

CIV. CASE NO. 675/98

In the matter between

PETER RONALD COOPER N.O.
(as liquidator of Growth Trust Corporation)

PLAINTIFF

And

D.B.O INVESTMENTS (PTY) LTD
t/a MAXI MOVIES

DEFENDANT

Coram
For the Plaintiff
For the Defendant

S.B. MAPHALALA – J
MR. L. KHUMALO
MR. S. NKOSI

JUDGEMENT
(25/06/99)

Maphalala J:

The plaintiff issued a combined summons and the defendant filed notice to defend the proceedings against it, whereupon plaintiff applied for summary judgement. The defendant filed its affidavit resisting summary judgement, and when the matter appeared before court on the 16th April 1999, the defendant then applied for leave to file a supplementary affidavit and in fact when the matter was argued the answering affidavit was presented to the other side as well as the court. This application is opposed by the plaintiff. Mr. Khumalo handed to court from the bar Heads of Argument to that effect.

The brief history of the matter is that this application on a prior occasion appeared before Sapire CJ who directed that the defendant should file the actual affidavit so that the judge who hears the application for leave to file is appraised of its contents.

Mr. Nkosi in motivating the reception of this affidavit at this stage argued that defendant when it was dealing with the plaintiff in the normal course of business was not aware that it was doing business with a number of companies under the general umbrella of Growth Trust, viz Swaziland Business Growth Trust, Growth Trust Commercial Corporation and Growth Trust Corporations. He directed the court to pages 121 to 122 of the paginated Book of Pleading to show that these companies are two different corporate entities. This fact was not known to the defendant when it was transacting with the plaintiff prior to the plaintiff's liquidation.

Further Mr. Nkosi submitted that his client in its papers that there was an element of fraud perpetrated by the plaintiff in its dealing with his client. That they were not aware of these facts when they filed their affidavit resisting summary judgment. Mr. Nkosi directed the court's attention to *Herbstein and Van Winsen in The Civil Practice of the Supreme Court of South Africa (4th ED) at page 443* where the learned authors state that the courts have on occasion allowed a defect in the defendant's affidavit to be cured by supplementary evidence given either orally or in a further affidavit. The authors cite the case of *Juntgen t/a Paul Juntgen Real estate vs Mottbusch 1989 (4) S.A. 490 (w)* where it was held that in summary judgment proceedings the court has a discretion in an appropriate case to allow an additional affidavit to be filed by the defendant in order to improve a defective attempt to set out a defence to the plaintiff's claim or to prove *bona fides*. Mr. Nkosi contended that the defendant present application is premised on the foregoing principle in *Juntgen (supra)*. He contended further that our rules are silent on the filing of a supplementary affidavit.

This, therefore, is nub of the application by the defendant.

Per contra Mr. Khumalo submitted that the submissions made on behalf of the defendant in support of this application were not relevant to the present application. He contends that there are two agreements which are the subject matter of this case, viz a loan agreement and a franchise agreement.

Then Mr. Khumalo addressed the court on the crux of the matter that defendant is bringing this application because it has come across facts it was not aware of when preparing its affidavit resisting summary judgement. His view is that defendant has no excuse of saying it did not know that the companies were separate because when a company is registered its

documents becomes public knowledge. The plaintiff has a claim in respect of the entire loan arising on a loan agreement between the plaintiff and the defendant. Nowhere in the agreement are other companies mentioned (see annexure “A” at page 9 of the paginated Book of Pleadings). Why then could the plaintiff mention these other two companies in the face of annexure “D”?

Mr. Khumalo further argued that the rules of this court do provide for the filing of such affidavit why is then Mr. Nkosi saying that the rules are silent. Mr. Khumalo is of the view that the rules is not silent but it has not provided for this exigency. The defendant is thus, shut out. A defendant who has a defence has to set it out when he get the opportunity to do so. He argues that *Herbstein and Van Winsen (supra)* at page 443 refers to the South African rule which is not the same as our rule. In any event, the defendant has not alleged any defect to invoke the principle in *Juntgens (supra)*. Mr. Khumalo contended that the Swaziland Rule importantly provides that leave may be granted by the court for the filing of a further affidavit (replying affidavit) by the *plaintiff, not by the defendant* (his emphasis); the defendant is to show a defence or the existence of a triable issue in the affidavit resisting summary judgement, not in any other (see Rule 32 (4) (a). Mr. Khumalo further directed the court’ attention to *page 507 Herbstein and Van Winsen (3r^d ED)* where the following circumstances were recognized as justifying the indulgence allowed by the court to a defendant who wants a further affidavit.

- a) Where the affidavit filed by the defendant opposing the summary judgement application is defective – to be cured by means of a supplement affidavit.
- b) Where the defendant has not been able to file timeously with justifiable reason for his failure.
- c) Where the defendant could not file the affidavit at all, through no fault of his.

These are the issues before court. It appears from South African case law that the defendant may be permitted to file further (opposing) affidavit only if he shows the existence of special circumstances, even then falling outside the ambit of Rule 32. The court has no discretion. There is no provision for such in the rule concerned. There are cases in South Africa where the defendant sought and was granted special permission to file further affidavit – whether to

be called supplementary or not in summary judgment application proceedings. In those cases the court formulated the following principles which set out the requirements for such special permission. That the defendant must give an explanation for failure to file the affidavit that he would then be seeking to have filed late; and why he did not include in the earlier affidavit the material or information that he now wants to place before the court and that the defendant should establish special circumstances justifying the indulgence sought from the court. (see *Gani vs Crescent Finance Corporation (Pty) Ltd 1961 (1) S.A. 222 (w)*; *Empire Fresh Meat Supply (Pty) Ltd vs Ilic 1980 (4) S.A. 23 (w) 6* and *Juntgen t/a Paul Juntgen Real Estate (supra)* for the enunciation of the foregoing principles). In *casu* I am in total agreement with Mr. Khumalo that defendant has not fulfilled these requirements. The defendant has not allege in its papers the defect it is seeking to cure if it is relying in what was held in *Juntgen (supra)*. The application is not made formally with a supporting affidavit in which will be set out the reasons in support. No explanation is given in the affidavit of the defendant's failure to raise or include in the affidavit already filed the facts and material that he now wishes to introduce or place before the court in the next affidavit, and the court is not given the details of what those facts or material are. No reason is given by the defendant whatsoever regarding why such facts or material were not placed before court in the affidavit being the only affidavit allowed in terms of Rule 32 and the defendant does not show any special circumstances to justify special permission by the court to have an extra or further or supplementary affidavit filed which should set out a triable issue or a bona fide defence so as to defeat the summary judgement. The mere pleas by Mr. Nkosi that the court should exercise its discretion in the interest of justice fall short of persuading the court to disregard the requirements laid down in the decisions cited above.

In the result, I dismiss the application for leave to file a supplementary affidavit as sought by the defendant with costs.

S.B. MAPHALALA
JUDGE

