Republic of South Africa

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

Case number: 3508/2021

Before: The Hon. Mr Justice Binns-Ward

Hearing: 18 November 2021 and 28 February 2022
Judgment: 14 March 2022 (order granted 28 February 2022)

In the matter between:

ABSA BANK LIMITED Plaintiff/Applicant

and

MARCEL CHRISTOFFEL MEIRING Defendant/Respondent

Order: The defendant is granted leave to defend the action. The costs of the summary judgment application shall be costs in the cause.

JUDGMENT
(Delivered by email to the parties and release to SAFLII.)

BINNS-WARD J:

[1] In this matter the plaintiff instituted action against the defendant for payment of an amount totalling R1 104 540.94, being the amount still outstanding on five instalment sale agreements by Artista 152 CC after the close corporation had been wound up. Recovery was

sought from the defendant based on the unlimited deed of suretyship he had executed in favour of the plaintiff in respect of any indebtedness to the bank by the close corporation.

[2] The defendant delivered notice of his intention to defend the action, but failed to deliver a plea within the time prescribed by the Uniform Rules. The plaintiff thereupon delivered a notice of bar. That elicited a special plea of extinctive prescription from the defendant. He did not plead over.

[3] The plaintiff then applied, in terms of the amended procedure under rule 32, for summary judgment. As required by the amended rule, the plaintiff's application was supported by an affidavit directed to show why the *pleaded* defence did not raise any issue for trial.

[4] The defendant responded with an opposing affidavit in which he adumbrated a defence based on the merits of the case; in other words, relying for the first time on the record on matters that fell to be pleaded in a general plea. When the summary judgment application was called before me on the opposed motion roll, the defendant had nevertheless still not delivered a general plea incorporating the defences identified in his affidavit opposing summary judgment.

[5] In the result, and essentially by agreement between the parties, the application was postponed for three months upon directions to the defendant to deliver his plea on the merits and for the exchange thereafter of supplementary supporting and opposing affidavits on the issue of summary judgment. The parties appeared to accept that the defendant was entitled of right to introduce a general plea at that stage, without the need for an application to amend his plea. The postponement was necessary because the plaintiff was not called upon to deal in a supporting affidavit in terms of Rule 32(2)(b) with any defences that had not been pleaded.[1]

[1] Rule 32(2) provides:

[6] On the resumption date, the court was asked to make an order by agreement refusing summary judgment and directing that the matter proceed to trial with the costs of the summary judgment proceedings to be costs in the cause. I made an order as requested but indicated at the time that a reasoned judgment would follow.

[7] It may be inferred from the history of the matter that the plaintiff would probably not have applied for summary judgment had it been apprised of all the defendant's grounds for defending the action at the stage when the defendant, purporting to comply with Rule 22, delivered his special plea. It follows that the defendant's conduct in failing to plead over materially delayed the finalisation of the litigation and contributed to an unnecessary incurrence by the parties of additional costs, not to mention an unwarranted demand on judicial time and court resources.

[8] What happened was plainly at odds with what presumably remains the object of the summary judgment procedure: the time and cost-effective disposal of litigation in matters that are amenable to the process and in which a defendant is not able to show that it has a bona fide defence. It begged the question whether it should be permissible for a defendant, at least in matters that could be affected by an application for summary judgment, to plead only those of its defences that can be specially pleaded and to withhold until a later stage its plea on those defences that fall to be generally pleaded.

'(a) Within 15 days after the delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment, together with an affidavit made by the plaintiff or 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 plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated date not being less than 15 days from the date of delivery thereof.'

(Underlining supplied for highlighting purposes.)

[9] Considerations of practicality and sound case management strongly suggest that the answer should be in the negative. But, as with other aspects of the new summary judgment procedure (see *Tumileng Trading CC v National Security and Fire (Pty) Ltd* [2020] ZAWCHC 28 (30 April 2020), 2020 (6) SA 624 (WCC) and *Belrex 95 CC v Barday* [2020] ZAWCHC 149 (6 November 2020), 2021 (3) SA 178 (WCC)), the rule maker omitted any express provision for the eminently foreseeable and potentially unwholesome situation attending the amendments to rule 32 that require a plaintiff in its supporting affidavit to '*explain ... why the defence as pleaded does not raise any issue for trial*'.

[10] The introduction of an express provision requiring a defendant to plead all its defences when delivering a plea would have been welcome, as historically there has not been uniformity of practice in this regard. Thring AJ described the prevailing position as follows in *Meyerson v Health Beverages (Pty) Ltd* 1989 (4) SA 667 (C) at 674A-D:

> 'In this Division the practice as regards pleading over has differed somewhat from that in some other Divisions. In the Cape, especially where a defence such as want of jurisdiction or *lis pendens* has been raised by way of a special plea, pleading over on the merits has usually not been insisted on. See *George v Lewe and Another* 1935 CPD 402 at 405; *Schuddingh v Uitenhage Municipality* 1937 CPD 113 at 118, Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 324-5 and Nathan, Barnet and Brink *Uniform Rules of Court* 3rd ed at 146. In such a case, where the special defence has failed, the Court entertains an application by the defendant to plead over on the merits. In *David Beckett Construction (Pty) Ltd v Bristow* 1987 (3) SA 275 (W) Flemming J, after referring at 278G to "a differing Cape view of a plea in bar" pointed out at 279G-H that there is no provision made in the Rules of Court for such a

procedure. He held at 280C-D that the intended effect of the Rules is that "every defence must be raised as part and parcel of the plea required by rule 22". See also *Pretorius v Fourie NO en 'n Ander* 1962 (2) SA 280 (O) at 283C-D.'[2]

The Cape practice plainly envisaged a trial of the special plea before any general defences needed to be raised. An application for a separation of issues in terms of rule 33(4) would not be necessary. Instead, an application for leave to plead over would follow if the specially pleaded defence were dismissed. An examination of the early Cape jurisprudence shows that the practice of not requiring a defendant to plead over was by no means consistent, and was discriminately applied according to the nature of the special plea involved. In my experience, however, the distinctions drawn in the early cases seem to have blurred into extinction and, latterly, what I shall call 'the Cape practice' became an all-embracing allowance that it was not necessary for a defendant to plead over when a special plea was filed.

[11] The commonly encountered persistence in 'the Cape practice' is borne out by the commentary on Rule 22 in the latest edition of Loggerenberg, *Erasmus, Superior Court Practice*. Cilliers and Loots, *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th ed (Juta, 2009) notes '(t)here is still controversy as to whether it is required to plead over on the merits of the matter when a special

[2] In *Pretorius* supra, at 283E-F, Smit JP, De Villiers J concurring, expressed the view that a defendant which contented itself with delivering just a special plea could not as of right thereafter deliver a general plea. He considered that it would be necessary for such a defendant to apply for and obtain leave to amend the originally delivered plea to add a general plea. The learned judge pointed out that there was no provision in the then pertinent magistrates' court rules (as there is also not in the subsequently adopted Uniform Rule 22) '*vir die indiening van verwere of verweerskrifte stuksgewys*' [*trans*.'for the piecemeal delivery of defences or pleas']. Herbstein J, Ogilvie Thompson J concurring, had expressed the same opinion in *Malherbe v Britstown Municipality* 1948 (1) SA 676 (C) at 679, and Ogilvie Thompson J, Van Wyk J concurring, reiterated that view in *King's Transport v Viljoen* 1954 (1) SA 133 (C) at 134D, stating '(d)*efendant then filed a special plea to the jurisdiction of the court, at the same time pleading in the alternative to the merits. This was a correct procedure, see Malherbe v Britstown Municipality ...*'. Those courts highlighted the procedural distinction between the simultaneous pleading of all a defendant's defences together and the subsequent separate hearing of any specially pleaded defence(s).

defence is raised by a special plea'.[3] That observation was, of course, made before the change to the summary judgment application procedure.

[12] 'The Cape practice' originated long before the adoption of the Uniform Rules in January 1965. It was probably inspired by the practice in Roman Dutch law, described in *Herbstein and Van Winsen* op cit, that 'it was not necessary to plead over when special defences such as lack of jurisdiction, *lis pendens*, *res judicata*, submission to arbitration, compromise, award of arbitrators, abandoning of appeal, non-appealability or want of capacity were pleaded'.[4] The practice did not exist in a procedural environment that allowed for summary judgment applications (which were introduced in this country only in the early 20th century[5]), and more especially the procedure currently in place in terms of the recently amended Rule 32.

[13] As the title implies, one of the objects of the Uniform Rules was to eliminate or reduce the incidence of differing rules of procedure in the various provincial and local divisions of the erstwhile Supreme Court. The purpose of procedural rules of court has always been, and remains, the efficient administration of justice, and any construction of them that would conduce to a hampering effect would be dubious; cf. *Motloung and Another v The Sheriff, Pretoria East and Others* (1394/2018) [2020] ZASCA 25; 2020 (5) SA 123 (SCA) (26 March 2020) at para 27, citing *Ncoweni v Bezuidenhout* 1927 CPD 130, in which Gardener JP said 'if there is a construction [of a rule of procedure] which can assist the administration of justice I shall be disposed to adopt that construction' .

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[3] At p. 586.

[4] At p. 603, citing (in fn. 104) J van der Linden *Institutes of Holland* Book III, Part I, chapter II, section XV (p 275 Translation by Juta). Innes CJ referred to the Roman Dutch practice in *Coronel v Gordon Estate G.M. Co., Ltd.* 1902 TS 112 at 115.

[5] See *Tumileng* supra, at para 13 and the sources cited there in note 15.

[14] Rule 22 does not make provision for the piecemeal pleading of defences, and it is difficult to conceive how permitting a defendant to disclose its defences in stages might in any contribute to the efficient and cost-effective administration of justice. All the indicators point the other way. The Roman Dutch law procedural practice, on which the 'the Cape Practice' seems to have originally been based, appears to have allowed pleading over to be deferred only in matters in which the special plea was directed at an issue or issues that called for preliminary determination before the merits of the claim were entered into. However, as noted in the judgments cited in note 2 above, the separate hearing and determination of specially pleaded defences as a matter of practicality and convenience is no way inhibited by an undiscriminating requirement that a defendant with a special defence should plead all its defences at the same time by pleading over. The decision whether any part of a pleaded case should be heard separately and before the rest of it is one best made when the court and the parties are in position to identify and review the implications of all the issues that might have to be determined in the action.

[15] If the intention had been to entrench the Roman Dutch procedure mentioned above, one would have expected the rule maker do have done so expressly. All the more so, in the context of the divergent practices concerning pleading over that were evident in the various divisions of the Supreme Court when the Uniform Rules were adopted and which had, even by then, been discussed over a long period of time in a significant number of earlier reported judgments. Rule 23(4), which provides 'Whenever any exception is taken to a pleading or an application to strike out is made, no plea, replication or other pleading over shall be necessary', suggests that the rule maker did apply its mind to the issue of pleading over. It chose to spell out when pleading over was not required.

[16] In the circumstances there was much to be said for the view expressed by Flemming J in *Beckett Construction* supra, concerning the interpretation of Rule 22. It is an interpretation that has enjoyed endorsement by the Constitutional Court in *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels* [2021] ZACC 24 (2 September 2021); 2021 (11) BCLR 1203 (CC); 2022 (1) SA 317 (CC) at para 33, where Mhlantla J stated that '(g)*enerally, when a special a plea is raised, all the defences on which the defendant intends to rely must be raised at the same time. This is so because, should the special plea fail, there would be no further opportunity to plead over on the merits*.'[6] (Interestingly, although the judgment makes no reference to the Roman Dutch practice, the special plea involved in *Crompton Street Motors* was one of submission to arbitration.) In addition to *Beckett Construction*, the Constitutional Court judgment (loc. cit.) cited *Thyssen v Cape St Francis Township (Pty) Ltd* 1966 (2) SA 115 (E) at 116G, where O'Hagan J stated '*If Rules 22 and 23 are read together one gains the impression that Rule 22 envisages the pleading of all defences at one and the same time. It is otherwise in the case of an exception where all the Court is concerned with is the content of the pleading attacked*'.[7]

[17] The Constitutional Court's judgment gives no indication, however, that the different practice followed by some practitioners in the Western Cape was considered. The nature of the question in issue did not require of it to do so. It is nevertheless evident from the context that the dictum was founded on the Court's interpretation of the Uniform Rules, and therefore, even if paragraph 33 of the judgment is obiter, it falls to be regarded as powerfully persuasive.

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[6] Footnotes omitted.

[7] The learned judge presumably had in mind Rule 23(4), which I have quoted in paragraph 15 above. *Herbstein and Van Winsen* op. cit. supra, at p. 604, points out that '(p)*rior to the coming into effect of the Uniform Rules there was also controversy as to whether it was necessary to plead over when exception was taken or an application to strike out was made*'. Noting that Uniform Rule 23(4) has settled that issue, the authors note that it is unfortunate that the rules contain no express provision as to whether pleading over is necessary when a special plea is filed.

[18] It is well established that statutory interpretation should be undertaken by construing the language used by the lawmaker with proper regard to its context, including the apparent purpose of the instrument; see *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16 (5 June 2014); 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28, since repeatedly endorsed by the Constitutional Court, most recently, in the reported judgments, in *BE obo JE v MEC for Social Development, Western Cape* [2021] ZACC 23 (27 August 2021); 2021 (10) BCLR 1087 (CC); 2022 (1) SA 1 (CC) in para 21 (fn. 27).

[19] The delay, unnecessarily increased costs and inconvenience occasioned in the current matter by the defendant's failure to plead over serve to demonstrate that the administration of justice would be better served by interpreting rule 22 to require a defendant to plead over, and by recognising that it does not leave scope for the continuation of 'the Cape Practice'. The implications of the amended rule 32(2)(b) have made it opportune to spell that out unambiguously, whereas it had previously perhaps not been exigent to do so.

[20] It follows that a defendant in a summary judgment application which has failed to plead all its defences will be required to apply to amend its plea if it seeks to add any for the purposes of its opposition to summary judgment. A defendant's failure to have pleaded such defences initially will be material and, in addition to all the usual requirements to obtain the indulgence of being granted leave to amend, will require convincing explanation if it is to exclude the possibility that a court might infer delaying tactics and a lack of bona fides. An additional effect will be that such a defendant will ordinarily have to bear the wasted costs of the application for leave to amend and those occasioned by any attendant postponement of the summary judgment application.

[21] In the current case I was content, against the background of prevailing uncertainty about the continuing acceptability of 'the Cape practice', to make the orders agreed to by the parties. The object of this judgment is to signal that will not be the case in the future.

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

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