, once the assets of the partnership have been made liquid, will first pay the debts of the partnership and if there is anything remaining then divide this proportionately to their remaining shares”.

[27] The court in *Robson v Theron*[12] held that for the purpose of distribution of the partnership assets an account must first be framed of what each partner owes the

partnership and of what is due to each partner by the partnership. The amount of the sum for which a partner is a debtor to the partnership should be set off against those for which he is a creditor. The above is the case after the partnership has been liquidated and it is a fortiori the correct legal position. We are not there yet. However, it hammers the last nail in the plaintiff's case.

Termination of the Partnership

- [28] The parties are ad idem that the partnership has been terminated. I agree with this proposition as a partner cannot be obliged to remain as such against his will. This is irrespective of what the reason for such termination is. However, there is no allegation by any of the partners that the partnership has been dissolved or liquidated. That is the catch. In my view the termination of partnership does not give rise to special consequences such as to entitle the plaintiff to claim by way of damages his monetary contribution to the partnership. Applying the *Robson v Theron* formula, a plaintiff must not only allege in its particulars of claim that the partnership has been terminated but must also allege that it has been wound up. This averment has not been made in this case and in my view summary judgment should fail.
- [29] In any event, whether the partnership has been terminated or not, such termination is insignificant if the partnership has not been properly wound up as it still remains liable to third parties for partnership debts. This is in line with the reasoning of the court in *Olivier v Stoop* above.[13]
- [30] I am alive to the existence of two common law remedies, namely; *actio pro socio* which is an action that may be instituted by a partner against a co-partner during the existence of a partnership for specific performance in terms of the partnership agreement and / or of personal obligation (*praestationes personales*)[14] arising out of partnership agreement business[15], and *actio communi dividundo* which is the equitable division of the partnership assets on dissolution of the partnership[16]. Both these remedies are not applicable in this case and it is not the applicant's case that they are. This issue then ends there, it will not be taken any further.

Misrepresentation

- [31] In this case the court is invited to grant summary judgment on the grounds of misrepresentation. Whilst misrepresentation may be a breach of duty of loyalty and good faith by the partners inter se which they owe each other, this may not be enough to persuade the court to grant summary judgment. Misrepresentation alone, fraudulent or not, cannot alter the above legal position. On the plaintiff's version alone, I believe I must decline the invitation.

Liquidated amount in money

- [32] In view of my finding aforesaid, the issue of whether a claim for damages is a liquidated amount, as claimed by the plaintiff, or not, as averred by the defendant, becomes of little significance. However, for better comprehension, it seems meet to revisit this issue, albeit very briefly, in order complete the picture and put this matter to rest.
- [33] A liquidated amount is an amount which is either agreed upon or which is capable of 'speedy and prompt ascertainment' or put differently; where the ascertainment of the amount in issue is 'a matter of mere calculation'[17]. In *Botha v W. Swanson and Co. (Pty) Ltd*[18], Corbett J, as he then was, held that a claim would not be regarded as one for liquidated amount in money unless it was based on an obligation to pay an agreed sum of money or it was so expressed that the ascertainment of the money so claimed was a matter of a mere calculation.
- [34] In *Leymac Distributors Ltd v Hoosen and Another*[19] the court concluded that the quantum of damages claimed necessarily has to be assessed by a court on the basis of what the court itself considers to be reasonable, fair and just. The court went on further to say "the court cannot assess the quantum of damages in a vacuum. It has to hear evidence...". The quantum of a monetary claim is regarded as liquidated if, firstly, the amount thereof has, prior to the application for summary judgment, been agreed upon by the parties. Secondly, if the amount thereof can be readily ascertained by way of simple mathematical calculation or, thirdly, if the amount thereof has been determined by a court of law.[20]
- [35] In dismissing summary judgment application in respect of the towing costs in *Leymac Distributors'* case above, Howard J said the following:
- "Applying the test which I consider to be the correct one, the plaintiff's other claim (b) is manifestly not a claim for 'a liquidated amount in money'. It is for damages in an amount of R80, representing expenditure allegedly incurred by the plaintiff having the bus towed from Braemer to Durban. Clearly the amount of these damages will not be liquidated until the court has assessed the quantum thereof, by the exercise of its own judgment on the question of whether the alleged expenditure, in whole or in part, was reasonably and necessarily incurred as a result of the first defendant's breach of the contract".*
- [36] By parity of reasoning, the plaintiff's claim in casu is for the expenditure of an amount of R1 284 787.11 or, alternatively R729 607.31 allegedly incurred by him at the initiation of the alleged agreement. In my view such damages cannot be said to be a liquidated amount within the context of Howard J's formulation. Neither have such damages been determined by the court nor can they be said to be easily ascertainable. The plaintiff's damages cannot, therefore, be regarded as a matter of mere calculation. I am not in concert with the plaintiff in this regard. Evidence still needs to be led and the appropriate forum for this purpose is the trial court. Summary judgment cannot in my view make liquidated what is intrinsically unliquidated. The damages remain unliquidated and the plaintiff is not entitled to such damages.

[37] It is my view that the reasoning of my brother, Howard J, is *pari passu* with the case at hand. In an attempt to bolster the applicant's case regarding the liquidity of its damages claim, Counsel for the applicant referred this court to the case of *Kleinhans v Van Der Westhuizen*. [21] The facts of the *Kleinhans* case are not analogous to the facts of the present case in that in *Kleinhans* the court was confronted with a situation where a sum of R150 000.00 was withdrawn and stolen from a company and which the respondent used for his own purpose. The amount was easily ascertainable.

The Court's discretion

[38] The court has an overriding discretion whether on the facts averred by the plaintiff, it should grant summary judgment or on the basis of the defence raised by the defendants, it should refuse it. Such discretion is unfettered. If the court has a doubt as to whether the plaintiff's case is unanswerable at trial such doubt should be exercised in favour of the defendant and summary judgment should be refused. The court can exercise its discretion and refuse summary judgment even if the requirements resisting summary judgment have not been met.[22] Referring to the extraordinary and drastic nature of the summary judgment remedy in *Maharaj v Barclays National Bank Limited*[23], Corbett JA reasoned as follows:

"The grant of the remedy is based on the supposition that the plaintiff's claim is unimpeachable and that the defendant's

defence is bogus and bad in law"[24].

[39] The test is whether on the set of facts before it, the court is able to conclude that the defence raised by the defendant is bogus or is bad in law. What falls to be determined by this court is whether, on the facts alleged by the plaintiff in its particulars of claim, it should grant summary judgment or whether the defendant's opposing affidavit discloses such a *bona fide* defence that it should refuse summary judgment.

Conclusion

[40] As may be gleaned from the above authorities, courts are extremely loath to grant summary judgment unless satisfied that the plaintiff has an unanswerable case. This is because summary judgment is an extra ordinary and very stringent remedy in that it permits a judgment to be given without trial. It closes the doors of the Court to the defendant.[25] It is only when there is no doubt that the plaintiff has an unanswerable case that it should be granted.[26] In such cases then the court can revisit its leniency and grant summary judgment.[27] In *Shepstone v Shepstone*[28], Miller J said:

"The court will not be disposed to grant summary judgment where, giving due consideration to the information before it, it is not persuaded that the plaintiff has an unanswerable case" and that... "a defendant may successfully resist summary judgment where his affidavit shows that there is a reasonable possibility that the defence he has advanced may succeed on trial".

[41] In this case I have no reason to deviate from the above well-established legal principles. Instead, I have a duty to follow the principles as they are binding on this court. However, this case is slightly distinguishable from other cases in that the defendant has not fully disclosed its defence to the satisfaction of this court. The defendants' opposing

affidavit lacks particularity, precision and diction (not to the equation of a plea, nonetheless), thus subjecting this court to much speculation about the defendants' real defence and its bona fides.

[42] The above does not, however, in my view fetter the overriding discretion of this court to refuse summary judgment if it considers it an appropriate order. It may be a matter for consideration when dealing with the issue of the costs.

[43] The summary judgment application fails for the reasons I have set out in paragraph 36 above, in the main. Furthermore, in the exercise of my discretion on the defence raised by the defendants, notwithstanding its short comings, it would seem to me that the most appropriate forum to adjudicate on this matter is the trial Court.

The Costs

[44] During hearing Counsel for the applicant conceded that the applicant is no longer pursuing the relief sought against the second defendant but only against the first defendant. What remains an issue is the appropriate costs order. In his heads of argument, Counsel for the defendants sought an order for a punitive costs order on a scale as between attorney and client, and that the action be stayed until payment of such taxed costs. In support thereof, the defendant's Counsel attached an unreported Judgment of Goosen J in *Coega Autospray (Pty) Ltd (In Liquidation) v Stateline Pressed Metal (Pty) Ltd*.^[29]

[45] As a general rule the awarding of the costs is always in the discretion of the Judge.^[30] The ordinary rule is that such costs should follow the result, being that costs are awarded to a successful litigant.^[31] The usual costs order in summary judgment applications is to reserve costs for determination by the trial Court.^[32] Rule 32 (9) creates an avenue for the award of the costs on a punitive attorney / client scale as a mark of displeasure against a litigant's objectionable conduct.

[46] Rule 32 (9) provides that:

"(9) The court may at the hearing of such application make such order as to costs as to it seems just: Provided that if -

- (a) The plaintiff makes an application under this rule, where the case is not within the terms of subrule (1) or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle him to leave to defend, the court may order that the action be stayed until the plaintiff has paid the defendant's costs, and may further order that such costs be taxed as between attorney and client; and

(b)”

[47] The purpose of the above subrule is, on the one hand, to discourage unnecessary or unjustified applications for summary judgment and, on the other hand, to discourage defendants from setting up unreasonable defences.[33]

[48] Pleadings in general are governed by Rule 18 of the Uniform Rules of court, “Rules”. Rule 18 (10) of the Rules regulates the manner in which pleadings relating to damages should be formulated. This Rule provides that:

“18 (10) A plaintiff suing for damages shall set them out in such a manner as will enable the defendant to reasonably to assess the quantum thereof. Provided that ...”

[49] The provisions of Rule 18 (10) should be read with the provisions of subrule (4) in mind which provides that:

“18 (4) Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading as the case may be, with sufficient particularity to enable the opposite party to reply thereto”.

[50] The above provisions have to be read conjunctively with the provisions of Rule 32 (2) (b) above.

[51] In this case the plaintiff has instituted an action against the defendants for payment of damages, being monetary expenditure, the plaintiff allegedly suffered flowing from a partnership agreement allegedly concluded between the parties. However, and

bizarrely, the plaintiff’s claim is not formulated with sufficient details as regards when, where and how such payments made. These are huge amounts of 729 607.31 and R555 179.86, respectively, which cannot, in the ordinary course of business,

change hands without a paper trail or in the very least a proof of payment. In Kleinhans[34] case the learned De Villiers J, observed that: “Legitimate business involving large sums of money is not normally transacted by handing over cash, especially...”

[52] The manner in which the plaintiff formulated its claim does not, in my view, pass the requirements set out in Rule 18

(10) above. I have already expressed my view that, for the reasons set out in this Judgment, summary judgment should fail. This issue rears its head again merely for the purpose of determining the costs.

[53] By the same token, I have already expressed my view regarding the shortcomings of the defendants’ opposing affidavit, more particularly its lack of sufficient particularity that would enable this court to determine whether their defence is bona fide or not.

[54] The above conundrum leaves me with no option but to deviate from the norm of reserving costs for determination by the trial court. My view is that such an order will not be appropriate in the circumstances. It will only serve to saddle the trial Court with a colossal burden of replaying these proceedings for the purpose of determining liability for the costs. The appropriate costs order in the circumstances would be to grant no order as to the costs or grant an order that each party pays its own costs.

Order

[55] In the result, I grant the following order:

1. Summary Judgment is refused.
2. The defendant is granted leave to defend the summons.
3. Each party shall pay its own costs.

H. S. TONI

ACTING JUDGE OF THE HIGH COURT

Counsel for the plaintiff :

Adv Cole

Instructed by

:

Wheeldom Rushmere & Cole Inc.

GRAHAMSTOWN

Counsel for the defendant

:

Adv Molony

Instructed by

:

Cloete & Co

HEARD ON

:

02 MAY 2018

DELIVERED ON

:

22 MAY 2018

- [1] See *Meek v Kruger* 1958 (3) SA 154 (T) at 156 and 158; *Joob Joob Investments (Pty) Ltd v Stock MavundlaZek Joint Venture* 2009 (5) SA 1 SCA 11C-G; Also *Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 A SCA at 232 F-G
- [2] Rule 32 (3) (a)
- [3] Rule 32 (3) (b)
- [4] *Oos Rande Bantoesakke Adminstrasie Raad v Santam Versekeringsmaatskappy Bpk en andere* 1978 (1) SA 164 (W); *Slabert v Volkskas Bpk* 1985 (1) SA 141 (T)
- [5] RJ Pothier A Treatise on the Law of Partnership(Tudor Transation 1.3.8
- [6] See *Bester v Van Niekerk v* 1960 (2) SA 779 (A) at 783 H-784A; *Muhmann v Muhmann* 1981 (4) SA 632 W at 634 C-F; *Pezutto v Dreyer* 1992 (3) SA 378 (A) 390 A-C
- [7] The above elements were restated in *Andrew Kinloch Butters v Nomsa Virginia Mncora* (181) 2011 [2012] ZASCA 29 (26 March 2012). Also *Joubert v Tarry & Co* 1915 TPD; *Bester v Van Niekerk supra*; *Purdon v Muller* 1961 (2) SA 211 (A) at 218 B-D
- [8] 1957 (3) SA 195 at 197 H
- [9] In *Meyer & Co. V Faber (No.2)* 1923 (2) Ch. 421 at 439
- [10] At 198
- [11] 1978 (1) SA 196 at 203 G
- [12] 1978 (1) SA 841 A at 850 C-D; Also *Sacks v Commissioner for Inland Revenue* 1946 AD 31 at 40; *Van Heerden v Pienar* 1987 (1) SA 86 A
- [13] See foot note 9 supra
- [14] Voet 17.2.10
- [15] See Robson op cit at 855H-856G
- [16] See Robson op cit et seq.
- [17] *Griesel J in Tredoux v Kellerman* 2010 (1) SA 160 CPD; See also the cases cited in Erasmus, *Superior Court Practice*, B1-210
- [18] 1968 (2) P.H. F85
- [19] 1974 (4) SA 524 (D) at 527 F-G
- [20] *Van Niekerk Summary Judgment, A Practical Guide*, Service Issue 14, 2015, pp 3-7
- [21] 1970 (1) SA 565 OPD at 567H to 568

- [22] Mahomed Essop (Pty) Ltd v Sekhukhulu and sons 1967 (3) SA 728 D. First National Bank of South West Africa Ltd v Graap 1990 NR 9 (HC)
- [23] 1976 (1) SA 418 (A)
- [24] 1976 (1) SA 418 (A) at 423G
- [25] See Evelyn Haddon & Co Ltd v Leo Janko (Pty) Ltd SA 662 OPD at 666A. In this case the court quoted Marais J in Mowschenson v Mercantile Acceptance Corporation of SA Ltd 1959 (3) SA 362 (W) at 366 regarding the proper approach to be adopted in dealing with similar matters.
- [26] Vide Breitenbrach v Fiat S.A. (EDMS) Bpk 1976 (2) SA 226 AT 229
- [27] Per Coertt J in Arend & another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 304F – 305
- [28] 1974 (2) SA 462 E-H
- [29] This is the Judgment was delivered in the Eastern Cape Division, Port Elizabeth and was delivered on 6 March 2018.
- [30] Kruger Bros & Wasserman v Ruskin 1918 AD 63 69; Also Graham v Odendaal 1972 2 SA 611 (A) at 616
- [31] Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd 1957 4 SA 225 (SR) 227
- [32] See Maharaj v Barclays Bank Ltd supra at 428
- [33] Per Vermoelen J in Foridar Construction Co (SWA) Pty Ltd v Kriess 1975 (1) SA 875 (SWA) at 878A
- [34] At 566E-F

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