

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES: **MFUNDO JUKUDA**

And

**AFRICAN PIONEER INVESTMENT HOLDINGS LTD &
STEPHEN MZUKISI DONDOLO**

- Registrar: **1770/08**
- Magistrate:
- High Court: **SOUTH EASTERN CAPE LOCAL DIVISION**

DATE HEARD: **04/11/08**

DATE DELIVERED: **07/11/08**

JUDGE(S): **JONES J**

LEGAL REPRESENTATIVES –

Appearances:

1. for the Applicant(s): **ADV: Vusani**
2. for the Respondent(s): **ADV: Gajjar**

Instructing attorneys:

- Applicant (s): **ANDILE NGQAKAYI ATTORNEYS**
- Respondent(s): **BOQWANA LOON & CONNELLAN**

CASE INFORMATION -

(a) *Nature of proceedings* : **APPLICATION FOR SUMMARY
JUDGMENT**

Not reportable

In the High Court of South Africa
(South Eastern Cape Local Division)
(Port Elizabeth High Court)

Case No 1770/2008
Delivered:

In the matter between

MFUNDO JUKUDA

Applicant

and

**AFRICAN PIONEER INVESTMENT HOLDINGS LTD
STEPHEN MZUKISI DONDOLO**

**1st Respondent
2nd Respondent**

SUMMARY: Application for summary judgment dismissed for non-compliance with the provisions of rule 32 and because the opposing affidavit contained evidence of a *bona fide* defence to the claim.

JUDGMENT

JONES J:

[1] This is an application for summary judgment in terms of rule 32(1) for payment of R12 090 000-00. It is opposed.

[2] The cause of action in the particulars of claim is that the 1st respondent, a company which, it turns out, is now deregistered and hence defunct, allegedly failed to pay dividends to the applicant, who was a shareholder, and is in consequence liable to him in the sum of R12 000 000-00, being the capital amount of the dividends, and R90 000-00 for patrimonial and non-patrimonial damages. The 2nd respondent, who was the executive director of the 1st respondent, is alleged to be jointly and severally liable with the 1st respondent for

these amounts. The 2nd respondent has excepted to these particulars of claim on the ground that they do not disclose a valid cause of action, and he has also brought application to have the particulars of claim set aside as an irregular proceeding in terms of rule 30. Those applications are pending.

[3] It is well known that summary judgment is an extraordinary remedy which deprives a respondent of his ordinary right to have his case heard in the normal course, and that the courts are unwilling to order it unless satisfied that the applicant has an unanswerable case. This requires a careful scrutiny of

- (b) the application, to ensure that there has been proper compliance with the rules, and
- (c) the opposing affidavit, to see whether a proper defence is disclosed. It is of course unnecessary to make findings on the merits and demerits of the defence. But it must be *bona fide* and legally sound.

[4.1] The opposition to summary judgment was based on two grounds. First, the 2nd respondent raised two respects in which the summary judgment application fails to comply with the provisions of rule 32.

[4.2] The first was that annexed to the summary judgment application is a share certificate issued by a company African Pioneer Limited to the applicant. The applicant seeks to justify this on the ground that the certificate is a liquid document, and hence permissible in terms of rule 32(2) which requires annexation of the liquid document, if any, upon which the claim is founded. It may

be that a share certificate is *prima facie* evidence that the applicant is the holder, though not necessarily the owner, of the shares and hence entitled to dividends, but it is not a liquid document reflecting an acknowledgement of liability in a specified sum of money. Further, the shares to which the certificate relates are in any event not shares in the 1st respondent. Its annexure was accordingly irregular. The incorrect annexation of documentary evidence will not, however, necessarily justify a refusal of summary judgment if it causes no prejudice. But the court must ignore that evidence.

[4.3] The next formal point was that the deponent to the affidavit in support of summary judgment did not allege that in his opinion the respondents have no *bona fide* defence. The objection here is based on the decision in this Court of *Afcol Manufacturing Ltd v Pillay* [1996] All SA 429 (SE) which holds that, in order to comply with the rule, the affidavit in support of summary judgment must allege that in the opinion of the deponent the respondents have no *bona fide* defence. It is insufficient for him to state, as did the deponent in this case, that he verily believes that they have no *bona fide* defence. I am aware of the criticism of this judgment, for example, in Harms, *Civil Procedure in the Superior Courts* B 125, footnote 10. Even if I were to consider that the criticism might be valid, I am unwilling to depart from established authority laying down the practice in this Division, especially where the point has not been fully argued before me with reference to principle and authority. I must therefore regard this objection as sound.

[5] The 2nd respondent's affidavit in opposition also raised a number of defences on the merits. I am not able to say that they are not *bona fide* defences. The 2nd respondent's counsel argued that the particulars of claim make no allegations to establish that he is jointly and severally liable with the 1st respondent for non-payment of dividends. This is *prima facie* on obligation of the company for which the directors are not liable except in extraordinary circumstances which are not here alleged. His counsel also argued that the particulars of claim do not allege any basis, whether in contract or delict or at all, for liability for patrimonial or non-patrimonial damages. Further, the argument was made that *ex facie* the particulars of claim, the claims against the respondents have prescribed. A perusal of the particulars of claim satisfies me that these are all triable issues. In addition, the 2nd respondent alleged that on deregistration of the 1st respondent the applicant was issued with shares in a new company in full and final settlement of any claims against the 1st respondent, which, if established, also amounts to defence. I am therefore obliged to give the respondents leave to defend.

[6] The application for summary judgment is dismissed, the respondents are given leave to defend, and the usual costs order will issue, namely that the costs of the application for summary judgment will stand over for determination by the trial court.

RJW JONES
Judge of the High Court
6 November 2008