Reportable
Case No 134/2001

In the matter between:

D F SCOTT (EP) (PTY) LIMITED **Appellant**

and

GOLDEN VALLEY SUPERMARKET **Respondent**

Coram: HARMS, CAMERON and NUGENT JJA
Heard: 6 & 15 MAY 2002
Delivered: 23 MAY 2002

Subject: Application and interpretation of Magistrates' Courts' rule 54.

JUDGMENT

HARMS JA/

HARMS JA:

[1] This appeal concerns an aspect of Magistrates' Courts' rule 54. The rule deals with actions by and against partners, a person carrying on a business in a name or style other than that person's own name, and by or against an unincorporated company, syndicate or association. It primarily permits these 'entities' to sue and be sued without citing the 'real' parties (such as the individual partners) by name. But, as some Roman once remarked, *nomen est omen*: citing a party under that party's alias may be risky. As far back as 1930, this Court had the occasion to express its dismay at the rule (*Parker v Rand Motor Transport Co and Another* 1930 AD 353 361; see also *Rees v Feldman* 1927 TPD 884). At the same time the hope was expressed that it may be found expedient to substitute a simpler and less confusing system of rules. No such luck. The principles underlying the rule were later incorporated in Uniform rule 14. To complicate matters the two

rules, without a discernible rationale, are not the same. Even the meaning of words differ. For instance, the word ‘firm’ is used in rule 54 to refer to a partnership whereas it is defined in rule 14 to refer to a business, carried on by its sole proprietor under a name other than that person’s own. Although this judgment concerns rule 54, the term will be used in the rule 14 sense.

[2] The plaintiff (the present appellant) issued summons in the magistrate’s court for the district of Somerset East for payment for goods sold and delivered during January and February 1997. The defendant was cited as ‘Golden Valley Supermarket’ and the summons called upon

‘die eienaar, Golden Valley Supermark, ‘n firma wat handel dryf te Golden Valley, Somerset Oos’

to do what summonses usually require of defendants. In due course an appearance to defend was entered on behalf of the ‘defendant’. The attorney on behalf of the defendant sought further particulars and these were supplied.

[3] The defendant, through the attorney, filed a plea, which, from the outset, contained the following defence:

'1.1 Golden Valley Supremarket is tans die eiendom van die Golden Valley Ventures BK en is gemelde beslote korporasie dus die verweerder in hierdie aksie;

1.2 Gedurende die tydperk 30 Oktober 1996 tot 4 Maart 1997 het ene meneer Wayne Vye die perseel, toerusting en meublement van Golden Valley Supermarket gehuur by die verweerder en het persoonlik handel gedryf onder die naam van Golden Valley Supermarket.'

[4] The plea was in accordance with Magistrates' Courts rule 19(5). It provides –

'(a) For the purposes of this rule "defendant" includes a person upon whom a summons has been served and who alleges that he is not the defendant cited in the summons and enters appearance to defend on that ground. The court may on hearing of any such defence order costs to be paid to or by such person as if he were a party to the action.

(b) If such defence be sustained the court, instead of dismissing the summons, may, if moved thereto by the plaintiff, allow any necessary amendment and order that it be served upon the real defendant.'

[5] The case went to trial on substantially this issue. The plaintiff's case was that the close corporation and not Mr Wayne Vye was liable to it. The defendant's evidence was in accordance with the plea and the Magistrate in the event upheld the plea, finding that the plaintiff all along knew that Mr Wayne Vye, and not the close corporation, was its debtor. The claim was consequently dismissed with costs.

[6] The plaintiff appealed to the Full Bench (*DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* [2001] 1 All SA 303 (E) per Kroon J and Govender AJ). For purposes of the appeal the plaintiff accepted the Magistrate's factual findings but argued that, in spite thereof, it was entitled to judgment against 'Golden Valley Supermarket'. In this regard the plaintiff relied upon rule 54 and the judgment of the Cape Full Court in

Farm Fare (Pty) Ltd v Fairwood Supermarket 1986 (4) SA 258 (C) 262C-E. The Court below nevertheless dismissed the appeal but granted the necessary leave to appeal to this Court where the issue remains whether on the facts judgment can be entered against 'Golden Valley Supermarket'.

[7] The record before the Court below was somewhat defective and the learned Judges were consequently unaware of the fact that after the filing of the plea the plaintiff had served a notice, purportedly under rule 54(1), requiring of the defendant to provide it with the names and addresses of the persons who had been the partners of the firm at the time the cause of action arose. The response accorded with the plea and stated that Mr Wayne Vye had been the sole proprietor of the business at the time.

[8] Rule 54 provides as follows –

'(1) Any two or more persons claiming or being sued as co-partners may sue or be sued in the name of the firm of which such persons were co-partners at the time of the accruing of the cause of action. In any such case any party may by notice require from the

party so suing or sued a statement of the names and places of residence of the persons who were at the time of the accruing of the cause of action co-partners in any such firm.

(2) The party receiving such notice shall, within 10 days after receipt thereof, deliver the statement required.

(3) When the names of the partners are so declared, the action shall proceed in the same manner and the same consequences in all respects shall follow as if they had been named in the summons; but all the proceedings shall nevertheless continue in the name of the firm.

(4) Any person carrying on business in a name or style other than his own name may sue or be sued in such name or style as if it were a firm name; and so far as the nature of the case will permit, all the provisions of this rule relating to proceedings against firms shall apply.

(5) The provisions of this rule shall also mutatis mutandis apply to an unincorporated company, syndicate or association.

(6) When action has been instituted by or against a firm or by or against a person carrying on business in a name or style other than his own name or by or against an unincorporated company, syndicate or association in the name of the firm or in such

name or style or in the name of the company, syndicate or association, as the case may be, the court may on the application of the other party to the action made at any time either before or after judgment on notice to a person alleged to be a partner in such firm or the person so carrying on business, or a member of such company, syndicate or association, declare such person to be a partner, the person so carrying on business or a member, as the case may be, and on the making of such order the provisions of subrule (3) shall apply as if the name of such person had been declared in a statement delivered as provided in subrule (2).'

[9] The approach to and interpretation of the rule are subject to a number of trite propositions, which in the context of the appeal nevertheless require emphasis. Rules of court are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right (s 34 of the Constitution; *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) 439). The rule deals with procedure and not with substantive law (*Simpson's*

Motors v Flamingo Motors 1989 (4) SA 797 (W) 797I). It does not turn a partnership or firm into a different entity or into a juristic person, existing separately from its members or owner (*Parker supra* 357 *in fine*). It does not create rights or liabilities which otherwise would not have existed (*Ahmed v Belmont Supermarket* 1991 3 SA 809 (N)). Also, it does not override other rules of more basic and general application. For instance, legal proceedings cannot commence against any party unless that party is notified by means of an initiating process; if not, the proceedings are null and void (*Dada v Dada* 1977 (2) SA 287 (T) 288C-F). Further, actions have to be commenced by a summons with a call upon the defendant (rule 5(1)), who must be properly identified (rule 6(5)), the process must be served upon the defendant, and the defendant must be given the opportunity to defend the case and to file a plea setting out the nature of the defence.

[10] If, as in this case, someone carries on business in a name or style other than that person's own, he may be sued in that name (rule 54(4)). It is important to note the use of the present tense in the opening phrase of the sub-rule: 'any person carrying on business' (*Maisel v Anglo African Furnishing Co* 1931 CPD 223 225). In this regard it differs from sub-rule (1), which deals with partnerships and where past facts (who were partners at the time the cause of action accrued?) might be relevant. In other words, the provisions of sub-rule (4) can be used only to determine the true identity of the defendant before court. (The citation of the defendant in the summons, by the way, was of the present owner of the business.) It is of little consequence that the other provisions of the rule apply to a case covered by this sub-rule because that is only the position 'so far as the nature of the case will permit'. *Maisel* (*loc cit*)[1] explained that –

[1] Followed in *The Fifty Six Dry Cleaners v Capitol Electric Co* 1962 (3) SA 529 (T).

‘[t]he nature of the case will not permit [the provision] to apply when action is instituted at a time when B owns a business upon a cause of action which accrued when A owned the business. In such a case, if plaintiff has a cause of action against B at all, he must elect whether to sue A or B. He cannot issue summons against the firm name, and serve it on B, and then, on a disclosure by B that A was the owner of the business when the cause of action accrued, claim that A is a party to the action. A and B, not being partners, cannot both be defendants in the action, and if A is the real party sued, then the disclosure of A's name made by B is not a disclosure by the 'party sued' in terms of Order 7, Rule 6 (1) [the present rule 54(1)] and consequently the Rule cannot apply.’

[11] This statement is, in my view, correct and directly applicable to this case. The plaintiff’s notice under rule 54(1) was ill conceived. At that stage the plaintiff knew from the plea who the defendant before the court was and who (according to the defendant) the owner of the firm was when the cause of action accrued. Even on the plaintiff’s version it was not a partnership. The request to disclose the name of the partners was in the circumstances misplaced. The plaintiff had chosen its target, namely the close corporation,

albeit by using its alias. The defendant, as mentioned, filed a plea under rule 19(5) and on that the plaintiff joined issue. A plea in that form entitled the defendant to have the dispute as to the identity of the defendant settled, something the Magistrate did. The plaintiff did not apply under par (b) of the sub-rule for an amendment of the claim and service upon the 'real' defendant. Under these circumstances, as the Magistrate correctly held, the reliance on rule 54(4) was misplaced and out of order. See *Rustenburg Kloof Kiosk v Friedland, Hart, Cooper & Novis* 1973 (2) SA 130 (T) 134.

[12] As mentioned, the plaintiff in the face of all this, pinned its hopes on *Farm Fare*, a judgment which in differing degrees was not kindly received by other courts (*Simpson's Motors v Flamingo Motors supra*; *Ahmed v Belmont Supermarket supra*; *PK Stores (Pty) Ltd t/a Eric's Spar v Mike's Kitchen* 1994 (2) SA 322 (O)). Before quoting the salient passage from the judgment, some factual background. The plaintiff sued a firm under its

business name. Ms Noor signed the power of attorney for the entering of appearance and, in opposing the summary judgment application, described herself as the proprietor of the firm. The defence was that the firm had purchased goods from the plaintiff on a cash basis only and that there could consequently not have been any amounts due to the plaintiff. On that issue the matter went to trial. To the plaintiff's surprise, the defendant called a witness – not Ms Noor – who alleged out of the blue that one Hassan and not Ms Noor had been the owner at the relevant time. The trial court upheld this 'defence' and dismissed the claim. The Full Court, instead of dealing with the matter only on the simple basis that the trial court had erred in upholding a defence, which had not been pleaded or properly ventilated, proceeded to consider whether or not a plea by the defendant that the owner at the relevant time was Hassan and not the present owner would have been excipiable (at 261I-J). It found that it would.

[13] The judgment in *Farm Fare* explained this finding (at 261J-262E) –

'Moreover in founding his judgment on the alleged transfer and retransfer of the business, the trial Judge denied plaintiff the benefit of the provisions of Rule 14 in terms of which plaintiff chose to sue, and inflicted on it a defendant which plaintiff had never itself selected. Plaintiff at no stage in the proceedings purported to sue Miss Noor instead of (the possibly mythological) Hassan. Rule 14 (2) provides in so many words that a firm may be sued in its own name. The plaintiff need not allege the name of the proprietor. The plaintiff may, but is not obliged to, attempt to discover who wore the mask of the firm name at the "relevant date" - apparently the date when the cause of action arose. . . . Where such information is not forthcoming, whether or not it has been called for, nothing prevents judgment being given against the firm as cited. A judgment in that form limits to the assets of the business the source from which plaintiff may recover the judgment debt. . . . It is irrelevant who was the proprietor at the "relevant date". Normally when a business is sold, that includes the assets, goodwill and liabilities.'

[14] The basic premise, namely that a plea in this form would have been excipiable is, at least as far as magistrates' courts are concerned, wrong. As

stated, rule 19(5) provides in terms for such a plea. It is difficult to see why the position would be different in the High Court. The passage quoted also contains some statements that have to be qualified. It is correct that the manner in which the case was handled had deprived the plaintiff of its procedural rights under uniform rule 14 but it is not entirely accurate to state that the trial court inflicted a defendant upon the plaintiff whom the plaintiff had not selected. The plaintiff had chosen the firm, which means that it had chosen the owner of the firm. On the pleadings and in the light of other factors it was common cause that the owner was Ms Noor. The plaintiff was, accordingly, entitled to judgment as prayed and judgment should have been issued against the firm. In the light of the common cause facts execution would then have been against the goods of Ms Noor. The error of the trial court was that it permitted the raising of an issue, which the defendant on record was not entitled to raise at that stage. *Cf Engelbrecht*

and Another v Visentin: in re Visentin v Clensatron South Africa and Others 1997 (2) SA 241 (W).

[15] Although it is correct, as stated in *Farm Fare*, that judgment may be entered against a firm, whether or not the name of the owner has been disclosed, this general proposition does not take account of the case where the identity of the owner of the business is in issue. If the owner of the firm before court is one person but the plaintiff wishes to hold another liable under that name, the identity of the proprietor at the date concerned is, contrary to the impression created by the Full Court's judgment, highly relevant.

[16] The last sentence quoted is also incorrect to the extent that it states that when a business is sold it generally includes the liabilities. Liabilities can only be transferred by means of a delegation, an agreement to which the creditor is a party. The sentence is also out of context. In deciding whether

a defence is excipiable, a court cannot have regard to what agreements 'normally' contain.

[17] It follows that *Farm Fare* cannot be relied on to support the plaintiff's argument. Counsel was asked about the object of the present exercise: what does the plaintiff wish to do with a judgment against 'Golden Valley Supermarket'? The frank response was that the plaintiff wishes to execute on the goods of Mr Wayne Vye after having him declared the person who carried on business under that name at the time the cause of action had arisen under rule 54(6) which has been quoted above. If this were possible, as counsel conceded, it would mean that the rule transformed firms into legal entities separate and apart from their owners. It would also mean that a judgment would be effective against someone who was not a party to the litigation.

[18] This is not the effect of this badly drafted sub-rule. The problem is that, as is the case of the whole of the rule, a rule drafted to deal with partnerships (where the partnership has assets separate from those belonging to the individual partners) was made applicable to individuals who trade under an alias (where all the assets vest in the same estate).[2] Nevertheless, the sub-rule cannot give the plaintiff what it wants. To the extent relevant, it provides that when action has been instituted against a person carrying on business in a name or style other than his own, the court may on application of the plaintiff made at any time either before or after judgment on notice to a person alleged to be the person so carrying on business, declare such person to be the person so carrying on business. Once again, the provision is limited to the person who, at the time of the summons, was carrying on the business under that name. The effect is that if the issue arises as to who the person behind the *persona* is, the court may determine that issue. It does not

[2] For the history of sub-rule (6): *Xakana v Elliot Brothers (Queenstown) (Pty) Ltd* 1967 (4) SA 724 (E) 727E-H.

mean that someone who is (or was) not before court is suddenly transformed into a judgment debtor. Any other interpretation would render the sub-rule *ultra vires*.

[19] The courts below were consequently correct in not granting judgment against 'Golden Valley Supermarket'. It remains to record that there was no appearance for the respondent when the appeal was called on 6 May. The matter stood down and later that morning, by agreement, was postponed to 15 May 2002. Since the non-appearance was due to the negligence of the respondent's Grahamstown attorneys, they were then ordered to pay the appellant's wasted costs *de bonis propriis* on the attorney and client scale.

The appeal is dismissed with costs.

L T C HARMS
JUDGE OF APPEAL

AGREE:

CAMERON JA
NUGENT JA