

REPUBLIC OF SOUTH AFRICA



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

Case Number: 27365/2021

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

.....2/17/2022.....
DATE

denise.fisher.
SIGNATURE

In the matter between:

CITY SQUARE TRADING 522 (PTY) LIMITED

Plaintiff

And,

GUNZENHAUSER ATTORNEYS (PTY) LTD
(Registration Number:2018/225530/07)

First Defendant

MAXINE GUNZENHAUSER

Second Defendant

JUDGMENT

Summary:

Civil Procedure – summary judgment: – rule 32(4) does not deprive the plaintiff of its rights under rule 28(8) to make consequential adjustments to its affidavit filed in terms of rule 32(2) pursuant to the amendment of the plea; rule 32(4) is a prohibition against the introduction of factual matter which is of the nature of a reply or rejoinder to the defendant's case.

FISHER J:

Introduction

[1] This is a summary judgment application. Interlocutory hereto, there has been an application in terms of rule 30 by the defendant to set aside the filing of a further affidavit by the plaintiff. This affidavit was filed for the purposes of supplementing the plaintiff's founding affidavit consequent upon an amendment of the defendant's plea effected after the filing of the application for summary judgment.

[2] The determination of the rule 30 application is fundamental to the summary judgment application and it was agreed that it should be determined before argument of the summary judgment application.

[3] The crisp question in the rule 30 application is whether it is permissible for the plaintiff to file the further affidavit in the circumstances.

Procedural history

[4] The summons was delivered on 14 June 2021 for payment of R503 305.6 together with interest and costs. The cause of action pleaded against the first defendant is for outstanding rental under two lease agreements and the cause of action pleaded against the second defendant is for the same indebtedness on the basis of her being a guarantor for such indebtedness.

[5] The first defendant filed a special plea of non-joinder and both defendants filed a plea which read as follows:

'AD PARAGAPH 1, 2 AND 3 THEREOF:

The contents of these paragraphs are denied, and the Plaintiff is put to the proof thereof.

AD PARAGAPH 4 —18 AND THE SUBPARAGRAPHS THEREOF:

Each and every allegation contained in these paragraphs are denied and the Plaintiff is put to the proof thereof.

WHEREFORE THE DEFENDANTS PRAY THAT THE PLAINTIFF'S CLAIM BE DISMISSED ON A SCALE AS BETWEEN ATTORNEY AND CLIENT'

[6] A scanner denial could hardly be imagined. The plaintiff thus issued the summary judgment application on the basis of this plea. The affidavit founding the summary judgment comprehensively sets out the plaintiff's case and engages to the extent required with the then existing plea. The defendants then filed their affidavit resisting summary judgment. In it they raised defences which had not been pleaded.

[7] The defendants thereafter sought leave to amend their plea in a bid to bring it into line with their affidavit resisting summary judgment.

[8] The plaintiff did not object to the amendment and it was duly effected. The amended plea seeks to plead new defences which were raised for the first time in the affidavit resisting summary judgment. This caused and postponement of the summary judgment application to enable the plaintiff to deal with the plea as amended.

[9] The plaintiff dealt with the new plea by filing the supplementary affidavit in issue.

[10] Mr White argues on behalf of the defendants that rules 32(2) and (4), properly construed, prohibit the filing of a supplementary affidavit. Mr Hollander for the plaintiff argues that, in light of the fact that the plea is now different, a further engagement with the plea is indicated and is not precluded by subrule (4). Mr White agrees that the application for summary judgment cannot be proceeded with in the circumstances of the amendment of the plea with the founding affidavit as is. He argues that a fresh

application for summary judgment must be brought. He relies in this latter regard on the judgment of *Belrex 95 cc v Barday*.¹

Discussion

[11] Rule 32(4) reads as follows in relevant part:

‘No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2) ...’

[12] Subrule (2) reads as follows in relevant part:

‘(2)(a) within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or by any other person who can swear positively to the facts.

(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a), verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiffs claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) ...’

[13] In *Belrex*, the court dealt with the question of whether a defendant was precluded from amending its pleading after the delivery of an application for summary judgment and, correctly, found that rule 32 could not be read to preclude the amendment of the plea mid-summary judgment proceedings.²

[14] Having found this, the Court was confronted by the same argument which now confronts this Court – being that rule 32(4) on the face of the prohibitive language used therein precludes the tendering of evidence other than in the founding affidavit. The Court agreed with this interpretation which led it to the conclusion that the only way for the process to move forward was for a fresh summary judgment application to be brought in accordance with the plea as amended.

¹ 2021(3) SA 178 (WCC).

² *Id* at para 30.

[15] In considering the matter the Court in *Belrex*, again correctly, raised the concern that such a position would provide an opportunity for the recalcitrant defendant who wishes to frustrate the proceedings. It concluded that this is a lacuna in rule 32 which appears to have been overlooked by those who framed the 'new' rule 32.³

[16] I am inclined to a more benign view of the assiduity of the drafters of the amendments to rule 32. Whilst it is correct that the rule itself does not deal with what is to happen if there is an amendment to the plea, rule 28(8), which is a rule of general application, takes account of the consequences of the amendment of pleadings generally. It reads as follows in relevant part:

‘ 28 (8) Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make consequential adjustment to the documents filed by him,’

[17] Rule 28(8) is deliberately inclusive. It does not specify that it relates only to consequential amendment of pleadings (it relates to 'documents') and neither does it prescribe how the 'adjustment' contemplated should take place. The only constraint is that it should be consequential on the amendment. Subrule (8), thus, expressly precludes the raising of issues which are extraneous to the pleading as amended. To the extent that an amendment of pleadings or relief other than one which is consequential is required, subrule (1) must be used and, leave to amend must be sought.

[18] In the case of the amendment of the plea after the filing of a summary judgment application the plaintiff is decidedly 'a party affected' by the amendment. Thus, the provisions of the rule 28(8) apply to it and so afford it the right to adjust the founding affidavit without leave, provided the adjustment is consequential. The, consequential adjustment in this instance would be the amendment of the affidavit filed in terms of

³ Id at para 31.

rule 32(2)(a) to take account of the amendment. I do not read rule 32(4) to preclude such adjustment.

[19] As long as the adjustment is strictly consequential on the amendment, there is, to my mind, no reason why the affidavit, although supplemented, should not be read to conform to the description of the subrule (2)(a) affidavit the purpose of which is to provide information as to the plaintiff's case in a way that 'explain[s] briefly why the defence pleaded does not raise any issue for trial.' (Emphasis added.)

[20] To my mind, it stands to reason that if the pleaded defence changes, the affidavit filed may need to be adjusted to deal with the new defence. The fact that a further affidavit is necessary for the purpose of this adjustment does not change the nature and characterisation of the founding application. Indeed, the adjustment may not be evidence dependent at all and may require only the setting out of a legal point. Such an adjustment would not, on any interpretation, be hit by the prohibition in subrule (4) which applies only to 'evidence'.

[21] It could not have been the intention of the drafters of the rule to allow the plaintiff to raise points of law arising from the amended plea but to prohibit the raising of factual content arising therefrom. Such a distinction would be irrational.

[22] The Rules Board for Courts of Law of the Republic of South Africa (the Board) is the body responsible for the review of the rules of court and the making, amendment or repeal of the uniform rules subject to the approval of the Minister of Justice and Correctional Services.

[23] Preparatory to the possible amendment of the summary judgment procedure, the Board appointed a task team to investigate and consider whether rule 32 was fit for purpose. Pursuant to this process, the Board released a memorandum (the memorandum) dealing with proposed changes to rule 32 which had arisen out of the task team's consideration of rule 32.

[24] In the memorandum it was raised that the task team was of the opinion that the then existing summary judgment procedure was unsatisfactory in a number of respects. In paragraph 3 of the memorandum it was said that the task team had raised the following main difficulties with the rule:

‘3.1 deserving plaintiffs were frequently unable to obtain expeditious relief because of an inability to expose bogus defences (either in their founding affidavit or in any further affidavit – further affidavits not being permitted);

3.2 opportunistic plaintiffs were able to use the procedure to get the defendant to commit to a version on oath and thus obtain a tactical advantage for trial in due course; and

3.3 a burden of proof was arguably shifted to the defendant which was not only unfair but (sic) led to the kinds of constitutional challenges which have emanated in the High Court’

[25] Central recommendations of the task team covered in the memorandum⁴ were that summary judgment should be applied for after the delivery of a plea or exception and that the application for supporting the summary judgment should not be the *pro forma* affidavit of the then existing rules but should instead ‘identify any point of law relied upon and explain briefly why the defence as pleaded does not raise any triable issues.’

[26] After dealing with various shortcomings which arose due to the formulaic approach to the founding affidavit in the then existing rule 32, the memorandum of the Board goes on to state as follows in relation to one of the main bases for the task team’s recommendations:

‘8.2 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 defendants 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’.

[27] It is thus clear from the memorandum that the main purpose of the amendment to rule 32 was to avoid the formulaic approach of the old rule to the

⁴ Report: at para 4

affidavit supporting a summary judgment application and to allow for proper engagement by the parties with the pleadings.

[28] In this context, to interpret the rule so as to allow the amendment of the defence mid summary judgment proceedings but then to close the door in those proceedings to the engagement with the very inquiry which the rule requires would make no sense.

Conclusion

[29] To my mind, rule 32(4) should not be read to deprive the plaintiff of its rights under rule 28(8) but rather as a prohibition against introducing factual matter which is of the nature of a reply or rejoinder to the defendant's case and which is not consequential on the amendment of the plea.

[30] I do not understand Mr White to argue that any of the matter sought to be introduced by the supplementary affidavit is not purely consequential. It would, in any event, be open for a defendant faced with such extraneous matter to have it struck out of the affidavit.

Order

[31] Thus, I order as follows:

1. The application in terms of rule 30 is dismissed.
- 2 The plaintiff's supplementary affidavit is declared to be properly filed.
- 3 The application for summary judgment is postponed to a date to be arranged with the office of Fisher J.
4. The costs are reserved

denise fisher

FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 17 January 2022.

Judgment Delivered: 18 February 2022.

APPEARANCES:

For the Plaintiff:

Adv L Hollander.

Instructed by:

Harris Incorporated.

For the Defendants:

Mr Jonathan White.

Instructed by:

MG Law Inc.