

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

**CASE NO.: 2304/2017**

In the matter between:

|                                       |                                    |
|---------------------------------------|------------------------------------|
| <b>SYLVIA ANNELIA VILJOEN N.O.</b>    | <b>First Applicant/ Defendant</b>  |
| <b>CLARANCE STANDER N.O.</b>          | <b>Second Applicant/ Defendant</b> |
| <b>JACOBUS FREDERICK VILJOEN N.O.</b> | <b>Third Applicant/Defendant</b>   |
| <b>JACOBUS FREDERICK VILJOEN</b>      | <b>Fourth Applicant/Defendant</b>  |
| <b>SYLVIA ANNELIA VILJOEN</b>         | <b>Fifth Applicant/Defendant</b>   |

And

|                    |                             |
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| <b>GWK LIMITED</b> | <b>Respondent/Plaintiff</b> |
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**JUDGMENT – APPLICATION FOR LEAVE TO APPEAL**

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**BESHE J:**

[1] Four of the five defendants against whom I granted summary judgment on the 13 July 2017 in favour of plaintiff, filed a notice of application for leave to appeal my judgment as aforementioned. However, on the day of the application, counsel for the applicants intimated that only first to third applicants were seeking leave to appeal (first to third defendant in the summary judgment application).

[2] As would be apparent from my judgment, in a bid to resist the summary judgment application the applicants filed a “Notice of objection to summary judgment”. In the said notice recorded that the application was opposed on the (i) merits, (ii) on a point *in limine*. The point taken by the applicants was that respondent’s affidavit in support of summary

judgment was fatally defective in that it did not comply with *Rule 32 (2)*. That defect according to the applicants was that in their opinion the applicants do not have a *bona fide* defence, it is stated “I verbally believe that the respondents/defendants have no *bona fide* defence .....”. No opposing affidavits were filed by or on behalf of the applicants as required in terms of *Rule 32 (3) (b)* of the *Rules*.

[3] For the reasons stated in my judgment (summary judgment) I dismissed the point *in limine* that was raised by the applicants.

[4] In their notice of objection to summary judgment, applicants gave notice that in the event that their point *in limine* is dismissed, leave to file an opposing affidavit on the merits will be sought. It is trite that the late filing of the opposing affidavit can be condoned. Defendant must however aver that he has a *bona fide* defence on the merits and the plaintiff must be given an opportunity to deal with such defence raised in plaintiff’s affidavit in opposing the application for condonation.

[5] No such application was placed before me. No such defence was disclosed to me (in respect of the summary judgment application either). That being the case, I had no option but to grant the summary judgment.

[6] It was only in the notice of application for leave to appeal and during argument in respect of this application (Leave to Appeal) that applicants sought to raise issues pertaining to the claims against them. Surely these are issues that should have been raised in respect of the summary

judgment application in an affidavit or oral evidence not for the first time during an application for leave to appeal.

[7] *Section 17 (1) (a) of the Superior Courts Act 10 of 2013* provides that leave to appeal may only be given where judge/s concerned are of the opinion that the appeal would have a reasonable prospect of success. I am not persuaded that in the case – namely that the appeal by the applicants would have a reasonable prospect of success.

**[8] Accordingly the application for leave to appeal the order and judgment granting summary judgment against the applicants is dismissed with costs.**

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**NG BESHE  
JUDGE OF THE HIGH COURT**

**APPEARANCES**

For the Plaintiff : Mr S Beukes  
Instructed by : JR BESTER & ASSOCIATES INC.  
C/o CLOETE & COMPANY  
112A High Street  
GRAHAMSTOWN  
Tel.: 046 – 622 2563  
Ref.: S Beukes/LF/VILJ

For the Defendants : Adv: KW Lüderitz SC  
Instructed by : WERKMANS ATTORNEYS  
C/o WHEELDON RUSHMERE & COLE INC.  
119 High Street  
GRAHAMSTOWN  
Tel.: 046 – 622 7005  
Ref.: M Van Der Veen/Michelle/S20177

Date Heard : 11 October 2017  
Date Reserved : 11 October 2017  
Date Delivered : 28 November 2017