REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No 17/46904

Case No 27740/2018.

Case No 27741/2018

Case No 3765/2019

Case No 11912/2018

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED :

3/09/2019 .....

DATE SIGNATURE

In the following matters between:

STANDARD BANK OF SA LTD	APPLICANT/ PLAINTIFF
And	
RAHME TERENCE MICHALE	1st RESPONDENT / DEFENDANT
And	
RAHME KRISTIN ADELE	2nd RESPONDENT / DEFENDANT
FIRST RAND BANK LIMITED.	APPLICANT/ PLAINTIFF
And	

MAX L CONSTRUCTION CC	1st RESPONDENT / DEFENDANT
And	
MOTLALEPULE ANDRIES LEBEOANA	2nd RESPONDENT / DEFENDANT

FIRST RAND BANK LIMITED.	APPLICANT/ PLAINTIFF
And	
MAX L CONSTRUCTION CC	1st RESPONDENT / DEFENDANT
And	
MOTLALEPULE ANDRIES LEBEOANA	2nd RESPONDENT / DEFENDANT

GMG TRUST COMPANY	APPLICANT/ PLAINTIFF
And	
MALOKA ASHELY	RESPONDENT / DEFENDANT

NEDBANK	APPLICANT/ PLAINTIFF
And	
SAM NKOSIYEDWA	RESPONDENT / DEFENDANT

JUDGMENT

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[1] The object of summary judgment is to prevent the frustration and unreasonable delay of a plaintiff's claim by a non-triable defence. The value of the procedure for a plaintiff lies in obtaining an expedited judgment. The operation of the amendment to Rule 32 on 1 July 2019, and the finding by Grant AJ in *First Rand Bank Ltd v Excel B Shabangu*

& 4 Others[1] (*First Rand Bank Ltd*) that the amendment applies retrospectively set the cat amongst the pigeons.

[2] A substantial number of opposed summary judgement applications are allocated for hearing each week. A separate summary judgment court was created to decide summary judgment applications due to the volume and complexity of some of the cases. There is an urgency to clarify the interpretation of the amended Rule and to make clear its procedural and practical effects.

[3] In *First Rand Bank Ltd*, Grant AJ held that the rule is intended to operate retrospectively. Based on this, he removed summary judgment applications before him on account that all summary judgment applications with effect from 1 July 2019 fall to be decided under the new rule. He concluded the retrospective application does not impair substantive rights or obligations of parties. The plaintiff retains the right to pursue the expedited procedure and, it is to the plaintiff's benefit to know what is defensible in the defence raised.[2]

[4] Although the judgment in *First Rand Bank Ltd* acknowledges the potential for wasted costs, and that a plaintiff may have to wait, it concludes these factors do not amount to a substantive impairment of rights nor give rise to real prejudice. The judgment reasons that the wait benefits a plaintiff because the plaintiff will be placed in a superior position as it will no longer presume what the defence is. The consequence of the decision is that it renders all procedural steps previously taken under the old rule ineffective.

[5] Given the importance of the issue, it has necessitated this separate judgment.

[6] The amended Rule 32 (1) reads:

> "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 –
>
> On a liquid document
>
> For a liquidated amount in money
>
> For delivery of specified movable property or
>
> For ejectment" (own emphasis added)

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[1] (2018/43336 ; 284/2019) [2019] ZAGPJHC 267 (16 August 2019)

[2] Ibid, para 16.

[7] Unlike before, where a plaintiff was entitled to apply for summary judgment after a defendant entered a notice of an intention to defend the *lis,* the altered position is, a plaintiff can only apply for summary judgment ***after*** the delivery of the defendant's plea. However, as before, a plaintiff retains the election to institute summary judgment application.

[8] Other than the procedural change, the amended rule appears to raise the bar and onus for securing summary judgment. By implication, a plaintiff must satisfy the court that the defendant has no defence on the merits when under the old rule, it was enough to show a defendant lacks a *bona fide* defence. On this score, because of the change in the onus, as well as other grounds dealt with below, I depart from Grant AJ's conclusion that the retrospective application does not impair substantive rights or obligations of parties. Besides, it is conceivable that there are pending court judgments for summary judgment applications granted the previous week, which will be affected by the decision in *First Rand Bank Ltd.* A series of difficulties arise and the cases below illustrate the practical and procedural effects of the *First Rand Bank Ltd* judgment.

[9] I will briefly deal with the history of the litigation in respect of some of the summary judgment application, which served before me on 27 and 29 August 2019 to illustrate some of the difficulties.

[10] In *Standard Bank of SA Ltd v Rahme Terence Michale & Rahme Kristin Adele*[3], the defendants fell into arrears in October 2017. The plaintiff commenced action proceedings in December 2017. It launched an application for default judgment on 27 March 2018. The defendant opposed the application on 10 April 2018. The applicant served this application for summary judgment on 4 May 2018 and set it down for hearing on 7 June 2018, a year before the amendment.

[11] In *First Rand Bank Limited v Max L Construction CC and Motlalepule Andires Lebeoana*[4] and *First Rand Bank Limited v Max L Construction CC and Motlalepule Andires Lebeoana*[5] the plaintiff seeks the repossession of two trucks sold to the defendant following a default on the instalment sale. Both matters involve the same parties. The plaintiff seeks the same relief in respect of each. The defence is the same.

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[3] Case no. 46904/2017

[4] Case no. 27740/2018

[5] Case no. 27741/2018

Summary judgment application was launched on 29 August 2018. I will deal with them conjointly.

[12] The application served before the court on five occasions, namely on 27 September 2018, 13 November 2018, 18 June 2019, 27 June 2019, and 27 August 2019. In each of these instances, it was postponed at the instance of the first and later second defendant. The plaintiff contends merits were argued on 27 June 2019 before the matter came to court before me on the 27 August 2019. The plaintiff had complied with all the requirements of the old rule. The threshold of the defence is disclosed in the opposing affidavits.

[13] In *GM Trust Company SA (Pty) Ltd No and others v Maloka Ashley*[6] the plaintiff seeks the return of a motor vehicle following a breach of the instalment sale agreement financing the motor vehicle entered in January 2015. As at January 2019, the defendant was in arrears for R 56 686, 01 and the contract balance was R 198 410, 42. The plaintiff instituted proceedings in February 2019, and the defendant noted an intention to defend the action in March 2019. The application was set down for hearing of the summary judgment application on 16 April 2019 but was postponed *sine die*, with costs reserved.

[14] In *Nedbank v Sam Nkosiyedwa*[7], action proceedings commenced on 23 March 2018 when the plaintiff issued the summons. The defendant entered an appearance to defend the action. The summary judgement application was enrolled on the unopposed roll on 21 February 2019, but the court granted leave to the respondent to file an opposing affidavit.

[15] I requested advocates Van Aswegen, Pretorius, and Adam to make submissions on:

[15.1] The retrospective effect of the amended rule; and

[15.2] The ambit of the discretion of the court.

[15.3] Separately, I requested Ms. Van Aswegen to make submissions on whether a plaintiff can validly obtain an order declaring an immovable property executable under Rule 32. I am indebted to them for their Heads of Argument.

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[6] Case no. 3765/2019

[7] Case no. 11912/2018

[16] Advocates Van Aswegen and Adam contended Rule 32 is not retrospective in effect based on the longstanding strong presumption against retrospectivity[8]. Their argument was founded on the Constitutional Court decision in *Veldman v Director of Public Prosecutions*[9], *Mokgoro J* that the rule does not provide for the retrospective application. The court *states that:*

> *"Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and will not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule is the principle of legality which requires that law must be certain clear and stable. Legislative enactments are intended to give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."*[10]

[17] Ms. Van Aswegen pointed to a long line of cases which state that where a retrospective application impairs existing rights, it is presumed not to affect matters which are the subject of pending legal proceedings. She argued that on construction, inference, and necessary implication, the rule does not provide for a retrospective application found in *First Rand Bank Ltd.* Innes CJ in *Curtis v Johannesburg Municipality*[11] a decision on which Grant AJ also relies, goes further than stated in *First Rand Bank Ltd* and holds that:

> *"the general rule is that, in the absence of an express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that* ***they should if possible be so interpreted as not to take away rights actually vested at the time of the promulgation****"*[12] *[own emphasis added]*

[18] Ms. Adam also took issue with the incorrect interpretation of Sections 11 and 12 of Interpretation Act 33 of 1957 in *First Rand Bank Ltd.* She argued that the heading in Section 11 refers to ***"Repeal and Substitution"*** *and Section 12 deals with the* ***"effect of the repeal of a law"*** and when it is read in context, it cannot be said that Section

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[8] See also *S v Mhlungu & Others* 1995(3)SA 867 (CC) para 65-67

[9] 2007 (3) SA 210 CC para 25

[10] Ibid, para 26

[11] 1906 TS 308

[12] Ibid at 311

12 deals with the ***deletion*** of a law only and Section 11 deals with the ***amendment*** of a law only. It is clear from the statute that **section 12 deals with the *effects of the repeal and substitution in section 11***. [emphasis added]. The *First Rand Bank Ltd* judgment reads:

> *"Section 12 deals with the repeal (deletion) 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"*
>
> *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 position 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."*[13]

[19] I agree with Ms. Adam; the interpretation is erroneous when reading the sections in their proper context. Section 12(2)(b) makes it clear and adequately covers the retrospective effect of a repeal or amendment. It denies a retrospective application to Rule 32 found and reads:

> *"Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:*
>
> *(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed"*

[20] The presumption against retrospectivity is a complicated matter limited by no less than six exceptions. Effectively, the question of retrospective operation of a rule is one inquiry, and the problem of interference with existing rights is another.[14] Even when a rule is expressly stated to be retrospective, the retrospective effect will not apply to completed transactions and matters subject of ***pending litigation***.[15]. It is in respect of the second aspect of the inquiry that I must also deferentially part ways with Grant AJ based on the procedural and practical effects the *First Rand Bank Ltd* decision has on pending applications before the court. In the instance of the matters which served

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[13] *First Rand Bank Ltd* . para 10 - 11

[14] *See BoE Bank Ltd v Tshwane Metropolitan Municipality* 2005 (4) 336 SCA

[15] See *Bellairs v Hodfnett and Another* 1978 (1) SA 1109 (A) 1148 F-G

before me, pending litigation means all summary judgment applications which were "*instituted or initiated*" before 1 July 2019. [emphasis added]

[21] Implementation of a new procedure to pending litigation received extensive consideration in *Unitrans Passenger (Pty) Ltd (Pty) Ltd t/a Greyhound Coach Lines and the Chairman of the National Transport Commission SCA*[16] . Similarly, to the amended rule 32, in *Unitrans* there were no transition arrangements in the amending legislation to usher the procedural effects of the change. Oliver JA confirmed the principle in *Bellairs v Hodfnett and Another* referred above and stated:

> *"Applying the law to the facts of the present case, I can find no indication at all, express or implicit, that it was or could have been the intention of the legislature that the amending legislation should be applied to a pending application with the effect of preventing it from proceeding before the NTC to its final determination by that body. No provision is made for the transfer of a pending application before the NTC to a Local Road Transport Board. No provision is made for the repayment of the application fees paid by the applicant. No indication is given of how the application should be proceeded with. No provision is made for compensating the applicant for wasted costs and expenses in preparing and presenting the pending application. It is unthinkable that the amending legislation should affect cases where the hearing has already taken place, and the NTC, having reserved judgment, is within a day or two of announcing its decision. The gross injustice and the impracticability of applying the amending legislation to such cases is obvious. The principle is the same whether the application has just recently been made or just recently been heard."*

[22] Contrary to the finding in *First Rand Bank Ltd*, the cases before me expose the distinction between what is *"procedural* "and *"substantive*" can be elusive, and, is often contrived. The impairment in a litigant's substantive right is not difficult to find. Firstly, there is a line of cases which recognise that even though a statute may appear procedural, if it adversely affects vested rights, which are not procedural, it will be construed prospectively.[17] Innes CJ in *Curtis v Johannesburg Municipality* a decision on which Grant AJ also relies, goes further than stated that:

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[16] [1999] 3 All SA 365

[17] See *Minister of Safety and Security v Molutsi and Another* 1996 (4) SA 72 (A) at 90F-J

> *"the general rule is that, in the absence of an express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that* ***they should if possible be so interpreted so as not to take away rights actually vested at the time of the promulgation"***

[23] Secondly, the right to an expeditious determination of a dispute which is foundational in Rule 32 is substantive in my view. The prejudicial delay in enforcement of a right where time is of the essence, as well as the expeditious exercise of the right to be heard has serious permutations for litigants in this Division. In many instances, the strength of a creditor's claim and the ability to secure assets could depend on the speed of obtaining the summary judgment decision. I have already alluded to the higher bar the amendment to Rule 32 ushers which is a substantive change.

[24] Thirdly, as illustrated, the matters of *First Rand Bank Limited v Max L Construction CC and Motlalepule Andires Lebeoana* and *First Rand Bank Limited v Max L Construction CC and Motlalepule Andires Lebeoana* before me demonstrate another absurdity that would result if I removed the applications from the roll.

[25] The opposing affidavits ventilate the merits of the defence comprehensively. Mr. Pretorius for *First National Bank* pointed that a plea under Rule 22 (2) is a concise statement of material facts. It will not add much to the affidavits already before me. He argued that there was substantial compliance and I must condone the absence of a plea. The court has the power to condone non- compliance where objections are purely technical, and the defendant is not prejudiced.

[26] It is important to observe in the context of the finding of retrospective application of Rule 32 *First Rand Bank Ltd* that a defendant can amend a plea at any time during the trial proceedings. The value and strength of an affidavit made under oath surpass the plea. On the facts of this case, removing the case from the roll to allow the filing of the plea, will serve a minimal purpose in this instance. What would be required of the court if there is a conflict between the affidavit and the plea? It will potentially lengthen the proceedings, contrary to the purpose of the procedure provided by the rule.

[27] An observation not too divergent from the current cases is in *Minister of Public Works v Haffejee NO*[18], where the court had this to say:

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[18] 1996 (3) SA 745 (A)

> *"The disruption, inconvenience, wastage of time and money, and other complications which could attend insistence upon pending and, a fortiori, pending part-heard cases being re-instituted before the Supreme Court are so obvious that they require no elaboration and there is no provision in the legislation for the mere transfer if such cases to the Supreme Court, Indeed it is difficult to envisage how provision could fairly and effectively be made for the transfer of a case which is actually part-heard."*

[28] There is the practical consideration of the escalating costs of litigation and the effects of a cost order on an unsuccessful litigant overlooked by Grant AJ. The amended rule makes no provision for the costly process of amendment of existing pleadings or filing of supplementary papers and re-enrolling the applications for a hearing. It seems unfair to mallet an unsuccessful litigant with these costs. The source of prejudice is not attributable to a party. It is not one that can be ameliorated by a cost order.

[29] The last matter not considered in *First Rand Bank Ltd* was raised by Mr. Pretorius who argued that the court has the inherent power to regulate its proceedings based on the Constitutional Court in *Eke v Parsons*[19] *which stated that:*

> *'Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said (i)t is trite that the rules exist for the court, and not the court for the rules. Under our constitutional dispensation the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to "secure the inexpensive and expeditious completion of litigation and ...to further the administration of justice". I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not adequately covered by the Uniform Rules, and generally ensuring the efficient administration of the courts' judicial functions'* [20]

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[19] 2016 (3) SA 37 (CC)

[20] Ibid, para 39 - 40

[30] In view of the conflicting approaches and judgements, Section 14(1)(b) of the Superior Courts Act 10 of 2013, grants a single Judge the power to discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of the Division. After consultation and consideration, it is clear the issue will resolve soon, once the changes to Rule 32 takes full effect. A referral to the Full Court will be an academic exercise.

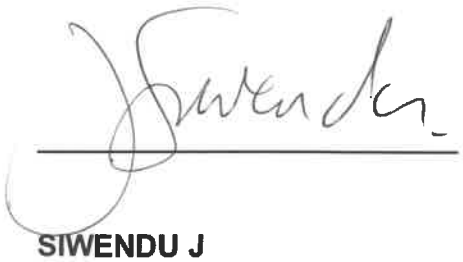
[31] For these reasons, I disagree with the finding by my brother Grant AJ, I find that:

[31.1] Rule 32 does not apply retrospectively, and there is no inference to be drawn to this effect.

[31.2] Rule 32 has prospective application effective to applications ***initiated*** after 1 July 2019

[31.3] The cases are correctly enrolled and are determinable in terms of old Rule 32.

[31.4] Separate reasons and orders will be made in respect of each as it is not necessary to address those in this judgment.



SIWENDU J

Heard on 27 and 29 August 2019

Delivered on 3 September 2019

APPEARANCES: **STANDARD BANK OF SA LTD v RAHME**

APPLICANT/ PLAINTIFF: ADV S VAN ASWEGEN

INSTRUCTED BY: STUPEL & BERMAN

1st RESPONDENT / DEFENDANT: NO APPEARANCE

2nd RESPONDENT / DEFENDANT: NO APPEARANCE

APPEARANCES: **FIRST RAND BANK LIMITED v MAX L CONSTRUCTION CC MOTLALEPULE ANDRIES LEBEOANA**

APPLICANT/ PLAINTIFF : ADV WG PRETORIUS

INSTRUCETD BY: ROSSOUW LESLIE INC

1st RESPONDENT / DEFENDANT: NO APPEARANCE

2nd RESPONDENT / DEFENDANT: NO APPEARANCE

APPEARANCES : **GMG TRUST COMPANY v MALOKA ASHELY**

APPLICANT/ PLAINTIFF: ADV R ADAMS

INSRUCTED BY: SMIT PRAT & JONES

RESPONDENT / DEFENDANT: NO APPEARANCE

APPEARANCES : **NEDBANK v SAM NKOSIYEDWA**

APPLICANT/ PLAINTIFF: ADV E COLEMAN

INSTRUCTED BY: **VAN HEERDEN INC**

RESPONDENT / DEFENDANT: DETAILS NOT ON RECORD

INSTRUCTED BY: WMK MATLALA ATTORNEYS