

SOUTH AFRICA / JUDGMENT

Rhegium Properties (Edms) Bpk and Another v Groenewald and Others (1005/13, 1006/13) [2017] ZANCHC 14 (20 January 2017)

[2017] ZANCHC 14

COURT

Northern Cape High Court, Kimberley

BEFORE

Lever AJ

CASE / FILE NUMBER

1005/13, 1006/13

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HIGH

COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

Reportable:

NO
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to Judges: NO
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to Magistrates: NO
Circulate
to Regional Magistrates: NO
CASE NO: 1005 &
1006/13
In

the matter between:

RHEGIUM
PROPERTIES (EDMS)
BPK
1st
Applicant
SCAMANDER
PROPERTIES (EDMS)
BPK
2nd
Applicant
AND
FRANCOIS
GROENEWALD
1st

Respondent
ANDRIES
JACOBUS
GROENEWALD
2ndRespondent
ANDRE
GROENEWALD
N.O
3rd
Respondent
FRANCOIS
GROENEWALD
N.O
4th
Respondent
PAUL
MAGIEL BESTER
N.O
5th
Respondent
ANDRIES
JACOBUS
GROENEWALD
6th
Respondent
Coram: Lever AJ

JUDGMENT

L Lever AJ

1. The above matters come before me as opposed applications to amend the respective combined summons in each case. There are two matters

consisting of case numbers 1005/2013 and 1006/2013. In each of these cases the plaintiffs are different corporate entities. The defendants however, are comprised of the same group of natural persons. Some of the defendants are cited in their dual personal capacity and as trustees of the 'Voordeel Trust' and others being cited simply as trustees of the 'Voordeel Trust'.

2. The issues to be decided in the above cases are the same. Counsel for both the applicants and the respondents approached the matter on the basis that the issues to be decided are indeed the same. Accordingly, I will only write one judgment in respect of both matters.

3. Originally, the Notices of Amendment in the respective cases were far ranging and dealt with a number of matters relating to the respective plaintiffs' claims. Some of the amendments sought were problematic in certain respects. However, at the hearing hereof, Mr Gilliland who appeared for the applicants in both matters withdrew certain of the amendments in both cases.
4. In case number 1005/2013 Mr Gilliland referred the court to the Notice of Amendment, which appears at page 74 of the relevant bundle, and specifically referred the court to paragraphs 8 to 15 thereof as well as a second paragraph therein which was also numbered as paragraph 15 and indicated that the applicants withdrew the proposed amendments set out in these paragraphs.
5. Mr Gilliland then referred to paragraph 16 of the said Notice of Amendment and indicated that the amendments that would have been

inserted in the Particulars of Claim as paragraphs 29.7.1 and 29.7.2 were also withdrawn and that in paragraph 16 of the said Notice of Amendment, the only amendments that the applicant pursued would be those that would have been inserted as paragraphs 29.7.3 and 29.7.4. These would then be renumbered to 29.7.1 and 29.7.2 respectively. These last two amendments are minor and deal with the issue of costs and further and/or alternative relief. In effect, the only amendments to be dealt with in the present application, being those set out and dealt with in paragraphs 1 to 7 of the said Notice of Amendment. These issues relate to the citation of the defendants.

6. In case number 1006/2013 Mr Gilliland referred the court to the Notice of Amendment, which appears at page 97 of the relevant bundle and indicated that the applicant withdrew paragraphs 7 to 15 of the relevant Notice of Amendment. Paragraph 16 of the said Notice of Amendment remains. Paragraph 16 deals with costs and further and/or alternative relief. Paragraphs 1 to 6 of the said Notice of Amendment remain in dispute. These paragraphs deal with the citation and reference to the parties.
7. On behalf of the applicants, Mr Gilliland tendered the costs in relation to the parts of the respective Notices of Amendment which were withdrawn at the hearing, specifically the costs relating to the preparation of the relevant objections and the costs of preparing the Heads of Argument in respect of such objections. Mr Van Rhyn SC, who appeared for the respondents herein, accepted such tender and I made an order in respect of such, incorporating the terms of the tender.
8. Turning back now to the relevant Notices of Amendment, the issue to be decided is whether the proposed amendments simply correct the citation of the defendants already before the court or whether the amendments introduce new parties to the respective actions.
9. In terms of Rule 17 of the Uniform Rules of Court (the Rules or Rule, as the case may be) a summons or a combined summons may be issued. Rule 17(2)(a) states that when a claim is not for a debt or a liquidated demand then a combined summons must be used. Nominally,

a combined summons has two parts, the first part being a summons as near as may be in accordance with form 10 of the first schedule to the Rules (form 10 summons), to which must be attached the second part, being a statement of the material facts relied upon by the plaintiff to support its claim, the Particulars of Claim.

10. In order to deal with the issue, being whether or not a defendant was cited incorrectly and the amendment simply corrects this or whether a new party is introduced to the action by the relevant amendment, it is necessary to set out how the defendants have been cited in each of the relevant combined summons'. On the facts of these cases it is necessary to set out how the defendants have been described in the heading of the form 10 summons as well as how they have been described in the body of the form 10 summons for both cases. It will also be necessary to set out how the defendants have been cited in both the heading and the body of the Particulars of Claim. Then it will also be necessary to refer to the amendments that are still pursued and the objections that are relevant to such proposed amendments.
11. In case number 1005/2013 and in the heading of the form 10 summons, the defendants are cited as follows:
 - 11.1. First defendant – Francois Groenewald N.O., the letters N.O. indicating that he is cited in a representative capacity;
 - 11.2. Second defendant – Andries Jacobus Groenewald N.O. cited in his representative capacity;
 - 11.3. Third defendant – Andre Groenewald N.O. cited in his representative capacity;
 - 11.4. Fourth defendant – Mnr Francois Groenewald cited in his personal capacity, being the same natural person as the first defendant,
merely cited in a different capacity;
 - 11.5. Fifth defendant – Paul Michiel Bester N.O. cited in his representative capacity; and
 - 11.6. Sixth Defendant – Andries Jacobus Groenewald cited in his personal capacity, being the same natural person as the second defendant,
merely cited in a different capacity.
12. In the body of the form 10 summons in case number 1005/2013 the defendants are cited as follows:
 - 12.1. First defendant – is cited in his representative capacity as a trustee of the Voordeel Trust;
 - 12.2. Second defendant – although the letters N.O. do not appear behind his name in the body of the form 10 summons, he is cited in a representative capacity as a trustee of the Voordeel Trust;
 - 12.3. Third defendant – his first name is given as Andries which is different from what is set out in the heading of the form 10 summons. However, he is also cited in a representative capacity as a trustee of the Voordeel Trust;

12.4. Fourth defendant – being the same person as the first defendant is cited in his personal capacity;

12.5. Fifth defendant – is cited in his representative capacity as a trustee of the Voordeel Trust; and

12.6. Sixth defendant – being the same person as the second defendant, is again cited in his representative capacity as a trustee of the Voordeel Trust as opposed to in his personal capacity as is apparent in the heading of the form 10 summons.

13. In the heading of the Particulars of Claim in case number 1005/2013, the defendants are cited as follows:

13.1. First defendant – is cited in his personal capacity (different from both the heading and body of the form 10 summons);

13.2. Second defendant – is cited in his representative capacity;

13.3. Third defendant – is cited in his representative capacity;

13.4. Fourth defendant – being the same person as the first defendant, is cited in his representative capacity (it appears that the order of citing him in his personal and representative capacity has been switched from the order that appears in the form 10 summons);

13.5. Fifth defendant – is cited in his representative capacity; and

13.6. Sixth defendant – being the same person as the second defendant is cited in his personal capacity (In the body of the form 10 summons second and sixth defendants were cited in their capacities as trustees of the Voordeel Trust. The heading of the form 10 summons gives an indication that it was intended to cite him in his dual representative and personal capacities).

14. In the body of the Particulars of Claim in case number 1005/2013, the defendants are cited as follows:

14.1. First defendant – cited in his personal capacity;

14.2. Second defendant – cited in his representative capacity as a trustee of the Voordeel Trust;

14.3. Third defendant – cited in his representative capacity as a trustee of the Voordeel Trust. In both the heading and the body of the Particulars of Claim the third defendants first name is given as Andre, which is not the case in the form 10 summons;

14.4. Fourth defendant – being the same person as the first defendant is cited in his representative capacity as a trustee of the Voordeel Trust;

14.5. Fifth defendant – cited in his representative capacity as a trustee of the Voordeel Trust; and

14.6. Sixth defendant – being the same person as the second defendant is cited in his personal capacity.

15. In case number 1005/2013 the applicants/plaintiffs seek to make the following amendments:

15.1. In the heading of the form 10 summons and in respect of the first defendant by deleting the letters N.O. In effect changing his

citation from being cited in a representative capacity to being cited in his personal capacity;

15.2. In the body of the form 10 summons and in respect of the first defendant by deleting the reference to the first defendant being sued in a representative capacity and changing his citation to indicate that as first defendant he is now cited in his personal capacity. It must be remembered that the first defendant is one and the same person as the fourth defendant.

15.3. In the body of the form 10 summons and in respect of the second defendant to add the letters N.O. after his name, even though in the body of the form 10 summons the second defendant is cited in his capacity as a trustee of the Voordeel Trust.

15.4. In the body of the form 10 summons to delete the first name of the third defendant and replace it with the name Andre so that it would correspond to the name of the third defendant as set out in the heading of the form 10 summons.

15.5. In the heading of the form 10 summons by deleting the citation of the fourth defendant “Mnr Francois Groenewald” and replacing it with “Francois Groenewald N.O.” So, that the order in which the first and fourth defendant is cited in his personal and representative capacities in the heading of the form 10 summons corresponds with the order in which he is cited in those capacities in the Particulars of Claim.

15.6. In the body of the form 10 summons in the citation of the fourth defendant, to indicate that he is being sued in his representative

capacity as a trustee of the Voordeel Trust. Then, the order in which the first and fourth defendant is cited in his personal and

representative capacities corresponds with the order in which it appears in the Particulars of Claim.

15.7. In the body of the form 10 summons by deleting the reference to the sixth defendant in his representative capacity and replacing it with contentions that he is cited in his personal capacity to correspond to the heading of the form 10 summons.

16. In case number 1005/2013 the respondents raise the following objections to the amendments sought by the applicants:

16.1. The form 10 summons and not the Particulars of Claim is the pleading that initiates the action;

16.2. The plaintiffs’ proposed amendments of the heading and body of the form 10 summons, as proposed in paragraphs 1 to 7 of the Notice of Intention to Amend, would constitute a substitution of parties against whom the action had been instituted; and

16.3. The remaining objections relate to the proposed amendments that the applicant withdrew at the hearing hereof.

17. In case number 1006/2013 and in the heading of the form 10 summons, the defendants are cited as follows:

17.1. First defendant – Andries Jacobus Groenewald N.O. cited in a representative capacity;

17.2. Second defendant – Andre Groenewald N.O. cited in his representative capacity;

17.3. Third defendant – Francois Groenewald cited in his personal capacity;

17.4. Fourth defendant – Paul Michiel Bester N.O. cited in his representative capacity; and

17.5. Fifth Defendant – Andries Jacobus Groenewald cited in his personal capacity, being the same person as the first defendant.

18. In the body of the form 10 summons in case number 1006/2013 the defendants are cited as follows:

18.1. First defendant – is cited in his representative capacity as a trustee of the Voordeel Trust without the letters N.O. after his name;

18.2. Second defendant – his first name is given as Andries which is different from what is set out in the heading of the form 10 summons. However, he is also cited in a representative capacity as a trustee of the Voordeel Trust;

18.3. Third defendant – cited in his personal capacity;

18.4. Fourth defendant – cited in his representative capacity as a trustee of the Voordeel Trust; and

18.5. Fifth defendant – being the same person as the first defendant, is again cited in his representative capacity as a trustee of the Voordeel Trust as opposed to being cited in his personal capacity as is apparent in the heading of the form 10 summons.

19. In the heading of the Particulars of Claim in case number 1006/2013, the defendants are cited as follows:

19.1. First defendant – cited in his representative capacity;

19.2. Second defendant – cited in his representative capacity. His first name is given as Andre, which corresponds to the heading of the form 10 summons;

19.3. Third defendant – cited in his representative capacity, which differs from his citation in both the heading and body of the form 10 summons;

19.4. Fourth defendant – cited in his representative capacity; and

19.5. Fifth defendant – being the same person as the first defendant is cited in his personal capacity.

20. In the body of the Particulars of Claim in case number 1006/2013, the defendants are cited as follows:

20.1. First defendant – cited in his representative capacity as a trustee of the Voordeel Trust;

20.2. Second defendant – cited in his representative capacity as a trustee of the Voordeel Trust. His first name is given as Andre, which corresponds to the heading of the form 10 summons and the heading of the Particulars of Claim, but differs from the body of the form 10 summons where he is cited as Andries Groenewald;

20.3. Third defendant – cited in his representative capacity as a trustee of the Voordeel Trust, which differs from his citation in both the heading and body of the form 10 summons;

20.4. Fourth defendant – cited in his representative capacity as a trustee of the Voordeel Trust; and

20.5. Fifth defendant – being the same person as the first defendant is cited in his personal capacity.

21. In case number 1006/2013 the plaintiffs seek to make the following amendments:

21.1. In the body of the form 10 summons and in respect of the first defendant, to add the letters N.O. after the first defendant's

name even though he is already cited in his capacity as a trustee of the Voordeel Trust in the relevant paragraph in the body of the form 10 summons;

21.2. In the body of the form 10 summons and in respect of the second defendant by replacing the name "Andries" with "Andre"

so that it conforms with the citation of the second defendant in the heading of the form 10 summons;

21.3. In the heading of the form 10 summons and in respect of the third defendant by adding the letters N.O. after his name;

21.4. In the body of the form 10 summons to delete the paragraph citing the third defendant and replace it with the following:

"FRANCOIS GROENEWALD N.O., 'n volwasse man wie se besonderhede aan Eiser onbekend is; in sy hoedanigheid as trustee van die Voordeel Trust met adres te Frans Lubbestraat 1, JAN KEMPDORP."

21.5. In the body of the form 10 summons, with reference to the fifth defendant, by removing reference to him being cited in his representative capacity and changing his citation to be in his personal capacity as surety and co-principal debtor for the obligations of the Voordeel Trust to the plaintiff. It must be remembered that the fifth defendant is the same person as the first defendant; and

21.6. In the body of the form 10 summons and with reference to the citation of the plaintiff, by deleting the words “(hierna ‘die

Eisers’ genoem)” and changing it to the singular “(hierna ‘die Eiser genoem)”, there being only one plaintiff in case number 1006/2013.

22. In case number 1006/2013 and in respect of the above proposed amendments, the respondents raised the following objections:

22.1. The form 10 summons and not the Particulars of Claim is the pleading that initiates the action;

22.2. Plaintiff’s proposed amendments to the heading and the body of the form 10 summons, as set out in paragraphs 1 to 6 of the Notice of Intention to Amend, constitutes a substitution of parties against whom the action had been instituted; and

22.3. The other objections raised in the relevant Notice of Intention to Amend deal with the objections that the applicant withdrew at the hearing hereof. Accordingly, such objections need not be considered herein.

23. Turning now to the respective arguments raised by the applicants and the defendants on whether the proposed amendments merely correct an incorrect citation or whether such proposed amendments introduce a new party to the action.

24. Mr Gilliland on behalf of the applicants’, submits that a ‘combined summons’ is a composite document. That the form 10 summons cannot exist and has no legal effect without the ‘Particulars of Claim’. That the form 10 summons and the Particulars of Claim are issued by the Registrar as a composite document. That the form 10 summons and the Particulars of Claim are served on the defendants as a composite document by the Sheriff. That the issuing and service of the form 10 summons without the Particulars of Claim would be a nullity and that such process would not result in an action being instituted.

25. Mr Gilliland submitted that, because one part of a combined summons cannot exist without the other that the combined summons must be read as a composite document whereby the two parts and the contentions made in the respective parts thereof must be read together.

26. Mr Gilliland referred the court to a passage in Harms[1] dealing with the nature and interpretation of the court rules and the authorities cited therein. On the strength of this passage submitted that: the object of the rules was to ensure a fair trial and the rules should be interpreted in that context; the rules exist for the court and not the other way round; the rules are not to be enforced for their own sake but their purpose is to ensure the inexpensive and expeditious completion of litigation; the rules should be interpreted and applied to achieve these objects.[2]

27. Mr Gilliland referred to certain positions taken by the defendants in their plea-over that indicate that they are and were fully aware that they were being cited in their capacities as trustees of the Voordeel Trust. In case number 1005/2013 Mr Gilliland referred to paragraphs 18.2, 20.2 and 22 of the relevant plea. In case number 1006/2013 Mr Gilliland referred paragraphs 9.2, 13, 14.2 and 14.3 of such plea.
28. In conclusion Mr Gilliland argued that on a correct reading of the 'combined summons' in both cases, that the Voordeel Trust had always been before the court. That the proposed amendments in both cases merely corrected certain errors in the description of the co-trustees. That the proposed amendments did not introduce a new party to either action. That from the passages of the defendants' pleas referred to above indicate that the respondents also understood that the trust was being brought before the court. Finally, on the authority of *GOLDEN HARVEST (PTY) LTD v ZEN-DON CC*[3] that the amendments ought to be allowed because they merely corrected a mis-description and did not introduce a new party to the action. Furthermore, there has been a gradual trend to move away from an overly formal approach.[4]
29. Mr Van Rhyn, for respondents on the other hand argued that the form 10 summons should establish who the parties to the relevant action are and in that context, it can be analysed without reference to the Particulars of Claim. Mr Van Rhyn contended on the authority of the *ASSOCIATED PAINT AND CHEMICAL INDUSTRIES (PTY)LTD t/a Albestra Paint and Lacquers v SMIT*[5] and the unreported judgment of Fischer AJ in the matter of *OLD MUTUAL INVESTMENT SERVICES (PTY) LTD v GIDEON ALBERTUS VAN ZYL AND TWO OTHERS*[6] that the proposed amendments would allow a substitution of parties and for that reason ought to be refused.
30. I must first consider whether the form 10 summons should be read as a composite document as motivated by Mr Gilliland or in isolation as motivated by Mr Van Rhyn before considering whether the issues raised by Mr Van Rhyn in regard to the form 10 summons and the amendment thereof in each case would constitute the substitution of a new party to the action in each of the relevant cases. If the form 10 summons must be read together with the contents of the Particulars of Claim in each case as a composite document, then there is no doubt who is intended to be sued and clearly the amendments only correct a mis-description in the summons. In those circumstances the proposed amendments ought to be granted. It is only if I conclude that the form 10 summons should be considered in isolation that I would need to consider the issues raised by Mr Van Rhyn in respect of the proposed amendments.
31. Neither Mr Gilliland nor Mr Van Rhyn could refer me to any authority on this point. In my view Mr Gilliland's argument is the more persuasive of the two. Clearly, a combined summons is what the name suggests, it is a composite document that is not whole or complete if any one of its component parts is excluded or missing. The composite document is issued by the Registrar and served on the defendants. This is distinct from a simple summons, where a summons as near as may comply with form 9 of the first schedule of the

Rules is issued by the Registrar and served on the defendants (form 9). It is only when the defendants have entered an appearance to defend the form 9 summons that the plaintiff is obliged to file a Declaration under the provisions of Rule 20.

32. Mr Van Rhyn submitted on behalf of the respondents, that if the form 10 summons does not establish that a defendant is a party to the action that such defendant need not even read the Particulars of Claim. In my view, this approach is overly technical and is not conducive to having the real issues between the litigants decided in as speedy and cost effective manner as possible. Furthermore, it overlooks the manner in which Rule 17 deals with a combined summons as a composite document. The one part being meaningless without the other.
33. Even though Rules 17(2)(a) and 18 do not require it, a practice has arisen, which appears to be almost universal, that the parties are fully described in the Particulars of Claim.
34. In all of these circumstances, I do not believe a defendant when served with a combined summons can simply look to the form 10 summons to determine whether or not he, she or it is a party to the action. I believe the combined summons must be read as a composite document. In these circumstances, it is sufficiently clear who the plaintiffs' intended to sue as the defendants. Accordingly, the proposed amendments ought to be allowed. They merely correct a misdescription of the defendants in the form 10 summons.
35. The last remaining issue is the issue of costs. Save for the order of costs already made, I can see no reason why the costs should not follow the event and costs will be awarded accordingly.

In the circumstances, the following order is made:

In case number 1005/2013:

- 1) Plaintiffs' are granted leave to amend their summons in accordance with paragraphs 1 to 7 and the remainder of paragraph 16 of the Notice of Amendment filed of record on the 26 April 2016.
- 2) Save for the order of costs already made herein, the respondents are to pay the costs of this application.

In case number 1006/2013:

- 1) Plaintiff is granted leave to amend its summons in accordance with paragraphs 1 to 6 and paragraph 16 of the Notice of Amendment filed of record on the 26 April 2016.

Lawrence Lever

Acting Judge

On behalf of Applicants :

Mr Gilliland

Haarhoffs Attorneys

On behalf of Respondents:

Mr Van Ryhn SC

Elliot, Maris Wilman & Hays Attorneys

Date of hearing:

28 October 2016

Date of Judgment:

20 January 2017

[1] Harms, CIVIL PROCEDURE IN THE SUPERIOR COURT, Butterworths., at A-4.

[2] Harms above.

[3] 2002 (2) SA 653 (O) at 661F.

[4] Four Tower Investments (Pty) Ltd v Andre's Motors 2005 (3) SA 39 at para [19].

[5] 2000 (2) SA 789 (SCA).

[6] Handed down in the Free State High Court, Bloemfontein on the 3 March 2011 under case number 4381/2009.

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