REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.: YES

16 AUGUST 2019 .....

CASE NO: 2018/43336

In the matter between:

FIRSTRAND BANK LIMITED

And

EXCEL BALENI SHABANGU	1st Respondent
EXCEL BALENI SHABANGU N.O	2nd Respondent
MASTER OF THE HIGH COURT, JOHANNESBURG	3rd Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	4th Respondent
BODY CORPORATE OF HARADENE HEIGHTS	5th Respondent

CASE NO: 284/2019

And in the matter between:

SHAIDA ABOO BAKER MAHOMED	Applicant
And	
ROAD ACCIDENT FUND	1st Respondent
DEV MAHARAJ & ASSOCIATES INC	2nd Respondent
DEV MAHARAJ	3rd Respondent

JUDGMENT

GRANT AJ

INTRODUCTION

[1] Summary judgment is governed by rule 32 of the High Court Rules. This rule was amended with effect from 1 July 2019.

[2] I am asked to adjudicate on several summary judgment applications,[1] launched in terms of the unamended rule 32.

[3] The question arises whether these applications must be heard in terms of the "old" (unamended) rule, or whether the new rule is applicable – that is, whether the new rule is to be given retrospective effect to pending matters.

[4] I asked Counsel appearing for all the parties to address me on the issue. Having heard Counsel and having considered their submissions and the material to

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[1] As indicated above.

which they directed me, I am of the view that the amended rule does indeed have retrospective effect.

BACKGROUND

[5] The rule was amended with effect from 1 July 2019, to require, most significantly, that summary judgments may only be applied for once a defendant's plea has been delivered, as follows:

> (1) The plaintiff may, **after the defendant has delivered a plea**, apply to court for summary judgment on each of such claims in the summons as is only—
>
> (a) on a liquid document;
>
> (b) for a liquidated amount in money;
>
> (c) for delivery of specified movable property; or
>
> (d) for ejectment;
>
> together with any claim for interest and costs.
>
> (emphasis added)

INTERPRETATION OF STATUTES ACT

[6] The question arises as to what becomes of pending matters. The answer appears in the Interpretation Act 33 of 1957 which governs the interpretation of law – including rules.[2] Section 1 of the Act provides:

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[2] Section 8(1) of the Act provides: In every law, unless the contrary intention appears, the expression 'rules of the court', when used in relation to any court, means rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of that court.

> The provisions of this Act shall apply to the interpretation of every law (as in this Act defined) in force, at or after the commencement of this Act in the Republic or in any portion thereof, and to the interpretation of all bylaws, **rules**, regulations or orders made under the authority of any such law, unless there is something in the language or context of the law, bylaw, rule, regulation or order repugnant to such provisions or unless the contrary intention appears therein.
>
> (emphasis added)

[7] Under the definitions section, "law" is defined as follows:

> 'Law' means any law, proclamation, ordinance, Act of Parliament or **other enactment having the force of law**...
>
> (emphasis added)

[8] Thus, the uniform rules of Court are laws and are to be interpreted in terms of the Act.[3]

[9] The following two rules appear to be critical to the resolution of this problem, and deserve to be recited here:

> **11 Repeal and substitution**

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(2) The powers of the said authority to make rules of the court, as defined in subsection (1), shall include a power to make rules of court for the purpose of any law directing or authorizing anything to be done by rules of court.

[3] Danie Van Loggerenberg 'Pending suits in the magsitrates' courts - The effect of the lack of transitional provisions in the new rules of court' (2011) 3 SALJ 611.

When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.

12 Effect of repeal of a law

(1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so reenacted.

(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any law so repealed or anything duly done or

suffered under the law so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence

committed against any law so repealed; or

> *(e)* affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, **as if the repealing law had not been passed.**

(emphasis added)

[10] Section 12 deals with the repeal (deletion)[4] of a law or rule. When this is the case – and it is significant to note that *only* in this case - is provision made for pending matters and that one may proceed "as if the repealing law had not been passed."

[11] However, section 11 governs the position where the law or rule has only been amended – as is the case with rule 32. In such cases there is, significantly, no provision for pending matters except that they continue to be governed by the repealed provision – **until the new provision comes into operation**. The amendments to rule 32 came into operation on 1 July 2019 and thus is, in my view, to be applied to the adjudication of all matters, as from that date.

COMMON LAW

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[4] Christo Botha *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 71.

[12] It has often been argued that this issue – whether a law or rule is to be regarded as having retrospective effect (so that it would be applicable to pending matters) – is resolved by reference to whether the amendment relates to a substantive right or to a procedural issue. If the new law or rule relates to a substantive issue, it is to be treated as prospective only, but if it relates to a procedural issue, it is to be regarded as retrospective in effect.[7]

[13] However, although it would seem that this may be regarded as a "general rule", our courts have been cautious to warn that the ability to allocate the amendment into one or other category should not be regarded as decisive. It is, what underlies this "general rule" that is of true import. The real issue is whether a substantive right or obligation would be impaired if the amendment, even if it may be categorised as merely procedural, would impair substantive rights and obligations. This was expressed in *Minister of Public Works v Haffejee*,[8] as follows:

> ... [I]t does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply.

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[7] See, for instance, *Curtis v Johannesburg Municipality* 1906 TS 308 312; *Transnet Ltd v Ngcezula*1995 (3) SA 538 (A) 549.

[8] *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A) 753.

[14] These sentiments have been endorsed numerous times by our Courts, including the Constitutional Court,[9] and the Supreme Court of Appeal.[10] It is not insignificant that the English law – from which we derive our law of procedure – has adopted exactly this view.[11] The rule against retrospectivity applies only in respect of changes to the law which would impair existing rights and obligations.

[15] This requires then that one consider what the effect will be of enforcing the rule change retrospectively. Will this impair a substantive right or obligation of either party? There answer to this appears to be unavoidably: no – it will not.

[16] The Plaintiff will retain its right to pursue an expedited procedure for summary judgment – but must only wait until it can know what it is that it is declaring indefensible. At most there may be wasted costs – but this cannot amount to a substantive impairment of rights – just as it is not regarded as giving rise to real prejudice in other contexts.

[17] It may also be – and perhaps will almost invariably be – that because the plaintiff will have to wait for the defendant's plea, it will be placed in a far superior position than it was under the unamended rule – where it had to effectively guess what the defence will be. As the rules board suggests:

> The summary judgment debate will thus hopefully be a more informed, and less, artificial, one, and engage with the real issues in the matter.[13]

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[9] *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) paragraph 28.
[10] *Nkabinde and Another v Judicial Service Commission and Others* 2016 (4) SA 1 (SCA) paragraph 64.
[11] See *Blyth v Blyth* [1966] a All ER (HL) 535; *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) 839.
[13] From the extract quoted at paragraph [19].

[18] The effect can only be that an informed decision whether to launch such proceedings will now be possible, and if launched, may be focused and permit for the "summary" disposal of the matter. This can only be in everyone's interests.

INTENTION OF THE LEGISLATURE – AS INFORMED BY THE RULES BOARDS REASONS

[19] Even if this conclusion was not as clear as it appears to be from the Act and the common law, the concerns of the Rules committee, which led to the amendments, are unassailable. They reflect an appreciation that the hearing of a rule 32 application on the section as it was, posed substantial prejudice to all parties. If there was any doubt as to whether the rules board and, in turn, the legislature in response, intended these amendments to be immediately binding, one need only take account of the reasons underlying the amendments – repeated here at length due to their importance:[15]

> a. A plaintiff at present does not have to indicate what exactly its cause of action is, or what facts it relies on, or why a defendant does not have a defence. Instead, the plaintiff is merely required (and permitted) to file a brief affidavit, taken from a template, "verifying the cause of action" in the vaguest possible way, opining that the defendant has no bona fide defence, and stating that "a notice of intention to defend has been delivered

[15] Own numbering; this extract is drawn from D Loggerenberg, E *Erasmus Superior Court Practice* 2 ed (2015) RS 10, 2019, D1-385-6, where the rules board's reasons are repeated at even greater length.

solely for the purpose of delay" (rule 32(2)). This formulaic affidavit is unsatisfactory in many respects.

b. The plaintiff, when deposing to its affidavit under the current rule, may well not be aware what defence the defendant is intending to advance.

c. The deponent of the affidavit (who could, for example, be an accounts manager in a bank) is also likely to have little idea as to why exactly the defendant is opposing: the defendant could for example believe (wrongly) that it has a viable defence, or that there is some impediment to the plaintiff succeeding irrespective of the merits (e.g. prescription, jurisdiction or lack of standing), or that the equities are such that a court could well be minded not to grant judgment for the plaintiff.

d. The current founding affidavit in summary judgment proceedings therefore invariably involves speculation on the part of the plaintiff's deponent. The lack of specificity as to the plaintiff's claim, and the complete lack of detail as to why the defendant's envisaged defence is bogus, coupled with the absence of any replying affidavit, also means that the plaintiff can easily be frustrated by a defendant who is prepared to construct or contrive a defence, or rely on technical points.

e. The best way of addressing these shortcomings would seem to be to require the founding affidavit in support of summary judgment to be filed at a time when the defendant's defence to

the action is apparent, by virtue of having been set out in a plea. This course is better than allowing a replying affidavit to be filed (as was suggested by a report prepared a few decades ago by the Galgut Commission). Merely including provision for a replying affidavit would not address the problems with the formulaic nature of the founding affidavit, and the speculation inevitably contained therein.

f. In the event of a plaintiff applying for summary judgment after the delivery of a defendant's plea, the plaintiff would be able to explain briefly in its founding affidavit why the defences proffered by the defendant do not raise a triable issue; and should indeed be required to do so in order that the question of whether there is a bona fide defence which is capable of being sustained could be considered by the Court in a meaningful way. Requiring the plaintiff to set out why, in its view, it has a valid claim and why the defendant's defence is unsustainable, would also remove the criticism that the defendant is being required to commit itself to a version when the plaintiff is not similarly burdened. Obliging the plaintiff to engage meaningfully with the case in its founding affidavit would moreover have the added benefit of reducing the temptation for a plaintiff to seek summary judgment as a tactical move (and as a way of forcing the defendant to commit to a version on oath, which can be subsequently used in cross- examination to discredit a witness of the defendant).

g. A stipulation that a plaintiff can only apply for summary judgment after delivery of a plea (rather than a notice of intention to defend) would also mean that the summary judgment application would be adjudicated on the basis of the defendant's pleaded defence and thus hopefully avoid a situation (such as not infrequently occurs under the current rule) where a defendant's version in its opposing summary judgment application diverges materially from its subsequently-delivered plea. The summary judgment debate will thus hopefully be a more informed, and less, artificial, one, and engage with the real issues in the matter.

h. Although foreign practice must be viewed with caution given the differences between countries and their procedural systems, it is notable, too, that the other jurisdictions considered by the Task Team — the United Kingdom, Canada, Australia and the U.S.A. — all permit summary judgment only after a plea has been filed (and indeed after pleadings have closed). The summary judgment procedure was seemingly introduced in South Africa on the basis of its use in England and Scotland. The fact that summary judgment is only competent in those jurisdictions after at least a plea has been filed (and would thus be premature after merely a notice of intention to defend has been delivered) is thus reassuring, and indicative of the merits of the proposed change.

[20] This analysis of the process which was permitted is damning. It does not seem to imply that the process does not serve a valid purpose or that injustice was necessarily done under the old rule. However, it points to the significant potential for injustice.

[21] To argue that the amendment is prospective only would be to accept that the legislature was content that the potential for injustice may continue after the date on which the new rule came into operation.

[22] Finally, on the intention of the legislature, the argument that, if the legislature intended the new rule to operate retrospectively, it would have said so expressly. However, this is to require of the legislature to restate the clear legal position as it applies under the Interpretation Act, and as it has manifested in our uncontested common law jurisprudence.

CONCLUSION

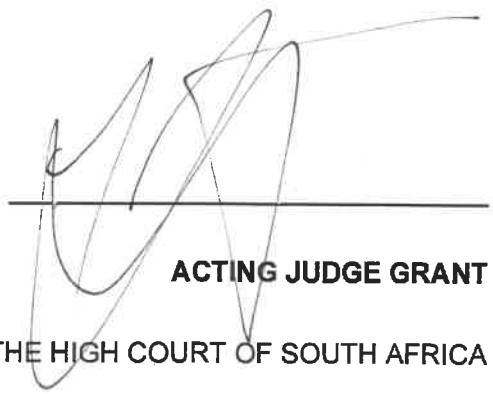
[23] I must conclude that, under the Act, the guidance available in the common law, and what must have been intended by the legislature, the amended rule 32 is applicable to all applications for summary judgment which fall to be decided from 1 July 2019.

[24] Therefore, all such applications which do not comply with the amended rule 32 are removed from the roll and parties are invited to comply with the new rule. The effect of this is that a defendant will be entitled to proceed to deliver its plea – and so, for the purposes of time frames, to proceed as was (and still is) provided in rule 32(7): as if no summary judgment application had been made.

[25] As to costs – it seems to me that the appropriate order here is one of costs in the cause – where the presiding officer deciding the main dispute, or if deciding to grant summary judgment under the new rule, may take account of the full record of the conduct of the parties.

IT IS THEREFORE ORDERED THAT:

1. The matters are removed from the roll;
2. The defendant shall be entitled to deliver its plea in accordance with and as otherwise provided by the rules;
3. Costs in the cause.



ACTING JUDGE GRANT

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING: **15 AUGUST 2019**

DATE OF JUDGMENT: **16 AUGUST 2019**

APPEARANCES:

FOR THE APPLICANT: ADV STRYDOM

INSTRUCTED BY: GLOVER KANNIEAPPAN INCORPORATED

FOR THE RESPONDENT: ADV POTGIETER

INSTRUCTED BY: MACHOBANE KRIEL INC

AND

APPEARANCES:

FOR THE APPLICANT: ADV BEHARIE

INSTRUCTED BY: RAMSURJOO

FOR THE RESPONDENT: ADV BEN-ZEEV

DEV MAHARAJ &ASSOCIATES INC