IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: 2812/2021P

In the matter between:

ARUM TRANSPORT CC	**APPLICANT**
and	
MKHWENKWE CONSTRUCTION CC	**FIRST RESPONDENT**
ZIKHALI ALFRED DLAMINI	**SECOND RESPONDENT**

ORDER

The following order is made:

1. The application for summary judgment is refused
2. The costs are reserved for determination by the trial court.

JUDGMENT

Bezuidenhout AJ

[1] The plaintiff, Arum Transport CC, applied for summary judgment against the defendants, Mkhwenkwe Construction CC and Mr Zikhali Alfred Dlamini, in the sum of R800 000.

[2] The combined summons was issued on 30 April 2021 and served on the defendants on 25 May 2021. The defendants entered an appearance to defend on 3 June 2021 and on the same day filed their plea.

[3] On 7 June 2021 the plaintiff filed its replication to the defendants' plea.

[4] The plaintiff thereafter filed its application for summary judgment on 23 June 2021, which falls within the 15 day period after the date of the delivery of the plea, as required by Uniform rule 32(2)*(a)*.

[5] The defendants opposed the application and filed an opposing affidavit, attested to by the second defendant, setting out the facts upon which defendants relied to show that they had a bona fide defence.

[6] At the commencement of the hearing of the opposed motion, counsel for the plaintiff, Ms E Van Jaarsveld, submitted that she deemed it proper to raise an issue not addressed by any of the parties in the papers or in the heads of argument filed by counsel, namely the fact that the plaintiff had taken a further procedural step by filing its replication. She is to be commended for advancing an argument detrimental to her own case which is proper and becoming of an officer of the court .

[7] The significance of this further procedural step is that the plaintiff would be precluded from proceeding to apply for summary judgment. This is in line with various authorities, many of which however predate the amendments to Uniform rule 32.

[8] Ms Van Jaarsveld referred me to *Quattro Citrus (Pty) Ltd v F & E Distributors (Pty) Ltd t/a Cape Crops*[1] where Gibson AJ was also faced with a situation where the plaintiff had filed a replication. The learned acting judge dealt with the amendments to Uniform rule 32 and referred extensively to the commentary in *Erasmus: Superior Courts Practice*[2] and in particular to the recommendations of the Superior Courts Task Team of the Rules Board for Courts of Law. After quoting from *Erasmus*,[3] where it is submitted that 'if the plaintiff takes a further procedural step after the delivery of the plea, i e an exception or a replication to the plea, he thereby waives his right to apply for summary judgment', the following was held:[4]

'[8] There is a seductive simplicity and elegance in a litigant being compelled to make a choice between bringing an application for summary judgment or filing a replication: in picking a course of action and having to bring an application for condonation if the chosen course of action were to be a failed application for summary judgment. If the application for summary judgment were to be successful, there would be no need to file the replication. This approach could also potentially relieve the court of the pressure of opportunistic applications for summary judgment.

[9] In my opinion, however, the Task Team's silence on the issue leaves the door open to the plaintiff to file a replication without waiving its rights to apply for summary judgment, as long as it files both the replication and the application timeously and in accordance with the rules of court. Both of these processes must be filed within 15 days of delivery of the plea. Accordingly, the filing of a replication will in no way compromise "the speediness of the remedy" afforded by rule 32, which was the issue of consideration for the Task Team when deliberating the timing of bringing the application. In my opinion, Mr Steyn is correct in arguing that, if the Task Team had intended for the applicant to be compelled to pick a course of action, a provision would have been incorporated dealing with the issue.'

[9] The learned judge proceeded to find that the defendant had suffered no prejudice as the replication had been filed timeously and subsequently granted summary judgment.

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[1] *Quattro Citrus (Pty) Ltd v F & E Distributors (Pty) Ltd t/a Cape Crops* [2021] JOL 49833 (WCC).
[2] D E Van Loggerenberg and E Bertelsmann *Erasmus: Superior Courts Practice* (RS15, 2020) at D1-384A.
[3] Ibid at D1-392B.
[4] *Quattro Citrus* paras 8-9.

[10] I respectfully disagree with Gibson AJ's findings and especially the reliance placed on the Task Team's silence on the issue.

[11] Uniform rule 32 has never contained a provision regarding the issue of whether a plaintiff could apply for summary judgment after taking a further procedural step. Even before the rule was amended to provide for an application for summary judgment to be brought only after a plea has been filed, courts recognised that a plaintiff could still apply for summary judgment even if a defendant had filed a plea, as long as the plaintiff had not taken a further step.[5]

[12] In *Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemical Co (Pty) Ltd*[6] *Klopper J said:*

'I agree, though, that once appearance to defend has been entered and a plaintiff thereafter files a declaration or takes a further procedural step, he thereby waives his right to ask for summary judgment, but not in a case like the present, where the declaration was attached to the summons for the sake of convenience only and before appearance to defend was entered.'

[13] Subsequently in *Jacobs v F P J Finans (Edms) Bpk*[7] Klopper AJP held that he was still of the same view as expressed in *Esso*, and said:

'… dan is dit ongerymd dat gemelde eiser prosesregtelikestappe neem wat op die verdediging van sodanige eis gemik is.'

He further found that the plaintiff had forfeited its right to apply for summary judgment. In casu, the plaintiff had supplied further particulars requested by the defendant, which the court held gave the defendant the impression that it had a right to defend the principal case.

[14] The findings by Klopper AJP were subsequently criticised in *Hire-Purchase Discount Co (Pty) Ltd v Ryan Scholz & Co (Pty) Ltd and another*[8] where Solomon AJ

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[5] *Steeledale Reinforcing (Cape) v HO Hup Corporation SA (Pty) Ltd* 2010 (2) SA 580 (ECP) para 8 and *Vesta Estate Agency v Schlom* 1991 (1) SA 593 (C) at 595I-H.
[6] *Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemical Co (Pty) Ltd* 1972 (2) SA 81 (O) at 83A.
[7] *Jacobs v F P J Finans (Edms) Bpk* 1975 (3) SA 345 (O) at 346C.
[8] *Hire-Purchase Discount Co (Pty) Ltd v Ryan Scholz & Co (Pty) Ltd and another* 1979 (2) SA 305 (SE).

found that '[t]he furnishing of the particulars by the plaintiff did not in any way constitute a waiver or abandonment of its rights under Rule 32'.[9]

[15] In *Steeledale,* Froneman J held that:[10]

'It appears to me, with respect, that the past underlying justification for allowing amplification of the summons (either in the verifying affidavit, or by delivering a declaration, or by delivering further particulars for the purposes of pleading), namely that it allows for a more comprehensive exposition of the case the defendant has to meet, and thus leads to a better assessment of whether a defendant has disclosed a bona fide defence, is countenanced neither by the wording of rule 32(2) and (4), nor by present binding authority. Summary judgment has repeatedly been described as an extraordinary and stringent remedy (see *Maharaj*, above, at 425H; *Tesven CC and Another v South African Bank of Athens* 2000 (1) SA 268 (SCA) ([1999] 4 All SA 396) at 277H - J; *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) ([2004] 2 All SA 366) at 35C - D), and there seems to me to be little remaining reason for extending its scope by allowing "amplification", in whatever form, of the cause of action as set out in either form of the summons.'

The application for summary judgment consequently failed.

[16] More recently in *The Standard Bank of South Africa Limited v Trumpie*,[11] Skosana AJ, in dealing with an application for summary judgment where the plaintiff contended that it would be seeking rectification of a written agreement being relied upon, said the following:

'The plaintiff has not yet pled rectification. In the present case, it can only do so by way of replication to the plea. The plaintiff could not file a replication as it could not take any further step after the plea.' (Footnote omitted.)

Skosana AJ placed reliance on *Hire-Purchase*.

[17] D Harms SC in *Civil Procedure in the Superior Courts*,[12] in the commentary on Uniform rule 32(2) in its amended form, stated that if a plaintiff takes a further procedural

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[9] Ibid at 307F-G.
[10] *Steeledale Reinforcing (Cape) v HO Hup Corporation SA (Pty) Ltd* 2010 (2) SA 580 (ECP) para 15.
[11] *The Standard Bank of South Africa Limited v Trumpie* 2021 JDR 1126 (GP) para 4.
[12] D Harms SC *Civil Procedure in the Superior Courts* (August 2020, Service Issue 71) para B32.5.

step after delivery of a notice of intention to defend 'he may thereby waive his right to apply for summary judgment'. Reliance was placed on *Esso.*

[18] *Erasmus* expressed a more definitive view, namely that '. . . if the plaintiff takes a further procedural step after the delivery of the plea, ie an exception or a replication to the plea, he thereby waives his right to apply for summary judgment'.[13] It appears to me that whereas the concern in *Quattro Citrus* was more directed at a replication compromising the speediness of the remedy afforded by Uniform rule 32 and lack of prejudice to the defendant, this was clearly not the concern as expressed by the authorities referred to by me and certainly not the reason why applications for summary judgement failed.

[19] In the present matter, the plaintiff pleaded in its particulars of claim that, during 2017, it entered into an oral agreement with the first defendant to render certain services as its subcontractor. Payment for the services would be made within a reasonable time but by no later than the date upon which the first defendant received payment from the Department of Transport. It is further averred that the first defendant, in breach of the agreement, failed to pay the plaintiff 'notwithstanding it having received full payment for such services from the Department of Transport during 2017 alternatively 2018'. It is further pleaded that as at November 2017, the first defendant was indebted to the plaintiff in the sum of R800 000.

[20] The plaintiff pleads further that the second defendant signed an acknowledgment of debt on 6 November 2017 in favour of the plaintiff in terms of which he acknowledged his indebtedness in the sum of R800 000 to the plaintiff in his personal capacity and, importantly perhaps, that he undertook to pay when paid by the Department of Transport.

[21] In their plea, the defendants deny the terms of the agreement, deny that they had received payment from the Department of Transport and aver that the second defendant was forced or threatened to sign the acknowledgment of debt relied upon by the plaintiff.

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[13] D E Van Loggerenberg and E Bertelsmann *Erasmus: Superior Courts Practice* (RS15, 2020) at D1-387-D1-388, and the authorities referred to in the relevant footnotes.

The defendants also pleaded that the claim against them prescribed on 5 November 2020.

[22] The replication filed by the plaintiff, clearly a further procedural step, proceeds to address various issues raised by the defendants in their plea, and even goes as far as attaching an answering affidavit, attested to by the second defendant in an application for the liquidation of the first defendant, to the replication.

[23] The replication was filed on 7 June 2021. In terms of Uniform rule 29(1)*(b)*, the pleadings closed on 22 June 2021. The application for summary judgment was only filed on the next day, 23 June 2021, albeit still within the period of 15 days as prescribed in Uniform rule 32(2)*(a)*.

[24] I have no doubt that the plaintiff's replication constitutes a further procedural step and that in filing the pleading, the plaintiff has clearly waived its right to apply for summary judgment. I agree fully with the sentiments expressed by Froneman J in *Steeledale.* I am also of the view that the amendments to Uniform rule 32 should not have any effect on this issue.

[25] In the event that I am wrong in this regard, I would in any event have found that the defendants have shown that there are triable issues justifying a refusal to grant summary judgement.

[26] Summary judgment has been described as an extraordinary and stringent remedy, and should only be granted where the plaintiff can establish its claim clearly and the defendant fails to set up a bona fide defence.[14]

[14] *Steeledale Reinforcing (Cape) v HO Hup Corporation SA (Pty) Ltd* 2010 (2) SA 580 (ECP), and *Erasmus* at D1-382 and the authorities referred to.

[27] The defendants are required to satisfy me by affidavit that they have a bona fide defence to the action. The affidavit should disclose fully the nature and grounds of the defence as well as the material facts relied upon.

[28] The second defendant's opposing affidavit was relatively short but concentrated mainly on the issue of prescription, which in respect of the claim against the second defendant is certainly a triable issue.

[29] Mr Ranjit, appearing on behalf of the defendants, also raised the issue of the debt not yet being due in his heads of argument. If this is found to be indeed the case, the issue of prescription would fall away. It is clear from the defendants' plea that they deny that the Department of Transport had made payment to them. Although this issue is only addressed in a roundabout manner in the opposing affidavit, it is clearly a triable issue. It has be held that '[a]ffidavits in summary judgment proceedings are customarily treated with a certain degree of indulgence, and even a tersely stated defence may be a sufficient indication of a bona fide defence for the purpose of the rule'.[15]

[30] Ms Van Jaarsveld made various submissions regarding the second defendant's alleged acknowledgment of indebtedness. Bearing in mind the sparse pleading in the particulars of claim as well as the averments and allegations made by the defendants in their plea and opposing affidavit with reference to, for instance, the allegation that payment would be made only once the defendants have been paid by the Department of Transport, this matter requires proper discovery and ventilation at trial. At this stage I am not required to judge the probabilities or the truthfulness of the defendants' allegations, unless the defence is inherently unconvincing, which, in my view, it is not.[16] Once the payment records of the Department of Transport becomes available, it might even be appropriate to apply to have the matter enrolled on the expedited trial roll.

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[15] *Erasmus* at D1-410 and the authorities referred to.
[16] *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228B.

[31] I asked both counsels to address me on the issue of costs and both submitted that costs should be reserved for decision by the trial court, which is sensible, bearing in mind the facts of the matter.

[32] I accordingly make the following order:

1. The application for summary judgment is refused.

2. Costs are reserved for determination by the trial court.

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BEZUIDENHOUT AJ

APPEARANCES

Date of hearing: 19 October 2021
Date of judgment: 12 November 2021

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