REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 4 March 2020
Date of judgment: 30 April 2020

Case No. 3670/2019

In the matter between:

TUMILENG TRADING CC Applicant / Plaintiff

and

NATIONAL SECURITY AND FIRE (PTY) LTD Respondent / Defendant

Case No. 3671/2019

And in the matter between:

E & D SECURITY SYSTEMS CC Applicant / Plaintiff

and

NATIONAL SECURITY AND FIRE (PTY) LTD Respondent / Defendant

JUDGMENT
(Transmitted by email to the parties' legal representatives and posted on SAFLII. The judgment shall be deemed to have been handed down at 10h00 on Thursday, 30 April 2020)

BINNS-WARD J

[1] The plaintiffs, in two actions, instituted against the same defendant, on what appear to be the same causes of action, have applied for summary judgment. Both applications came up for hearing together in the Fourth Division on the semi-urgent roll, having been postponed by agreement between the parties on that basis by the motion court judge.

[2] The well-established summary judgment procedure that had worked successfully for so long has recently been materially altered by means of various amendments to rule 32 of the Uniform Rules of Court. The applications in the cases before me were brought in terms of the 'new' rule 32, which has been in effect since 1 July 2019.[1]

[3] One might easily be forgiven, however, when regard was had to the parties' heads of argument, for thinking that it was business as usual. Reliance was had on the established leading authorities like *Maharaj*[2] and *Joob Joob Investments*,[3] with no indication that any consideration had been given to whether, and if so, how, the principles rehearsed in such authorities might have been affected by the changes wrought to the procedure in terms of the recent amendments. On the face of it, as I made clear during the oral argument, I would have thought that that approach was misconceived.

[4] Apart from a full bench decision in the Gauteng Division on the question of whether the amendments affected applications that were instituted before 1 July 2019,[4] there does not appear to be any reported jurisprudence yet on the operation of the amended procedure.

[5] Why it was thought desirable to bring in changes that will inevitably delay the ability of, and increase the cost to, deserving plaintiffs to obtain summary judgment is less than clear. It is also not self-evident how the courts are expected to deal with the extra material, in many cases disputatious material, that will now be put before them in such applications, in determining whether a defendant has shown that it has a bona fide defence. Commentators have noted that '*Rule 32 in its amended form is not a model of clarity*'.[5] They have also gone so far as to opine that '*the fact that under the new procedure the merits of a defendants*

[1] GN R842 published in GG 42497 dated 31 May 2019.

[2] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

[3] *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23 (27 March 2009); [2009] 3 All SA 407 (SCA); 2009 (5) SA 1 (SCA).

[4] *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another; Steeledale (Pty) Ltd v Gorrie and similar cases* [2019] ZAGPJHC 386, [2019] ZAGPPHC 500 (4 October 2019); 2020 (1) SA 623 (GJ).

[5] DE Van Loggerenberg, *Erasmus, Superior Court Practice* 2nd ed. (Juta, loose-leaf), Vol. 2 at D1-387 [Service 11, 2019].

pleaded defence in an action would be subjected to judicial scrutiny in what in effect is an opposed motion and not in the normal course of a trial, raises the issue of constitutionality of the procedure'.[6] It will become apparent later in this judgment that I do not share the latter opinion.

[6] As the object of the amendments does not emerge altogether clearly from the wording, which might easily be read to have introduced purely mechanical changes, it is relevant to refer to the Memorandum published by the Task Team constituted by the Rules Board[7] when it advertised for comment as to whether rule 32 should be amended.[8]

[7] The Task Team had concluded that the existing procedure was unsatisfactory because (i) 'deserving plaintiffs were frequently unable to obtain expeditious relief because of an inability to expose bogus defences (either in their supporting affidavit or in any further affidavit – further affidavits not being permitted)', (ii) '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 a trial in due course' and (iii) the constitutional challenges to which it reportedly had given rise. The Team considered that the identified causes for concern might 'best be alleviated and addressed' by (a) providing that an application for summary judgment be brought after the defendant had filed its plea rather than after it had given notice of intention to defend and (b) replacing the essentially pro forma ('formulaic') style of supporting affidavit in summary judgment applications with a supporting affidavit that '*should instead identify any point of law relied upon and explain briefly why the defence as pleaded does not raise any triable issues*'.

[8] Paragraph 8 of the Memorandum gave the following 'brief overview' of the Task Team's reasoning:

> '8.1 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

[6] Id.

[7] The Memorandum was distributed to 'role-players' under cover of a letter of the Secretary of the Rules Board for Courts of Law, dated 27 June 2016.

[8] Cf. *C:SARS v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16 (25 March 2020) at para. 17, citing *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* [1986] ZASCA 10 (6 March 1986) at pp. 17-20; 1986 (2) SA 555 (A), at 562D-563B and *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC), at para. 94, fns 100-102.

stating that "*a notice of intention to defend has been delivered solely for the purpose of delay*" (rule 32(2). This formulaic affidavit is unsatisfactory in many respects.

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

8.1.2 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.

8.1.3 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.

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 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.

8.3 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).

8.4 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.

8.5 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.

8.6 If the summary judgment procedure is changed as proposed, the Task Team does not believe that a replying affidavit would either be necessary or appropriate. A plaintiff would have had a chance to address the averments in the defendant's plea in its founding affidavit in support of summary judgment. If the defendant has a further rebuttal in its answering affidavit, then, if that is credible, the summary judgment application would be defeated; but that is not necessarily inappropriate as the matter would then presumably have complexities which render it ill-suited to the summary judgment remedy. For a similar reason, a referral to oral evidence (also mooted in the Galgut Commission report) seems inadvisable.

8.7 The Task Team debated whether, as in the comparative jurisdictions consulted, summary judgment should potentially be available for any kind of claim (including illiquid claims for damages). It was concluded that this would not be appropriate, and that summary judgment could justifiably be confined to the kinds of matters referred to in section 32(1).

8.8 The Task Team also debated whether, if summary judgment should no longer be brought after delivery of a notice of intention to defend, it should be allowed only after close of pleadings. It was however decided against requiring a plaintiff to wait until after any replication, rejoinder or rebuttal had been filed. While such a rule would ensure that the debate was fully informed, and based on all pleaded defences and ripostes, it was thought that the speediness of the remedy could be compromised, and also that, as the objective behind summary judgment was to allow judgment to be obtained expeditiously in clearly deserving cases, a matter in which there were replications, rebuttals and the like was probably one ill-suited to summary judgment.

[9] The reasoning is, with respect, not as helpful as might have been hoped in giving meaningful insight into the rationale for, and intent behind, the rule changes.

[10] The constitutional challenges reportedly mounted against the established rule (the rationale of which was only 10 years ago held by the Supreme Court of Appeal in *Joob Joob Investments* to be 'impeccable' and praised by the court at the time as a procedure that had been usefully and effectively implemented for nearly a century[9]) are not identified in the Task Team's memorandum. They, in any event, do not appear to have been pressed to determination, for I could find no record of them in the law reports, nor on SAFLII. Insofar as it might be implied that they may have been predicated on the contention that the old rule had the capacity of unfairly depriving defendants of their right to a full-blown trial, their prospects of success could only be rated as poor if regard were had to the fate of a similar challenge to the provisional sentence procedure, rejected by a unanimous court in *Twee Jonge Gezellen v Land and Agricultural Development Bank of South Africa*.[10] The Constitutional Court did find that the common law pertaining to provisional sentence required development by the infusion of a degree of judicial discretion into the procedure in the interests of justice, but summary judgment has, by contrast with that procedure, always been subject to a generous measure of judicial discretion.[11]

[11] It is difficult to see how the ability of plaintiffs to obtain 'expeditious relief' through summary judgment is to be facilitated or rendered less susceptible to constitutional challenge by postponing their opportunity to apply for it until after the defendant has delivered its plea. The change undoubtedly comes at a cost, both in time and expense. The evident effect of these considerations on plaintiff litigants has been notable. There has been a significant drop in the number of summary judgment applications on the court rolls.[12] The reduced numbers would suggest that if ever the procedure were genuinely regarded by litigators as ineffective before the amendments, it might now be regarded as even more so. Time will tell.

[12] The Task Team professed to take comfort from the timing of summary judgment applications in other jurisdictions such as England and Australia. But reference to the

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[9] *Joob Joob Investments* supra, at paras. 31-33.

[10] *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a The Land Bank and Another* [2011] ZACC 2 (22 February 2011); 2011 (3) SA 1 (CC); 2011 (5) BCLR 505 (CC).

[11] Cf. e.g. *SA Bank of Athens Ltd v Van Zyl* [2005] ZASCA 2 (21 February 2005); [2006] 1 All SA 118 (SCA), at para. 16.

[12] In the first week of March 2020, for example there were only three summary judgment applications set down for hearing on the Western Cape Division motion court roll, whereas in a comparable 5-day period in the preceding year (11-15 March 2019), before the introduction of the amended procedure, there were 25 such matters on the roll. I could not find the court rolls for a continuous five-day period in March 2018, but in the four days between 13-16 March 2018, 27 summary judgment applications were enrolled.

summary judgment procedures in those countries shows that the import of the procedures that go by that label there differs starkly from that in place here (whether in original or amended form). Most significantly perhaps, by virtue of the fact that the test for summary judgment in the foreign jurisdictions involves an assessment of the merits of the case in order to determine whether the party against whom summary judgment is applied for (it could be either claimant or defendant in England and Australia) enjoys either a 'real' or a 'reasonable' prospect of success[13] if the matter were to go to trial.[14] It would, understandably, usually be difficult for such an assessment to occur before a plea had been delivered.

[13] However, our procedure, by contrast, even in its amended form, remains true to that in which summary judgment was originally introduced in the English civil procedure in the mid-19th century.[15] Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure. That means that the test remains what it always was: has the defendant disclosed a bona fide (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed. The classical formulations in *Maharaj*[16] and *Breitenbach v Fiat SA*[17] as to what is expected of a defendant

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[13] The lack of a *real* prospect of success for the defence (or claim) is the test in terms of CPR 24, which regulates 'summary judgment' in terms of the English Civil Procedure Rules. It is also the test in summary judgment proceedings in the Supreme Court of the Australian state of Victoria; see ss 61 and 62 of the Civil Procedure Act, 2010 (Act 47 of 2010 (Vic) and Order 22 of the Supreme Court Rules of Civil Procedure (2015). The absence of a *reasonable* prospect of success is the test in the Federal Court of Australia; see s 31A of the Federal Court of Australia Act 156 of 1976 (Cth). The High Court of Australia has highlighted the material difference between the import of the '*reasonable* prospect of success' test in terms of s 31A and the '*real* prospect of success' test in terms of CPR 24 in the English rules. It held that the effect of the absence of reasonable prospect of success test distinguished it from the real prospect of success test in that absolute certainty about the outcome of the claim or defence was not required before summary judgment could be granted; see *Spencer v Commonwealth of Australia* [2010] HCA 28 (1 September 2010), at paras. 52-56. (Interestingly, in the context of the ambit of the Task Team's comparative survey, which included both Australia and the USA, the High Court also highlighted, at para. 57, that it would be 'dangerous' to have direct comparative reference to the summary judgment procedures in the United States under the Federal Rules of Civil Procedure, which it regarded as materially distinguishable.)

[14] It is not only the test that is different in the foreign jurisdictions. English and Australian courts seized of applications for summary judgment are also endowed in terms of their respective summary judgment rules with various powers (which differ from one jurisdiction to the other) such as those of hearing oral evidence and making interlocutory orders and giving case management directions. In England, for example, where it appears to the court hearing a summary judgment application *possible* that a claim or defence may succeed but *improbable* that it will do so, it may, in terms of Practice Direction 24, also make a 'conditional order' requiring the defendant to pay a sum of money into court. Equivalent powers form no part of the amended local summary judgment regime.

[15] See *Edwards v Menezes* 1973 (1) SA 299 (NC); [1973] 1 All SA 515 (NC), at 304 (SALR), *Joob Joob Investments* supra, at paras. 29-31 and JA Faris, *The historical context of summary judgment in South Africa: politics, policy and procedure*, (2010) LXIII CILSA 352 for a historical overview of the history of the summary judgment procedure in this country.

[16] *Maharaj* supra, at p.426A-E.

seeking to successfully oppose an application for summary judgment therefore remain of application. A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant.

[14] The Task Team's concern about the use by plaintiffs of the procedure for 'tactical advantage' is also difficult to understand as a basis for the amendments to the rule that have been introduced. Litigation is not a game. And in the modern era, the general tendency in litigation worldwide is for courts to require litigants to make full disclosure of their cases as early as possible so as to facilitate effective case management and promote the most efficient and cost effective disposal of cases by the avoidance of unnecessary trials and the shortening of those that do proceed to hearing. A plaintiff that applied for summary judgment when it knew or reasonably should have appreciated that the defendant had a bona fide defence, and was therefore abusing the procedure, was always, and remains, exposed to an adverse costs order. The amended rule provides for even stricter sanctions against abuse, by providing expressly for the making of orders that the proceedings be suspended until the delinquent plaintiff has paid any costs awarded against it for abusing the procedure.[18]

[15] What the amendment requiring an application for summary judgment to be brought only after a plea has been delivered is identifiably directed at achieving, and should succeed in doing, is the avoidance of speculative summary judgment applications. Under the previous regime, a plaintiff might bring the application in the genuine belief that the defendant had entered an appearance to defend only for the purpose of delay, only to learn that the defendant was able to make out a bona fide defence when the defendant's opposing affidavit was delivered. Such applications, and there were many, rarely went to a hearing, however. That was because the parties to such matters would almost invariably agree to 'the usual order', granting the defendant leave to defend. Under the new rule, a plaintiff would be justified in bringing an application for summary judgment only if it were able to show that the *pleaded* defence is not bona fide; in other words, by showing that the plea is a sham plea.

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[17] *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T), at 228B-H.

[18] Rule 36(9)(a).

[16] Of primary interest in the adjudication process, and no doubt also for practitioners assisting litigants with the drafting of their affidavits, are the changes in the stated requirements for –

(i) the content of the plaintiff's supporting affidavit, and

(ii) in relation to (i), the effect, if any, of the aforementioned changes on what is expected of a defendant in respect of its opposing affidavit.

Content of the supporting affidavit

[17] As to (i), rule 32(2)(b) now provides that the supporting affidavit must '*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 plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial*'. The change was effected by the insertion of the underlined wording into the subrule.

[18] It is by no means obvious what was sought to be achieved by inserting the requirement that the deponent to the supporting affidavit must identify any point of law relied upon and the facts upon which the plaintiff's claim is based. After all, now that summary judgment applications fall to be brought after the plea has been delivered, there will always be either a combined summons or a simple summons and declaration already on record. The particulars of claim or declaration are required to comply with the requirements for pleading set out in rule 18. Accordingly, they must contain a clear and concise statement of the material facts upon which the plaintiff relies for its claim with sufficient particularity to enable the defendant to plead thereto. If the allegations in the pleaded claim do not make out a cause of action that is cognisable in law, it is amenable to exception, and if the pleading does not comply with rule 18, it is liable to be struck out as an irregular step. If the plaintiff's cause of action depends on a 'legal point' that is not evident on the alleged facts, the point should therefore already be apparent in the summons or declaration. One must assume therefore that a claim to which a plea has been delivered should be neither excipiable nor non-compliant with the requirements of rule 18 as to particularity.

[19] Is the deponent to the supporting affidavit then required to repeat in narrative form what should already be apparent from the plaintiff's pleadings? Or is he or she expected to set out the *facta probantia* in elaboration of the *facta probanda* alleged in the pleadings? Having regard to the purpose of summary judgment proceedings, which is to prevent matters in which the *defendant* does not appear to have a bona fide *defence* having to go to trial, no

obvious point is served by an elaborate supporting affidavit concerning the merits of the *plaintiff*'s pleaded *claim*.

[20] I think that it would be desirable therefore if plaintiffs were encouraged to confirm what should already be apparent from their pleaded case as succinctly as possible. No purpose will be served by a laborious repetition of what the judge and the defendant should be able to discern independently from the pleaded claim. No harm will be done by using a 'formulaic' mode of expression if it serves the purpose; which, it seems to me, it would do in most matters.

[21] The requirement that the plaintiff's supporting affidavit should explain briefly why the pleaded defence 'does not raise an issue for trial' is of more interest. It cannot be taken literally, for a plea that did that would be excipiable, and there is no indication that the amended summary judgment procedure is intended as an alternative to the exception procedure. For the reasons given later with regard to the cases before me, I consider that the amended rule 32(2)(b) makes sense only if the word 'genuinely' is read in before the word 'raise' so that the pertinent phrase reads 'explain briefly why the defence as pleaded does not *genuinely* raise any issue for trial'. In other words, the plaintiff is not required to explain that the plea is excipiable. It is required to explain why it is contended that the pleaded defence is a sham. That much is implicit in what the Task Team said in para. 8.3 of its Memorandum.[19] The position would have been made clearer had the words 'does not make out a bona fide defence' been used. That would have made for a more clearly discernible connection between the respective requirements of subrules (2)(b) and (3)(b). That there be such a connection is necessary if the amended rule as a whole is to be workable.

[22] What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a bona fide defence. This is because the plaintiff's supporting affidavit now falls to be made in the context of the deponent's knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a 'formulaic' supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not bona fide and has been raised merely for the purposes of delay.

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[19] See paragraph [8] above.

[23] It seems to me, however, that the exercise is likely to be futile in all cases other than those in which the pleaded defence is a bald denial. This is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case. As the current applications illustrate, the exercise is likely therefore to conduce to argumentative affidavits, setting forth as averments assertions that could more appropriately be addressed as submissions by counsel from the bar. In other words, it is likely to lead to unnecessarily lengthy supporting affidavits, dealing more with matters for argument than matters of fact.

Content of the opposing affidavit

[24] As to (ii), rule 32(3)(b), which provides for what is required in a defendant's opposing affidavit, remains as it was before, save that the affidavit must now be delivered at least five days before the hearing of the application, instead of by noon on the day but one before the hearing, as had previously been the case. As has always been the position, the opposing affidavit must '*disclose fully the nature and grounds of the defence and the material facts relied upon therefor*'. The purpose of the opposing affidavit also remains, as historically the case, to demonstrate that the defendant '*has a bona fide defence to the action*'. There is thus no substantive change in the nature of the 'burden',[20] if that is what it is, placed on a defendant in terms of the procedure. However, the broader form of supporting affidavit that is contemplated in terms of the amended rule 32(2)(b) will in some cases require more of a defendant in respect of the content of its opposing affidavit than was the case in the pre-amendment regime, for the defendant will be expected to engage with the plaintiff's averments concerning the pleaded defence. In this regard I anticipate that we shall also see much argumentative matter in the opposing affidavits under the new regime, for argument will be met with counter-argument.

[25] The assessment of whether a defence is bona fide is made with regard to the manner in which it has been substantiated in the opposing affidavit; viz. upon a consideration of the extent to which '*the nature and grounds of the defence and the material facts relied upon*

[20] Para. 8.3 of the Task Team Memorandum.

therefor' have been canvassed by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was 'contrived', in other words not bona fide. And the amended subrule 32(3)(b) implies that it should continue to be the indicated method. (If a case gives rise to a defendant being able to cogently rely on 'technical points',[21] it was, and remains, entitled to do so.)

[26] The traditional import of the requirement that the facts relied on by a defendant be '*fully*' disclosed was mentioned earlier in this judgment.[22] It may be, now that the opposing affidavit falls to be made after the defendant's plea has been delivered, that more is required of the defendant in terms of the amended rules than was previously demanded. After all, the qualification by Corbett JA in *Maharaj* supra, loc. cit.,[23] that '*the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading*' sounds incongruous when the court adjudicating the summary judgment already has the plea before it. But if the requirements are indeed more stringent, does it mean that the intention behind amendment was to make the procedure more draconian or drastic than it used to be? I doubt it.

[27] Had such a signal change been intended, it seems unlikely that subrule 32(3) would have been left substantively in the same form that it used to have. I would also have expected any change in what was required of the defendant's opposing affidavit to be accompanied by the introduction of other changes to bring our procedure more into line with that in jurisdictions in which the courts are able to give directions that enable the genuineness of the advanced defences to be further explored before summary judgment is granted or refused, or further directions to be given for the management of the claim.[24]

[28] Against the background of the aforegoing analysis, it is time to turn to the determination of the two applications under the new rule that are before me.

In case no. 3671/2019

[29] The action was commenced by means of a combined summons. It is evident from the particulars of claim that the claim is for payment of commission allegedly due and payable to

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[21] Para. 8.1.3 of the Task Team Memorandum.

[22] See paragraph [13] above.

[23] See notes 2 and 16 above.

[24] See notes 13 and 14 above.

the plaintiff by the defendant in terms of a written agreement, a copy of which is annexed to the pleading.

[30] It is apparent from the allegations in the particulars of claim, read with the attached agreement, that the plaintiff had been engaged by the defendant, then known as Chubb Security, as a 'Chubb Incentive Programme agent'. The plaintiff's functions in terms of the agreement were to recruit clients for Chubb Security and to instal the pertinent systems linking up the client's burglar alarm to Chubb Monitoring and Response. It is alleged in the summons that, in terms of clause 6.1 of the agreement, the defendant was entitled to terminate the contract at any time by giving the plaintiff at least 60 days' written notice. The pleading further alleges that, in terms of clause 6.4 read with clause 8 of the agreement, should the termination of the agreement occur in the manner aforesaid without the plaintiff having been at fault, and provided the plaintiff had been an 'active agent' for 24 months at date of termination, the defendant would be liable, subject to certain further conditions that were set forth in the particulars of claim, to continue to pay commission to the plaintiff on the monthly fees paid to the defendant by the clients that the plaintiff had introduced.

[31] The plaintiff alleged that the agency was terminated by the defendant in terms of the 60 days' notice clause. A copy of the notice of termination is attached to the particulars of claim. The notice of termination, dated 20 September 2017, reads as follows:

> **Termination of CIP Agent Agreement**
>
> It is with regret that we hereby provide notification of the termination of our agreement and provide the necessary 60 day notice commencing with effect from 01 October 2017. The services and agreement will therefore terminate on 30 November 2017. We are currently investigating the circumstances of the termination to determine whether it is with, or without cause, and therefore whether the termination is either in terms of 6.1 or 6.3 of the agreement In this regard, Chubb reserves its rights to rely on any evidence found that qualifies the termination to bring it in line with clause 6.3. This investigation pertains to various aspects regarding reputational, performance and/or breach issues.
>
> In addition to the above, we further reserve the rights of the company to engage with specific CIP Agents regarding amendment of agreements, remunerations and stipulations in the immediate future.
>
> We will be contacting all relevant CIP Agents via e-mail or in person regarding the above if relevant. However, should no further contact be forthcoming, the termination remains in effect and the necessary contractual stipulations will be applied.
>
> We thank you for your participation in the program and wish your company every success in future endeavours.
>
> Yours sincerely

[32] The plaintiff alleges that the termination did not occur as a result of any fault by the plaintiff and that the various conditions to which its contractual entitlement to the continued payment of commission have been satisfied. It alleges that the defendant has, however, failed, since 1 December 2017, to pay the commission due in the amount of R70 897,36 per month and that the resultant amount in which the defendant was indebted to it as at 28 February 2019 was R1 063 640,40.

[33] The plaintiff has claimed payment of the aforesaid amount of R1 063 640,40 plus interest thereon *a tempore morae* at the prescribed rate of interest. It has also claimed 'payment of the commission to the plaintiff by the defendant every month in accordance and in compliance with clause 8 of the Agreement, from 1 March 2019 onwards', plus interest thereon *a tempore morae*.

[34] In its plea, the defendant notes the allegations in the particulars of claim and pleads 'that any payment due and owing to the Plaintiff will be subject to inter alia clause 6.3 of the Agreement'. As the terms of the termination letter indicated, clause 6.3 was an alternative to clause 6.1 of the agreement. It allowed for the summary cancellation of the agreement by the defendant in certain defined circumstances. (Clause 6.1, it will be remembered, is the cancellation on 60 days' notice clause.) The defendant denied that the contract had been cancelled in terms of clause 6.1 and, in amplification of the denial, pleaded that its notice of termination had expressly stated that the defendant had been 'investigating the circumstances of the termination to determine if the said termination was pursuant to clause 6.1 or 6.3 of the Agreement'.

[35] The defendant denied any liability to the plaintiff and, in paragraphs 8-10 of its plea, pleaded as follows:

> 8. … the agreement was terminated by the Defendant pursuant to clause 6.3.4. The Defendant's (sic) workmanship and product installations were defective and/or of an inferior quality which has caused the Defendant to suffer reputational harm.
>
> 9. The Defendant had to remedy the defective workmanship of the Plaintiff and suffered financial loss.
>
> 10. The Defendant will file a counter claim in due course.

[36] In its application for summary judgment, the plaintiff sought judgment for all of the relief prayed for in terms of its particulars of claim. The application was supported by a six-page affidavit by the sole member of the plaintiff close corporation. The affidavit's content was divided into sections under various subheadings that were clearly inspired by the

requirements of the amended rule 32(2)(b). It is convenient to quote paragraph 6-16 thereof because they serve to illustrate the difficulties described earlier in fathoming the object of the amendments.

Point of law relied on

6. The plaintiff relies on the legal principles surrounding the termination of an agreement and specific performance of the obligations of the parties in terms of such an agreement.

Facts upon which claim based

7. The plaintiff's claim is based on the facts set out in its Particulars of Claim, in particular that the defendant terminated the agreement between the parties ("the Agreement") in terms of clause 6.1 thereof, that the plaintiff remains entitled to the payment of commission and that the defendant has breached the Agreement by failing and/or refusing to pay such commission to the plaintiff.

Defence does not raise issue for trial

8. In its notice of termination of the Agreement, a copy of which is annexed to the plaintiffs particulars of claim, marked "AST2" ("the Notice"), the defendant stated that it was investigating the circumstances of such termination in order to establish whether the agreement was terminated pursuant to clauses 6.1 or 6.3 thereof. The defendant further claims that the agreement was terminated in accordance with clause 6.3.4 thereof as it suffered reputational damage due to "*the defendant's*" workmanship and product installations being defective.
9. Such defence must be rejected.
10. Firstly, it is clear from the first paragraph of the Notice that the defendant relied on such clause 6.1 in terminating the Agreement as it terminated the Agreement on 60 days' written notice and not with immediate effect as allowed and envisaged by clause 6.3.
11. Secondly , clause 6.3 allows for the cancellation of the Agreement by notice in writing in the event that the plaintiff either committed an act of insolvency, went into liquidation, is charged with or convicted of a criminal offence, brought the defendant into disrepute or did business with any company in direct competition with the defendant.
12. It is clear from the Notice that at that time the defendant was not aware of any fact that could allow it to rely on the provisions of clause 6.3 and that the agreement was thus not terminated as a result of any fault of the plaintiff.
13. Thirdly, subsequent to the termination of the Agreement, the defendant never paid any commission to the plaintiff. It is thus clear that the defendant never had any intention to pay any commission to the plaintiff and that it relies in bad faith on clause 6.3.4 of the agreement in order to avoid doing so.
14. Fourthly, the defendant's allegations regarding its alleged reputational risk is (sic) so vague that it can be rejected out of hand. It clearly has not suffered a reputational risk or any damages as confirmed by the fact that it has failed to deliver a counterclaim to date hereof, despite threatening to do so.

15. Fifthly, as the Agreement was not cancelled as a result of any fault of the defendant, the plaintiff is entitled to continue to receive the payment of commission, especially as the defendant did not make any allegation that the plaintiff was not an active agent, as at the date of termination of the Agreement, for a period of 24 months, that the defendant's clients did not remain its active clients or that such clients are indebted to the defendant.

Conclusion and prayer

16. I confirm that the defendant's plea does not raise any issue for trial and it and that it has entered appearance to defend and delivered its plea purely in order to delay the relief rightly due to the plaintiff.

17. I must respectfully say that the plaintiff is entitled that summary judgment be granted against the defendant as prayed.

[37] It will be noted that the averments in the supporting affidavit added nothing by way of fact to what was already discernible from the particulars of claim. The legal character of the claim was also apparent from the summons, and the need for the plaintiff to describe 'the point of law' relied upon gave rise to awkwardly superfluous averments. The rest of the averments were purely argumentative; and, in arguing that the plea did not raise any issue for trial, the argument was misplaced. In context, it is evident what the deponent clearly meant was that the triable defences that were advanced in the plea were not bona fide and had been advanced merely for delay, which is something different. In short, in seeking to comply with the amended subrule, the deponent has actually highlighted the obscurity of the object(s) sought to be achieved by the amendments.

[38] It must be assumed that the plaintiff accepted that the manner in which the notice of cancellation had been couched had left it open to the defendant to fall back on clause 6.3 of the agreement during the period of notice were it able to establish a basis for doing so. If the position were otherwise, the plaintiff would no doubt have noted an exception to the plea, and indeed should have done so if that were the case. The defendant's failure to note an exception to the plea was essentially tantamount to a tacit admission that a cognisable defence was made out in it, at least on the face of it.

[39] The triable defence most obviously evident in the defendant's plea is its allegation that the defendant had cancelled the contract in circumstances in which it had been relieved of the obligation to pay ongoing commissions. The defendant alleged that the plaintiff had caused it reputational damage as a result of poor workmanship. If the allegation were well founded, it arguably engaged clause 6.3.4 of the contract, which entitled the defendant to summarily the cancel contract if the agent brought Chubb into disrepute. Bringing the defendant into disrepute would arguably amount to 'fault' for the purposes of clause 6.4 of

the agreement, with the consequence that it would be freed from any obligation to pay ongoing commissions.

[40] However, does the fact that the bones of a triable defence have been made out in the plea mean that summary judgment must be refused? The answer is clearly 'no'! The reason for the negative answer is that the enquiry is not whether the plea discloses 'an issue for trial' in the literal sense of those words, it is whether the ostensible defence that has been pleaded is bona fide or not. As discussed earlier, that that is the relevant enquiry in a summary application follows from the rule maker's decision to leave subrule 32(3) substantively unamended. If one were to apply the amended rule differently, it would be impossible to marry the requirement of a plaintiff apparently posited by subrule 32(2)(b) (viz. showing that 'the defence as pleaded does not raise any issue for trial') with what is demanded of a defendant in terms of subrule 32(3)(b) (viz. showing that its defence to the action is bona fide; i.e. that its ostensible defence is not a sham). The respective supporting and opposing affidavits would pass each other like ships in the night if one were to understand the notion of 'issue for trial' in subrule 32(2)(b) as denoting something different from a 'bona fide defence' within the meaning of subrule 32(3)(b).

[41] In the current case the plaintiff has given a number of reasons why it considers that the non-excipiable plea does not disclose a bona fide defence. It points out (i) that the defendant had been unable, when it gave notice of cancellation in September 2017, to identify with any specificity any respect in which the plaintiff had been at fault; (ii) that it had failed to pay any commission since the effective date of the termination of the contract in December 2017 without having informed the plaintiff that it had been found to have been at fault in any respect (iii) that by the time it delivered its plea in August 2019 it had still had not identified, other than in the vaguest and broad-brush terms, how the plaintiff had allegedly been at fault. It also points out (iv) that, even by September 2019, the plaintiff had been unable to formulate its supposed counterclaim for the damages it had allegedly sustained in consequence of allegedly having to remedy the plaintiff's allegedly defective workmanship. As observed earlier, these are all points that could have been argued on the papers as they were when the application was launched. They did not require to be spelled out in a supporting affidavit. The old style 'formulaic' supporting affidavit would have sufficed. The effect of the amended requirements for a supporting affidavit is, however, to require the defendant to deal with the argumentative material in its opposing affidavit. A defendant that fails to do that, does so at its peril.

[42] How has the defendant responded to the application? In the opposing affidavit - deposed to by its attorney of record instead, as might have been expected, by a director or manager of the defendant company – it is averred that the plaintiff has not pleaded any facts as to how the commission amount is derived and contended that '*in the absence of ... any factual allegations which would enable the amount to be speedily ascertained ... the amount claimed does not constitute 'a liquidated amount in money*'. It is also averred that the defendant '*has specifically pleaded that the agreement was terminated pursuant to clause 6.3.4, due to its'* (sic) *having suffered reputational harm, i.e. that the agreement was terminated due to Plaintiff's failure to provide adequate workmanship*'. The affidavit provides no particulars of the 'reputational harm' or of 'the inadequate workmanship'. It also says nothing about the 'financial loss' allegedly sustained by the defendant in remedying the defective workmanship that is alleged in the plea and which was identified there as the subject of an intended claim in reconvention that to date (March 2020) has still not seen the light of day.

[43] The opposing affidavit concludes with the following averments:

> **CONDITIONS NOT FULFILLED**
>
> 15. In the alternative to the aforegoing, and even if it is found that the termination was without due cause as alleged by the Plaintiff, in terms of the claim as pleaded the plaintiff is only entitled to claim payment in the event that certain conditions are met, namely that
>
> 15.1 Plaintiff had been an active agent for 24 months as at date of termination;
>
> 15.2 The Client remains an active client of the defendant; and
>
> 15.3 The Client has no money owing to the defendant.
>
> **Particulars of claim paras 6.2 - 6.4**
>
> 16. The Defendant has specifically denied that any or all of these conditions have been met.
>
> **Defendant's Plea par 7**
>
> 17. If it is found that any or all of these conditions have not been met, this would serve as a complete defence to the Plaintiff's claim, and it is therefore submitted that summary judgment ought to be refused.
>
> **CONCLUSION**
>
> 18. For the above reasons, it is submitted that the Plaintiff's case, to the extent that one exists, cannot under any circumstances be held to be unanswerable, and that summary judgment herein ought to be refused and the Defendant granted leave to defend.

[44] The averments in the defendant's opposing affidavit fall far short of what is required of it in terms of rule 32(3)(b) if it is to avoid summary judgment; see in this regard what has

been described as 'the classic formulation' by Colman J in *Breitenbach v Fiat SA*.[25] Where are the material facts it relies on for its defence? None are given.

[45] If the defendant were genuine in its reliance on clause 6.3.4 of its contract with the plaintiff, it should have been able to describe exactly how the plaintiff's workmanship had been defective and what it had been required to do to remedy it. It should have been able to identify the clients affected by the allegedly inadequate work. It did not do so.

[46] If any of the contractual conditions for continued commission payments had not been met, the defendant should have been in a position to identify the client involved and the basis upon which the trigger for releasing the defendant from its payment obligation had been activated; for example, because a client had terminated its service contract with the defendant. In such a case, 'the full facts' would include an indication of the name and address of the client concerned and the date upon which it ceased to be a client. The defendant, however, provided no particularity whatsoever.

[47] It is difficult to conceive that if the defendant really had a counterclaim against the plaintiff arising out of the expense incurred in undertaking remedial work, it would not be in a position, nearly two and a half years after the effective termination of the agency agreement, to formulate the claim, or at least furnish reasons for its inability to have done so. It did neither.

[48] To borrow from Navsa JA's characterisation of the defendant's position in *Joob Joob Investments*, 'such defences as were proffered [were] cast in the most dubious terms'.[26] The most probable inference in the circumstances is that no particularity has been furnished because the defences and supposed counterclaim are not genuinely advanced. This is especially so because the defendant not only failed, quite dismally, to satisfy the requirements of rule 32(3)(b), it also failed to respond to the challenge to it in the plaintiff's supporting affidavit to back up its bald plea with substantiating particularity. If a defendant fails to put up the facts that it obviously should have been able to do were it advancing a genuine defence, it cannot complain if the court is left in a position in which it is unable to find a reasonable basis to doubt that it does not have a bona fide defence. There is, moreover, nothing in the papers to justify the court exercising its overriding discretion in favour of the defendant.

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[25] *Breitenbach v Fiat SA* supra, loc. cit.

[26] At para. 34.

[49] There is no merit in the allegation that the claim is not one in a liquidated amount. The amount claimed is based on the monthly commissions that the plaintiff was receiving when the contract was terminated. The basis for them should be readily confirmable from both the plaintiff's and the defendant's records, and therefore subject to quick and ready proof.

[50] In the result I am satisfied that the plaintiff is entitled to summary judgment in respect of its liquidated claim and an order to that effect will issue. However, I do not consider that the prayers for payment of commission from 1 March 2019 onwards, together with interest thereon, are in respect of liquidated claims. They constitute claims for debts that had not yet come into existence when the summons was issued and therefore could hardly be regarded as liquidated. The plaintiff was also not in a position, when the action commenced, to allege that the conditions to which the defendants continuing obligation to maintain the commission payments had continued to be satisfied after the date of the initiation of proceedings. It is by no means clear to me that it was competent in the given circumstances for the plaintiff to seek judgment for payments to be made *in futuro*.

In case no. 3670/2019

[51] The claim in case no. 3670/2019 is almost identical to that in case no. 3671/2019. The only differences are in the amount that has been claimed (in this case, a total of R885 427,35 based on unpaid commissions of R59 028,49 per month from 1 December 2017 to 28 February 2019) and that a copy of the agreement was not attached to the particulars of claim because, so it is alleged, 'the plaintiff does not have a copy of the Agreement in its possession and accordingly cannot attach it hereto'. The plaintiff did annex a copy of the defendant's letter of termination, which, apart from the name of the addressee, is in identical terms to the letter addressed to the plaintiff in case no. 3671/2019, quoted in paragraph [31] above. The claim also includes a prayer for payment of commission from 1 March 2019 onwards. For the reasons given in the preceding paragraph, I do not regard the claim for ongoing payments as a liquidated claim.

[52] Having entered appearance to defend, the defendant failed to deliver its plea timeously and was placed under bar. The plea that was ultimately delivered was in identical terms to that delivered in case no. 3671/2019. Notwithstanding that it referred to various clauses in the agreement between the parties, the defendant did not attach a copy of the agreement to the plea.

[53] The affidavit in support of the application for summary judgment is substantially identical in its wording to that in case no. 3671/2019. That is not surprising having regard to the correspondence between the respective causes of action and the fact that both of the plaintiffs are represented by the same attorney. It is evident from the allocated case numbers that the summonses in the actions must have been issued at the same time.

[54] The opposing affidavit, in this case, also deposed to by the defendant's attorney of record rather than a director or employee of the defendant company, is in identical terms to that made in case no. 3671/2019. It falls short of what is required in terms of rule 32(3)(b) for the same reasons as those stated in paragraphs [42] to [49] above. In the circumstances, summary judgment will be granted in this case in the amount of R885 427,35.

Orders

[55] The following order is made in case no. 3671/2019:

(a) Summary judgment is granted in favour of the plaintiff in the sum of R1 063 640,40, together with interest a tempore morae at 10,25% per annum on the constituent monthly amounts of R70 897,36 from the dates upon which each such amount fell due during the period 31 December 2017 to 28 February 2019 to date of payment.

(b) The defendant is ordered to pay the plaintiff's costs of suit incurred to date of this judgment.

(c) The plaintiff's claim for ongoing payments from 1 March 2019 is referred to trial and, insofar as necessary, the defendant is granted leave to defend that claim.

[56] The following order is made in case no. 3670/2019:

(a) Summary judgment is granted in favour of the plaintiff in the sum of R885 427,35, together with interest a tempore morae at 10,25% per annum on the constituent monthly amounts of R59 028,49 from the dates upon which each such amount fell due during the period 31 December 2017 to 28 February 2019 to date of payment.

(b) The defendant is ordered to pay the plaintiff's costs of suit incurred to date of this judgment.

(c) The plaintiff's claim for ongoing payments from 1 March 2019 is referred to trial and, insofar as necessary, the defendant is granted leave to defend that claim.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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