REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO: 12161/2008

In the matter between

PANDURANGA SIVALINGA DASS NO	**First Plaintiff**
ASOKAN POOGESEN NAIDU NO	**Second Plaintiff**
SANDAKRISARAN NAIDU NO	**Third Plaintiff**

and

LOWEWEST TRADING (PTY) LTD	**Defendant**

JUDGMENT

Delivered:
18 January 2010

TSHABALALA JP

INTRODUCTION

[1] The plaintiffs instituted action against the defendant for arrear rentals payable in terms of a lease agreement. After service of the summons the defendant entered an appearance to defend the action. On 19 November 2008 the plaintiffs served an application for

summary judgment in terms of Rule 32 of the Uniform Rules of Court; and the application was set down for 28 January 2009. On 5 December 2008 a notice of bar called upon the defendant to deliver its plea within five days. The defendant subsequently served a plea on 10 December 2008. On 27 January 2009 the defendant served an affidavit opposing the summary judgment application.

[2] The parties are in agreement that the application for summary judgment should be refused but the defendant has refused to agree to the granting of the usual order in terms of which the costs of the summary judgment application are reserved for a decision by a trial court. The defendant also opposed the plaintiffs application for an order directing that the action be placed on the expedited roll.

POINTS RAISED *IN LIMINE*

[3] Defendant contended that it is entitled to the costs of the summary judgment application because the application was defective on two grounds raised *in limine*, namely:

1. that the plaintiffs served a notice of bar and accordingly waived their right to apply for summary judgment; and
2. that the plaintiffs failed to comply with the provisions of Rule 18(6) of the Uniform Rules in that they failed to annex the written portion of the lease agreement to the particulars of claim.

[4] Plaintiffs' counsel, Ms *Law*, submitted that the notice of bar was served after delivery of the application for summary judgment. It

was conceded that the service of the notice of bar was an irregular step but it was one which could be set aside in terms of Rule 30 of the Uniform Rules. Furthermore in the absence of a withdrawal of the application for summary judgment it cannot be said that the service of the notice of bar amounted to a waiver of the plaintiffs right to continue with the application for summary judgment. Plaintiffs accordingly submitted that the first point *in limine* had no substance.

[5] As regards the second point *in limine*, plaintiffs submitted that the agreement was partly oral and partly written and a copy of the written portion of the agreement was not annexed to the particulars of claim. Although Rule 18(6) provides that if a contract relied upon is in writing, a copy of which must be annexed to the pleadings, the plaintiffs submitted that their failure to do so is not fatal to the application for summary judgment. According to the plaintiffs the terms of the lease agreement were fully pleaded in the particulars of claims. It was further submitted that the defendant had not been prejudiced by the plaintiffs failure to comply with Rule 18(6) and such failure can be condoned by this court.

[6] Plaintiffs therefore submitted that the costs of the summary judgment application be reserved for decision by the trial court. It was finally submitted that the refusal of the defendant to agree to the granting of the usual order as well as its opposition to the action being placed on the expedited roll should result in the defendant being ordered to pay the costs of the opposed hearing.

[7] Defendant argued that it was compelled to file a plea because the plaintiffs demanded that the defendant file its plea. The error of filing a notice of bar was on the part of the plaintiffs and therefore the defendant should not have to agree to the granting of the usual order. Furthermore the plaintiffs failure to comply with Rule 18(6) resulted in the pleading being defective and the plaintiffs are therefore not entitled to summary judgment.

APPLICATION OF THE LAW

[8] In my judgment I will firstly deal with the notice of bar that was served by the plaintiffs. Rule 26 requires that a notice of bar be served upon a defendant who has failed to deliver his plea, giving him five days to do so, failing which he will *ipso facto* be barred. In this case it has been argued that the plaintiffs waived their rights to summary judgment by serving a notice of bar.

[9] In *Van Heerden v Samarkand Motion Picture Productions* 1979 (3) SA 786 (T) the plaintiff applied for summary judgment but before judgment could be delivered the plaintiff served a notice of bar to plead on the defendant. The plaintiff then applied for default judgment and the defendant applied for an order setting aside the notice of bar as an irregular proceeding. Myburgh J approved what was said by Boshoff J in the case of *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) apropos the effect of a summary judgment application on the delivery of a plea. In this regard Boshoff J had said at 454F-G:

> 'A defendant is certainly not in default of a plea where he has delivered notice of an intention to defend and is prevented from proceeding with his defence by an application for summary judgment under and by virtue of the provisions of Rule 32.'

Myburgh J held at 790A-B that the 'election by the plaintiff to bring summary judgment proceedings stays the running of any period in terms of Rule 22'. The notice of bar was accordingly set aside and the application for default judgment was dismissed. And in *Khayzif Amusement Machines CC v Southern Life Association Ltd* 1998 (2) SA 958 (D) the court, per Levinsohn J (as he then was), observed at 963E-F that 'summary judgment proceedings place a moratorium on the delivery of a plea pending the Court's decision as to whether leave to defend ought to be granted'.

These dicta indicate that a defendant will not be penalized for a failure to deliver a plea because a summary judgment application suspends the time period for the delivery of a plea.

[10] Mr *Tobias,* who appeared for the defendant, submitted that where a plaintiff made use of the summary judgment procedure and the ordinary rules of court, a plaintiff could not fall back on the summary judgment procedure. He referred this court to the decision of *Jacobs v FPJ Finans (Edms) Bpk* 1975 (3) SA 345 (O) where Klopper AJP held that a plaintiff who furnishes further particulars is debarred from claiming summary judgment because he has waived his right to do so. The judge was of the view that the provision of further particulars by a plaintiff would amount to a procedural step which was 'aimed at the defence of the claim'.

Klopper AJP further found at 346E-F that a plaintiff cannot make use of the unusual practice of summary judgment and of the usual procedure simultaneously and that when he furnishes particulars to the summons or declaration which indicate to the defendant that he has a right to defend the principal case, the plaintiff cannot fall back on the summary judgment procedure.

It was therefore submitted by the defendant that it would have been dangerous to choose to ignore the notice of bar.

[11] The *Jacobs* decision was however not followed in *Hire-Purchase Discount Co (Pty) Ltd v Ryan Scholz & Co (Pty) Ltd and Another* 1979 (2) SA 305 (SE). And in *B W Kuttle & Association Inc v O'Connell Manthe and Partners Inc* 1984 (2) SA 665 (C), in an application for summary judgment, the defendant took the point *in limine* that the plaintiff was precluded from applying for summary judgment as it had furnished further particulars. The court approved the decision of *Hire-Purchase Discount* supra and held at 668 that, by furnishing further particulars, the plaintiff did not waive or abandon its right to claim summary judgment. Waiver, the court said, connotes a deliberate intention on the part of the person concerned to abandon a right which he may have; and the furnishing of further particulars could not be said to amount to a waiver.

[12] And in *Paul v Peter* 1985 (4) SA 227 (N), a decision emanating from the Natal Provincial Division, Friedman J pointed out that although there were differences between Supreme Court rule 32

and rule 14 of the Magistrates' Courts Rules dealing with summary judgment, there was no merit in arguing that a plaintiff waived his or her right to summary judgment by furnishing further particulars. The learned Judge did not follow the *Jacobs* decision and held at 230E-G:

> 'The purpose of summary judgment procedure is to bring an expeditious end to a case where a defendant has no defence and has simply entered appearance for the purpose of delay. It seems to me that there is nothing whatsoever inconsistent between a plaintiff's applying for summary judgment on the one hand and on the other hand, and in case his application might prove to be unsuccessful, expediting the closure of pleadings in the main action itself. The plaintiff, by furnishing the further particulars, is indicating no more nor less to the defendant than that he, the defendant, is prepared to furnish that which the defendant wishes him to furnish. I cannot conceive of such conduct being inconsistent with an intention to endeavour to bring the proceedings to an expeditious end by making use of summary judgment proceedings.'

[13] In the present case it is clear that the plaintiffs erred by filing a notice of bar. As stated earlier, summary judgment proceedings place a moratorium on the delivery of a plea. The defendant could have applied to this court to set aside the notice of bar as an irregular step in terms of Rule 30; but it chose to deliver its plea. The defendant took a further step which triggered Rule 30(2)(a). Rule 30(2)(a) provides that an application to set aside an irregular step may be made only if 'the applicant has not himself taken a further step in the cause with knowledge of the irregularity'.

The plaintiffs error of filing the notice of bar was cured by the defendant having filed a plea. I therefore find that the first point *in*

limine has no substance and it must be found that the plaintiffs, by serving a notice of bar, did not waive their right to apply for summary judgment.

[14] I now turn to consider the issue raised by the defendant related to the plaintiffs non-compliance with Rule 18(6). Rule 18(6) provides:

> 'A party who in his pleading relies upon a contract shall state whether the contract is written or oral and when, where and by whom it was concluded, and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading.'

[15] It is trite law that, where it is possible, the rules of court must be complied with. It is important to take heed of what was stated by Addleson J in *Charsley v AVBOB (Begrafnisdiens) Bpk* 1975 (1) SA 891 (E) at 893C-D:

> '(I)f there is a material defect in any of the formalities required by the Rules of Court, the court should not readily grant summary judgment. On the other hand, where it is clear that the Rules have substantially been complied with and there is no prejudice to the defendant, I think that the court should condone a failure to comply with the technical requirements of the Rules.'

Similarly in *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) Schreiner JA stated at 278F-G:

> 'No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'

[16] This court is empowered to condone the non-compliance with Rule 18(6). The defendant could have relied on the provisions of Rule 35(12) and Rule 35(14) both of which entitle a litigant to call for such documents as may be referred to in a pleading, before pleading (see *Nxumalo v First Link Insurance Brokers (Pty) Ltd* 2003 (2) SA 620 (T) para 9). The defendant has not shown that it has suffered any prejudice by the non-compliance. Plaintiffs non-compliance with Rule 18(6) is therefore condoned.

ORDER

[17] In the result I make the following order:

1. The application for summary judgment is refused.
2. The costs of the summary judgment application are reserved for decision by the trial court.
3. Defendant is to pay the costs of the opposed hearing.
4. The action is to be placed on the expedited roll.

TSHABALALA JP _____

Date of Hearing:	10 November 2009
Date of Judgment:	18 January 2010
Counsel for Plaintiffs:	Ms E.S. Law
Instructed by:	Murugasen Attorneys
Counsel for Defendant:	Mr. D.G. Tobias
Instructed by:	Shaukat Karim & Company