

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2021/0031

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 28 July 2023

WJ du Plessis
WJ du Plessis

In the matter between:

SA TAXI DEVELOPMENT FINANCE (PTY) LTD

PLAINTIFF / APPLICANT

and

TREVOR COLLIN JOHNSON

DEFENDANT / RESPONDENT

JUDGMENT

DU PLESSIS AJ

Introduction

- [1] This is an application for summary judgment for the return of a vehicle and costs. The Plaintiff (as the Applicant is in the main action) is only seeking the return of the vehicle and costs.
- [2] On the day of the hearing, there was no appearance for the Respondent. My registrar phoned counsel for the respondent indicated in the practice note (an attorney with

right to appearance). She said that she did not receive an instruction for appearance, despite informing the instructing attorney about the date of set down. Out of concern for the Respondent she hastened to court (after the court adjourned) to put that on record. Without an instruction, however, she could not address me on any merits and the Respondent remained unrepresented. Counsel for the plaintiff persisted in their request for summary judgment. I heard the matter and reserved judgment.

- [3] The fact that there was non-appearance for the Respondent does not mean that the summary judgment must be decided on default. In *Morris v Autoquip (Pty) Ltd*¹ the court found that an application for summary judgement should be distinguished from a trial or even an application for provisional sentence. As it is an extraordinary remedy the court is not permitted to ignore the affidavits filed by the defendant in opposition to the application for summary judgment. Thus, although there was no appearance for the Defendant, the court did consider its opposing affidavit, although, as will be shown, nothing turns on it.

History of the matter

- [4] After the Plaintiff filed an application for summary judgment, the Defendant amended his pleas several times. The chronology is set out below to understand better how the case has progressed.
- i. On the 4th of January 2021, the Applicant issued the summons.
 - ii. On the 26th of January 2021, the Respondent served a notice of intention to defend.
 - iii. On the 9th of March 2021, the Applicant served a notice of bar for the Respondent to deliver his plea.
 - iv. On the 16th of March 2021, the Respondent served his plea.
 - v. On the 7th of April 2021, the Applicant served a notice of application for summary judgment.

¹ 1985 (4) SA 398 (W).

- vi. On the 14th of April 2021, the Respondent served a notice of intention to oppose summary judgment.
- vii. On the 11th of June 2021, the Respondent served his notice of intention to amend the plea and served his amended plea on the 29th of June 2021;
- viii. On the 20th of July 2021, the Applicant served its notice of application for summary judgment on the Respondent's attorneys of record.
- ix. On the 28th of July 2021, the Respondent filed his notice of intention to oppose summary judgment.
- x. On the 13th of January 2022, the Applicant served on the Respondent its heads of argument and practice note.
- xi. On the 27th of July 2022, the Applicant filed an application to compel the Respondent to file heads of argument. This was filed on the 10th of November 2022.
- xii. On the 20th of February 2023, the Respondent served his notice of intention to amend the plea and served his amended plea on the 13th of March 2023.
- xiii. On the 26th of June 2023, the Respondent served his notice of intention to amend the plea.

[5] The Defendant denies the amount in arrears, questions whether the Plaintiff is a registered credit provider and disputes that a valid contract was concluded. He also pleads the following special pleas:

- i. Jurisdiction – it should instead have been instituted in the Magistrates Court as per s 29(1)(e) of the Magistrates' Court Act 32 of 1994 read with s 172(2) of the NCA.
- ii. Jurisdiction – the agreement provides that the Magistrate's Court has the necessary jurisdiction to hear the matter, and this is more in line with s 34 of the Constitution since the Defendant does not have the means to litigate in the High Court.
- iii. Reckless credit – that reckless credit was granted contra s 81 of the NCA.

[6] The Defendant amended this plea before the summary judgment application as follows:

- i. Lack of jurisdiction in terms of section 21(2) of the Supreme Court Act 10 of 2013 as the agreement was signed in Nigel and the Defendant resides in Potchefstroom (amendment of the 29th of June 2021).

[7] In the affidavit to their Rule 32(2) application, the Plaintiff dealt with these defences and pleas. However, after filing the supporting affidavit to the R32(2) application, the Defendant amended its plea, and added the following additional special plea:

- i. No locus standi to enter into a lease agreement (amendment of the 13th of March 2023, supplemented by the 26th of June 2023 proposed amendment).

[8] There is no affidavit before the court dealing directly with the amended pleas, the additional special plea and the defences it raises. This is not entirely the Applicants' fault, as the amended R32 allows for a scenario where a Defendant can amend their pleas after filing the application for summary judgment and the supporting affidavit. This raises the question of what the court should do when the supporting affidavit does not address additional defences and/or special pleas filed after the application for summary judgment.

The law

[9] Summary judgments are opposed matters where the claim is that the only reason the defendant opposes the matter is to delay the matter. The rules are thus there for a plaintiff who finds themselves in such a situation to attempt to shortcut the proceedings by obtaining a judgment without going to trial. This is an extraordinary procedure as it allows the court to grant a final order without hearing the other side during a trial. At the same time, it only seems fair that a plaintiff should not have to litigate if the defendant has no defence to the claim. It is then for the court to balance these two interests.

[10] Previously the rules provided that a plaintiff could launch an application for a summary judgment 15 days after the notice of intention to defend. Under the new

Rule 32,² the plaintiff can only launch the application 15 days after the Defendant filed his plea. This is, presumably, to ensure that the Defendant at least gets some chance to be heard and so comply with the *audi alterem partem* principle, and to enable courts to be more confident in granting summary judgments.

- [11] The affidavit to support summary judgment is a very technical document strictly prescribed by the rules. Rule 32(2) requires the filing of a supporting affidavit by the plaintiff, and rule R32(4) precludes the plaintiff from producing any other evidence other than what is contained in the supporting affidavit. Because it is such an extraordinary procedure, strict compliance with the forms is important.
- [12] It might be that this amendment to the rule allows opportunistic defendants to delay the matter and frustrate plaintiffs. Under the new rule, a defendant can wait 20 days to lapse and not deliver his plea. Then the plaintiff must file a notice of bar to force the defendant to deliver a plea. The defendant can also amend its plea after the application for summary judgment, which, as will be seen below, in the absence of the plaintiff filing another affidavit can lead to non-compliance with R32(2)(b). This all happened in this case. However, I am not making a finding on the *bona fides* or not of the actions by the Defendant in this matter, as this was not before me.
- [13] A similar situation arose recently in various matters. In the case of *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC), the court ruled that the defendant was not prohibited from making amendments to its pleading even after the submission of an application for summary judgment. The court further granted the plaintiff permission to file a new application based on the amended plea, provided that the application for amendment was approved.
- [14] In the case of *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd*,³ this court ruled on similar facts that was is available to a plaintiff in such a case is the filing of a supplementary affidavit, as Rule 28(8) makes provision for the right

² Applicable to applications after 1 July 2019.

³ 2022 (3) SA 458 (GJ).

to make a consequential adjustment to the "documents filed by him". This adjustment encompassed the submission of a supplementary affidavit that addresses the defence raised in the amended plea. The court states

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

[15] In *SA Taxi Development Finance (Pty) Ltd v Mako*⁴ the court held that on those facts, it was not only permitted, but compelled to file a supplementary affidavit. This was based on the view that the court must be satisfied that each of the requirements in Rule 32(2)(b) has been fulfilled before it can hold proper compliance with the sub-rule.⁵ In that case, the court found that the summary judgment is defective without a supplementary affidavit.

[16] In the absence of such a supplementary affidavit, it is not for the court to guess the validity of the Defendant's defence. This was explained in *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd*:⁶

"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."

⁴ [2022] JOL 56109 (GJ). Incidentally, in this case it was the same Applicant represented by the same counsel.

⁵ *Mpfuni v Segwapa Inc and Another* 2022 JDR 0617 (GJ) paras 5 and 6.

⁶ [2020] ZAWCHC 28; 2020 (6) SA 624 (WCC) para 23.

[17] In this case, the Applicant has not requested leave from the court to file a supplementary affidavit, and the new issues in the amended pleas, should they only be legal issues, was not dealt with in the heads of argument or in court. Thus, considering the amended pleas and in the absence of a supplementary affidavit that addresses the amended pleas, I have no other option but to find that there is a lack of compliance with Rule 32(2)(b).

Order

[18] I, therefore, make the following order:

1. The application for summary judgment is dismissed, and the Defendant is granted leave to defend the action.
2. The costs of the summary judgment application are costs in the cause.



WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:	Adv Rosalind Stevenson
Instructed by:	Marie-Lou Bester Incorporated
Counsel the for Respondent:	No instruction for an appearance on the day, Heads of Argument filed by Ms Roxanne Barnard (attorney)
Attorneys for Respondent:	Duff Pretorius Attorneys as correspondents for Naude Prokureurs Inc
Date of the hearing:	18 July 2023
Date of judgment:	28 July 2023