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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: **2023-115047**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 19 June 2024

SIGNATURE:

In the matter between:

PLUS 94 RESEARCH (PTY) LTD

Applicant

and

N[...] U[...]

First Respondent

N[...] U[...]

Second Respondent

(in her capacity as legal guardian
of the minor child D[...] M[...] U[...])

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The narrow issue to be decided in this judgment is whether, in summary judgment proceedings the filing by a defendant of an intention to amend its plea is a bar to the hearing of the application.

FACTS

- [2] For ease of reference the parties herein will be referred to as cited in the main action. Upon receipt of the summons, the defendants filed a notice to defend the action, which notice was followed by a plea.
- [3] The plaintiff, thereafter, and on or about 21 February 2024 brought an application for summary judgment. The defendants filed their affidavit resisting summary judgment on 4 April 2024 and the matter was duly enrolled for hearing on 27 May 2024. Prior to the hearing and on 22 May 2024 the defendants filed a notice of intention to amend their plea. In terms of rule 28(2) the plaintiff has 10 days to file a written objection to the proposed amendment, failing which the amendment will be effected. The 10 day period only expired on 5 June 2024. In the result, the period envisaged in terms of rule 28(2) expired after the date on which the summary judgment was set down for hearing.

SUBMISSIONS AND LEGAL PRINCIPLE

- [4] At the inception of the hearing, I enquired from the parties whether the filing of the notice of intention to amend is a bar to the hearing of the summary judgment. Ms Barnard, counsel for the plaintiff, submitted that the allegations in the proposed amended plea are ill-conceived and do not further the defendants' defence to the plaintiff's cause of action. As such, Ms Barnard submitted that the summary judgment application should proceed.
- [5] Mr Ntshaba, counsel for the defendants, held a different view. Mr Ntshaba contended that the proposed amendment needs to be dealt with in terms of the provisions of rule 28 and was, therefore, indeed a bar to the hearing of the summary judgment application at this stage.

- [6] Neither counsel could refer the court to case law on the point and the court afforded counsel an opportunity to file supplementary heads of argument dealing with the specific point. I am thankful to counsel for the supplementary heads of argument that were filed. The heads shed valuable light on the issue in question.
- [7] It appeared from the heads that the question was considered and answered by Henney J in *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC). In the *Belrex* matter the time period in terms of rule 28(2) had also not expired at the time of the hearing of the summary judgment application. Henney J dealt with the anomalies created by the procedure in rule 32 read with the provisions of rule 28 and concluded that the summary judgment application could not proceed until the proposed amendment had been effected.
- [8] Due to the prejudice caused to the plaintiff, in that the plaintiff was not afforded an opportunity to deal with the further defences raised in the amended plea, the plaintiff was given leave to bring a fresh application for summary judgment on the amended plea.
- [9] Fisher J in essence agreed, in *City Square Trading 522 (Pty) v Gunzenhauser Attorneys (Pty) Ltd and Another* 2022 (3) SA 458 (GJ), with the finding in *Belrex*. Fischer J, however, did not agree with the remedy afforded to a plaintiff in such circumstances and held as follows at para [18] and [19]:

“[18] In the case of the amendment of the plea after the filing of a summary judgment application, the plaintiff is decidedly 'a party affected' by the amendment. Thus, the provisions of the rule 28(8) apply to it and so afford it the right to adjust the founding affidavit without leave, provided the adjustment is consequential. The consequential adjustment in this instance would be the amendment of the affidavit filed in terms of rule 32(2)(a) to take account of the amendment. I do not read rule 32(4) to preclude such adjustment.

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

[10] I respectfully agree. In the premises, the summary judgment application cannot at this stage proceed. Once the provisions of rule 28 has been exhausted, the plaintiff may, if so advised, file a supplementary affidavit and set the summary judgment application down for hearing.

COSTS

[11] The only aspect left for determination is the wasted costs occasioned by the postponement of the application. The sole reason for the postponement is the belated filing of the defendants' notice of intention to amend their plea. It follows that the defendants should bear the wasted costs occasioned by the postponement.

ORDER

1. The application for summary judgment is postponed *sine die*.
2. The respondents are ordered to pay the wasted costs occasioned by the postponement.

**JANSE VAN NIEUWENHUIZEN, J
JUDGE OF THE HIGHT COURT
GAUTENG DIVISION, PRETORIA**

DATES HEARD:

27 May 2024

DATE DELIVERED

19 June 2023

APPEARANCES

For the Applicant: Advocate M Barnard

Instructed by: DIXON ATTORNEYS

For the Respondents: MR S NTSHABA

Instructed by: NDUMISO VOYI AND ASSOCIATES INC