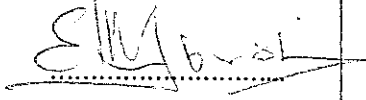


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: 68585/2013

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
18/2/2014	
DATE	SIGNATURE

18/2/2014

In the matter between:

MOOIRIVER MALL (PTY) LTD

PLAINTIFF

and

ALIDA MAGDALENA STROEBEL

FIRST DEFENDANT

MARLO STROEBEL

SECOND DEFENDANT

J U D G M E N T

KUBUSHI, J

- [1] This is an opposed summary judgment application. The plaintiff is claiming summary judgment for payment of a debt against the members of Redwood Falls Trading 127 CC trading as Juicy Lucy CC (the CC). According to the plaintiff the CC was finally deregistered on 15 July 2011. The debt emanates from a rental agreement between the plaintiff and the CC and the plaintiff is holding the defendants liable for the debt on the ground that they were the members of the CC at the time the CC was so deregistered.
- [2] It is alleged that the plaintiff obtained judgement in the magistrates' court, Potchefstroom, against the CC which was premised on the payment of rental and damages. A warrant of execution was issued for the recovery of the debt but the CC was deregistered and the debt could therefore not be realised. The plaintiff is as a result claiming the said payment from the defendants.
- [3] The defendants are opposing the application on the ground that there is an appeal pending against the judgment granted against the CC in the magistrates' court. The defendants contend that the alleged indebtedness which the plaintiff relies on does not represent indebtedness due by the CC and as such they are not liable to pay it. They allege in the opposing affidavit deposed to by the first defendant and confirmed by the second defendant that the defence raised in the matter before the magistrates' court that of the failure by the plaintiff to provide an agreement between the plaintiff and the CC represent a defence available to

them. According to the defendants the CC is not deregistered but is under liquidation.

[4] The plaintiff's contention in respect of the defendants ground for opposing the application is that the defence is not *bona fide* in that firstly, the CC cannot be under liquidation because it has been deregistered and there is no evidence on the papers that it was ever registered again. Secondly, the appeal is not pending since at the time when it was struck off the roll of appeal that court declared that the appeal has not been noted.

[5] Uniform rule 32 (3) (b) requires that a defendant, against whom summary judgment has been sought, must satisfy the court by swearing positively to the fact that he has a *bona fide* defence by disclosing fully the nature of the grounds of the defence and the material facts relied upon for such a defence. The papers must be looked at as a whole in order for a court to come to a conclusion as to whether leave to defend should be granted to a defendant or not.

[6] I am not satisfied that the defendants have in their answering affidavit fully disclosed the nature of the grounds of their defence. There is no evidence before me that the appeal on which the defendants rely will be prosecuted. The defendants' contention is that it has been postponed and that they are currently in the process of obtaining the necessary funds to provide the required security. During the hearing of the application the plaintiff's counsel handed in a copy of a

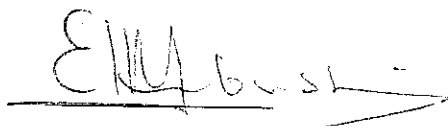
judgment which shows that Prinsloo and Phatudi JJ on 18 May 2012 declared that the CC failed to note the appeal and subsequently struck the appeal from the roll. The defendants' counsel did not object to the handing in of this judgment and I therefore considered it when giving this judgment. There is also no evidence that the CC is under liquidation as suggested by the defendants. No evidence was tendered by the defendants to that effect nor was there any sort of confirmation from the liquidator that indeed the CC is under liquidation or that the defendants have approached him/her to handle the appeal. The defendants' counsel argued against the acceptance of the copy of a document from CIPRO which indicated the deregistration of the CC. Even if I do not take this into consideration, the evidence that the CC has been deregistered stands because the defendants did not put a challenge to it.

[7] In the circumstances I find myself constrained to can grant the defendants leave to defend the matter. The defendant is entitled to its judgment.

[8] I do not agree with the plaintiff's counsel that the plaintiff is in the circumstances of this case entitled to a punitive cost order.

[9] Consequently I make the following order against the defendants:

- a. Payment of the amount of R220 371 – 25;
- b. Payment of the amount of R157 552 – 17;
- c. Payment of the amount of R857 – 75 *per day* for the period 19 March 2010 to 31 March 2010;
- d. Payment of the amount of R929 – 82 *per day* from 1 April 2010 until re-let of the premises;
- e. Payment in the amount of R14 799 – 73;
- f. Interest on the aforesaid amounts at a rate of 15.5% *per annum a tempora morae* until date of final payment.
- g. Costs of the suit on a party and party scale.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearances:

HEARD ON THE	: 13 FEBRUARY 2014
DATE OF JUDGMENT	: 18 FEBRUARY 2014
PLAINTIFFS' COUNSEL	: ADV D H WINBEEK
PLAINTIFFS' ATTORNEY	: BEN GROOT ATTORNEYS INC
DEFENDANTS' COUNSEL	: ADV L K VAN DER MERWE
DEFENDANTS' ATTORNEY	: CAWOOD ATTORENYS