IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 16473/12

In the matter between:

WP FRESH DISTRIBUTORS (PTY) LTD	Applicant
and	
HENDRIK JACOBUS KLAASTE N.O.	FirstRespondent
CAROLINA EPAFRAS N.O.	Second Respondent
JOHN HENRY JONES N.O.	Third Respondent
RIAAN TIETIES N.O.	Fourth Respondent
WILLEM VAN ZYL N.O.	Fifth Respondent
ABRAHAM ADAMS N.O.	Sixth Respondent
LORENZO HEYNS N.O.	Seventh Respondent
CORNELIA VAN ZYL N.O.	Eighth Respondent
JOHANNA CUPIDO N.O.	NinthRespondent
EDWARD GERHARDUS STEVENS N.O.	Tenth Respondent

JUDGMENT: 23APRIL 2013

Schippers J:

[1] On 27 August 2012 the applicant instituted motion proceedings foran order granting judgment against the respondents in the sum of R714 011.01, jointly and severally. The applicant's claim arises from a suretyship agreement in terms of which

the respondents, in their capacities as the trustees of KEP Boerdery Trust ("*the Trust*"),bound themselves as sureties and co-principal debtors for amounts owed to the applicant by Castle Crest Properties 22 (Pty) Ltd("*Castle Crest*").

[2] Instead of delivering their answering affidavits, on 11 October 2012 the respondents delivered a document headed, respondent's notice in terms of rule 23(1) ("*the notice*"). It states that the respondents take exception to the applicant's notice of motion on the basis that it discloses no cause of action and moreover is vague and embarrassing. In essence, the notice states that it is unclear upon what facts or circumstances the applicant relies for its claim for judgment against the respondents in the sum of R714 011.01; and that the reference to "*judgment*" in prayer 1 of the notice of motion appears to be inconsistent and in direct conflict with the principles governing judgments, and accordingly is vague and embarrassing. The applicant is then given an opportunity to remove the cause of complaint which renders thenotice of motion vague and embarrassing.

[3] The applicant did not respond to the notice, hence this application that the exception be upheld.

[4] The first question that arises is whether the respondents may invoke rule 23 in relation to an application. MrTsegarie, who appeared for them, submitted that they may raise an exception to an application because rule 23(1) refers to "*any*

pleading";and that in motion proceedings the affidavits constitute both the pleadings and the evidence.[1]

[5] To my mind, the answer to the question lies in the proper construction of the Rules of Court. Rule 23(1)provides inter alia that where any pleading is vague and embarrassing or lacks averments necessary to sustain an action, the opposing party may deliver an exception thereto and may set it down for hearing; provided that where a party intends to take an exception that a pleading is vague and embarrassing, the opponent must be given an opportunity of removing the cause of complaint. However, in applications there is no recognized procedure for raising an exception before the case comes to trial.[2]Instead, rule 6(5)(d)requires any person opposing an order sought in the notice of motion to notify the applicant in writing that he or she intends to oppose the application; and to deliver an answering affidavit within 15 days of the notice of intention to oppose.[3] If a respondent intends to raise only a question of law, he or she is required to deliver a notice of this intention, setting forth the question of law.[4]Thus a respondent who wishes to raise a preliminary point that a case is not made out in the founding papers, must do so in the answering affidavit.This construction is buttressed by rule 6(14) which expressly states that rules 10, 11, 12, 13 and 14 apply *mutatis mutandis* to all applications. Rule 23 is not one of them.

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1 *Saunders Valve Co Ltd v Insamcor (Pty) Ltd* 1985(1) 146 (T) at 149C, *affirmed in Transnet Ltd v Rubenstein* 2006(1) SA 591(SCA) para 28.
2 *Randfontein Extension Ltd v South Randfontein Mines Ltd and Others* 1936 WLD 1 at 4-5.
3 Rule 6(5)(d)(ii).
4 Rule 6(5)(d)(iii).

[6] It is true that in motion proceedings the affidavits constitute both the pleadings and the evidence. But that is why in such proceedings the respondent is called upon not only to plead to the claim as set out in the founding affidavits and the notice of motion, but also to place before the court its evidence.[5] In *Randfontein*,[6] Greenberg J (as he then was) said that in applications, a court would not countenance a procedure which would enable a respondent to delay the case and get a postponement by raising unsuccessful preliminary points. Likewise, this Court has held that generally, to grant the respondent a postponement in order to deliver an answering affidavit after a preliminary point has been taken, would give rise to an undue protraction of the proceedings and result in a piecemeal handling of the matter, which is contrary to the very concept of the application procedure.[7]

[7] For these reasons, I have come to the conclusion that rule 23(1) does not apply to applications and that the notice is bad in law.

[8] Apart from this, in my view the respondents' substantive complaints are without merit. The notice states that a "*judgment*" or order is a "*decision*" which generally has three attributes: (1) the decision must be final in effect and not susceptible of alteration by a court of first instance; (2) it must be definitive of the rights of the parties; and (3) it must have the effect of disposing of a substantial part of the relief claimed. The

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5 *Saunders* n 1 at 149F.
6 Note 2 at 5.
7 *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 136H-137A.

notice of motion and founding affidavit, the notice goes on to state, do not exhibit the attributes of a decision. Seemingly for this reason,the notice statesthatthere is no basis upon which the applicant can claim an order that judgment be granted in its favour.

[9] The respondents are however mistaken and their reliance on *Zweni*,[8]is misplaced. What plainly is sought in paragraph 1 of the notice of motion is an order that the respondents pay the applicant the sum stipulated. Whether that order is styled as the grant of judgment against the respondents in that amount, or an order directing the respondents to pay that amount, its effect is the same. No preceding order or "*judicial pronouncement*" is required for the relief sought in prayer 1 of the notice of motion, as suggested in the notice.*Zweni's* case deals with one of the jurisdictional requirements for leave to appeal from a High Court sitting as a court of first instance, namely that only a "*judgment or order*" within the meaning of that term in section 20(1) of the Supreme Court Act 59 of 1959, is appealable.[9] It finds no application in this case. The applicant's claim is for payment of the sum of R714 011.01 due by Castle Crest, for which the Trust is liable as surety and co-principal debtor. The founding papers plainly disclose a cause of action and for this reason, the respondents' contention that the notice of motion is vague and embarrassing, has no merit.

[10] What remains then is whether the respondents should be given an opportunity to file opposing affidavits. It was not suggested by the applicant that the respondents

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8 *Zweni v Minister of Law and Order* v 1993(1) SA 523(A).

9 *Zweni* n 8 at 531B-D.

were *mala fide* or that they resorted to delaying tactics in filing the notice. Although there is no explanation for their failure to file affidavits on the merits, I think that they should be given an opportunity to put their case before the Court.Furthermore, the applicant has not claimed that it would be prejudiced by the late filing ofanswering affidavits.

[11] In the result, the following order is issued:

1. The respondents' exception is dismissed with costs.

2. The respondents are directed to file their answering affidavits, if any, on or before Wednesday 15 May 2013.

SCHIPPERS J

Judgment:	**Schippers J**
Counsel for the Applicant:	**Adv. RG Patrick** Cape Bar
Instructing Attorneys:	Cluver Markotter Inc Cluver Markotter Building, Mill Street Stellenbosch Ref P Hill
Counsel for Respondent:	Adv C Tsegarie Cape Bar
Instructing Attorneys:	Brink & Thomas Inc.

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Cape Town
Ref: J Thomas

Dates of hearing: 16 April 2013

Date of judgment: 23 April 2013