



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

Case number: 4851/2022

In the matter between:

**REDEFINE PROPERTIES LIMITED**

Plaintiff

and

**B MASIQHAME TRADING 224 CC t/a TNT PROJECTS  
AND INVESTMENTS**

First Defendant

**THOZAMA NANCY TONGO**

Second Defendant

**Coram:** Acting Justice P Farlam

**Heard:** 7 August 2024

**Delivered electronically:** 20 August 2024

---

**JUDGMENT**

---

**FARLAM AJ:**

- [1] The proceeding in this matter which was set down for hearing on 7 August 2024 was a summary judgment application, which had been launched by the plaintiff on 18 March 2024, and initially set down for 22 April 2024, before being

postponed on that day as a result of the defendants' delivery of an answering affidavit, later than the date prescribed by Uniform Rule 32(3)(b), the week before. The summary judgment hearing could not however proceed on the 7<sup>th</sup> of August because, so I was informed from the bar, the defendants had served a Rule 28(4) application the day before (Tuesday, 6 August) and that application to amend the defendants' plea and counterclaim had to be adjudicated before the summary judgment application could proceed. The Rule 28(4) application – with a court stamp reflecting the date of 7 August 2024 (i.e., the date on which the summary judgment application had been set down) – was then handed up by the defendants' attorney.

- [2] The parties were agreed that the summary judgment application had to be postponed *sine die*. But they took divergent positions on the question of costs, as well as whether the plaintiff was entitled to further relief in order to ensure that it could potentially persist with its summary judgment application, or bring a new or amended summary judgment application, in due course. I shall consider those issues in turn.

### **The costs of the postponement**

- [3] The plaintiff submitted that the defendants should pay the wasted costs attributable to their eleventh-hour application to amend, which resulted in the derailing of the summary judgment application (which the plaintiff was ready to argue). The defendants, on the other hand, submitted that the wasted costs attributable to the Rule 28(4) application should stand over for consideration

in the action, or be costs in the cause in the action; alternatively be considered in the context of the amendment application.

- [4] As set out in *LAWSA*,<sup>1</sup> with reference to relevant case law:<sup>2</sup>

*'The general rule is that, where a party is responsible for a case not being proceeded with on the day set down for hearing, such party must pay the costs that are wasted. It is not correct to state as a general rule that wasted costs are to be paid by the party who seeks a postponement. That may be the normal order if no-one is to blame for the fact that the trial has to be postponed, but if a postponement has become necessary in consequence of the fault or default of one of the parties or his or her representative, the normal rule is that the wasted costs are awarded against the party who was at fault or in default.'*<sup>3</sup>

- [5] That approach is illustrated by the judgment of Cape Provincial Division of the High Court in *Sanvido*,<sup>4</sup> where, not dissimilarly to the present case, the defendant served a notice of intention to amend its plea and counterclaim shortly before the trial, necessitating the plaintiff seeking a postponement of the action *sine die* on the morning of the hearing. The Court (*per* Berman AJ, as he then was) ordered the defendant to pay the costs occasioned by, and attributable to, the notices of intention to amend; the costs of the plaintiff's application for a postponement and for payment of wasted costs; and the costs

---

<sup>1</sup> *The Law of South Africa*, Vol. 10 3<sup>rd</sup> ed. "Costs" para 314.

<sup>2</sup> Including *Burger v Kotze and Another* 1970 (4) SA 302 (W) at 304E-H; *Sublime Technologies (Pty) Ltd v Jonker and Another* 2010 (2) SA 522 (SCA) para [3].

<sup>3</sup> See, too, the comments in the same paragraph of the *LAWSA* "Costs" section under the heading "Costs of the day", where it is stated that a litigant who forces another party to apply for a postponement must, in the normal course, pay the costs of the (wasted) day or other wasted costs.

<sup>4</sup> *Sanvido & Sons (Civil Engineering) (Pty) Ltd v Aglime (Pty) Ltd* 1984 (4) SA 339 (C).



wasted as a result of the postponement of the trial. Berman AJ also *inter alia* stated the following in support of those orders:<sup>5</sup>

*'Here was a case where significant amendments were moved at a very late stage and - as I made clear in Manus v Nelson (supra)<sup>6</sup> - where a party is in no position to resist an application for a postponement of a trial, brought as a result of its having made late discovery (as in Manus' case) or as a result of substantial amendments made at a very late stage (as here), it would have to show very strong grounds for depriving the other party of its costs or for delaying argument as to liability therefor.'*

- [6] It is furthermore well-established,<sup>7</sup> as well as reiterated in Rule 28(9), that a party seeking to amend its pleadings is seeking an indulgence from the court and should accordingly pay the wasted costs occasioned by its application unless it provides good reasons for a different outcome.
- [7] In the present matter, there is no reason to depart from the normal position. On the contrary, there are compelling reasons for adhering to it. For in this case, it was not only possible for the defendants to have brought their application to amend earlier, but they were obliged by the Uniform Rules to do so. The defendants finalised Rule 28(1) notices, giving notice of intention to amend their plea and counterclaim, on 28 June 2024. On 11 July 2024, the plaintiffs objected to the proposed amendments (as they were permitted under Rule 28(3) to do), alleging among other things that the intended amendment "is a *mala fide* strategy aimed at causing the postponement of the plaintiff's

---

<sup>5</sup> *Sanvido supra* fn.4 at 343F-G.

<sup>6</sup> 1982 (2) PH F62 (C).

<sup>7</sup> See, e.g., *Myers v Abramson* 1951 (3) SA 438 (C) at 455E-H.

application for summary judgment set down for hearing on 7 August 2024". In terms of Rule 28(4), the defendants had ten (10) court days within which to lodge an application for leave to amend, were they to be desirous of persisting with the amendments. That period expired on 25 July 2024 (the day that the plaintiff's heads of argument were filed with the Court). No application for leave to amend was however brought then, or even in the week thereafter. It was only on the day before the hearing of the summary judgment application that a Rule 28(4) application was apparently served on the plaintiff; and it was only on the day of the hearing itself that the application to amend was filed with the Court.

- [8] To make matters worse, the second defendant has stated in the defendants' affidavit in support of its Rule 28(4) application that she instructed the defendants' attorney on 16 April 2024 to "consider filing for [sic] an application amending the said pleas and counterclaim on behalf of the defendants". The defendants therefore could, and should, have delivered their notice of intention to amend in late April, or at least early May 2024, all the more so as they had known since 22 April 2024 that the summary judgment application would now be heard on 7 August 2024. Yet the defendants' notice of intention to amend was only served about two-and-a-half months later, at the end of June 2024, and thus barely more than a month before the summary judgment application was due to be heard. That delay is moreover not explained at all in the second defendant's Rule 28(4) affidavit.



[9] The defendants' conduct thereafter also smacks of an intention to delay and frustrate, rather than a desire to effect amendments which were believed to disclose a *bona fide* defence, which the defendants were desirous of ventilating. It is, for example, apparent from an annexure to the second defendant's Rule 28(4) affidavit that the plaintiff's attorneys sent a letter to their counterparts dated 5 July 2024, in which they proposed a timetable designed to allow the defendants to effect their desired amendments without disrupting the hearing of the summary judgment application set down for 7 August 2024.<sup>8</sup> One would have expected a party which was seeking to amend its plea to introduce or amplify a defence which it genuinely believed to have merit to have agreed to that proposal, or at least engaged constructively with it (as the amended pleading should, on that hypothesis, render summary judgment unattainable). There is however no indication from the second defendant's Rule 28(4) affidavit that the defendants' attorney even responded to that letter. Nor, as mentioned, was the Rule 28(4) application thereafter brought within the prescribed ten days after the delivery of the plaintiff's notice of objection on 11 July 2024.

[10] The postponement was thus not only attributable to the defendants, but caused by their unexplained delays, exacerbated by their disregard of the

---

<sup>8</sup> The plaintiff proposed that (i) the defendants effect their amendments by delivering amended pleadings by 9 July; (ii) the plaintiff supplement its summary judgment papers by 11 July, in order to address the amendments; (iii) the defendants supplement their summary judgment answering affidavit by 16 July; and (iv) the summary judgment application be argued with reference to the amended pages on 7 August 2024.

Uniform Rules. It is therefore appropriate in the circumstances to order the defendants, jointly and severally, to pay the wasted costs occasioned by the postponement on 7 August 2024,<sup>9</sup> as sought by the plaintiff.<sup>10</sup> The plaintiff has also requested that counsel's costs be granted on Scale B. That seems apposite in the light of the size of the claim and the potential complexities of the summary judgment application.<sup>11</sup>

**The further orders sought by the plaintiff to facilitate the continuation of the summary judgment application**

[11] In addition to seeking the costs of the postponement, the plaintiff has, as mentioned, requested relief designed to ensure that it can persist with its summary judgment application. More especially, it has sought orders (contained in prayers 2 to 4 of the plaintiff's draft order) that:

- ‘2. *In the event of the First and Second Defendants' application in terms of Uniform Rule 28(4) dated 5 August 2024 being granted and on the First and Second Defendants perfecting the amendments to their plea and counterclaim pursuant thereto, the Plaintiff is given leave, if so advised, to re-enrol its application for summary judgment for hearing.*

---

<sup>9</sup> An order to this effect was made in *Plus 94 Research (Pty) Ltd v N.U. and Another* (2023/115047) [2024] ZAGPPHC 573 (19 June 2024) para 11, where, five days before the hearing of a summary judgment application (and more than a month after the delivery of an affidavit opposing summary judgment), the defendants filed a notice of intention to amend their plea. The court stated crisply: “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.”

<sup>10</sup> The plaintiff only seeks party-and-party costs, and it is therefore unnecessary to consider whether a punitive costs order would have been justified.

<sup>11</sup> These factors fall to be considered in terms of Uniform Rule 67A(3)(b).



3. *In the abovementioned event, and should the Plaintiff elect to re-enrol its application for summary judgment for hearing:*
  - 3.1 *the Plaintiff is to supplement its affidavit in support of its application for summary judgment within 10 days of the First and Second Defendants perfecting the amendments to their plea and counterclaim;*
  - 3.2 *the First and Second Defendants are to supplement their affidavit opposing the Plaintiffs application for summary judgment within 10 days thereafter; and*
  - 3.3 *the parties are to exchange heads of argument in accordance with the Court's practice directives.*
4. *In the event of the First and Second Defendants' application in terms of Uniform Rule 28(4) dated 5 August 2024 being refused, the Plaintiff is given leave, if so advised, to re-enrol its application for summary judgment for hearing.'*

[12] As plaintiff's counsel explained, those further orders are sought in light of the fact that Uniform Rule 32 does not expressly regulate a scenario in which a defendant amends, or seeks to amend, its plea after a summary judgment application has been brought, and there may thus be some uncertainty as to whether a plaintiff can still seek summary judgment in such circumstances.

[13] As this Court held in *Belrex v Barday*,<sup>12</sup> a defendant who is desirous of amending its plea in the face of a summary judgment application should be permitted to do so, in accordance with Uniform Rule 28. (That would be so, irrespective of whether the plea is sought to be amended before the defendant's affidavit in opposition to summary judgment has been filed, or thereafter.) Rule 32 does not preclude a defendant from amending its plea;

---

<sup>12</sup> *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC).



indeed, it does not deal with the filing of pleas at all. Nor does the rule detract from the rights accorded parties by Rule 28. As the plaintiff in this case appreciated, the defendant can therefore not be precluded from having its Rule 28(4) application heard in due course.

[14] As acknowledged in *Belrex*, an amendment by a defendant faced with a summary judgment application will however preclude the summary judgment application proceeding in the form in which it was issued. The summary judgment application would be directed at the initial plea, not the plea as amended. The plaintiff would therefore not have engaged with all the defences that the defendant has, subsequent to the launching of the summary judgment application, indicated that it wants to advance; and it might also have addressed defences which were no longer being persisted with. In the circumstances, the summary judgment application as issued would, at least to some extent, become moot.

[15] What accordingly falls to be considered is the consequences of such a development. That question is particularly important given that, as pointed out in *Belrex*,<sup>13</sup> a defendant faced with a summary judgment application could potentially use an amendment, or an application to amend, as a stratagem to frustrate a plaintiff which is seeking summary judgment. Were a late amendment of a plea by a defendant to have the effect of precluding a plaintiff

---

<sup>13</sup> At para 31.

from continuing with its summary judgment application, the purpose behind the rule would therefore be defeated.

[16] As observed in *Belrex*,<sup>14</sup> the consequences of a defendant filing an answering affidavit in opposition to summary judgment which (as in *Belrex*'s case and the present matter) deals merely with the initial plea, not the plea as amended or sought to be amended, have not been expressly provided for in the amended Rule 32. In the view of the court in *Belrex*, this is a lacuna "which the task team of the Rules Board may not have considered".<sup>15</sup> Fisher J in *City Square Trading*,<sup>16</sup> by contrast, takes, in her words, "a more benign view of the assiduity of the drafters of the amendments to rule 32". While noting that it is correct that the rule itself does not deal with what is to happen if there is an amendment to a plea which is the subject of a summary judgment application, Fisher J points out that Rule 28(8), which is of general application, takes account of the consequences of amendments of pleadings generally, and permits any party affected by an amendment to "make any consequential adjustment to the documents filed by him".

[17] A rule in the Uniform Rules, like a section of a statute, should be construed in accordance with the well-established rules of interpretation,<sup>17</sup> and thus with

---

<sup>14</sup> At para 34.

<sup>15</sup> At para 31.

<sup>16</sup> *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another* 2022 (3) SA 458 (GJ).

<sup>17</sup> As enunciated in the often-quoted judgment of Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18].

reference to the actual words used, the apparent purpose to which the provision was directed, the context in which it appears and the circumstances attendant upon its coming into existence. A sensible meaning is also to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose.

- [18] An objective of the amended Rule 32<sup>18</sup> was, as the Rules Board's explanatory memorandum indicated, to address *inter alia* the problem that, under the original rule "[d]eserving plaintiffs were frequently unable to obtain expeditious relief because of an inability to expose bogus defences (either in their founding affidavit or in any further affidavit – further affidavits not being permitted".<sup>19</sup> Were a summary judgment application under the amended rule able to be defeated by a defendant by the simple expedient of the defendant filing a notice to amend its plea, that objective would be defeated; and indeed the summary judgment procedure would have been rendered less, rather than more, efficacious.<sup>20</sup> As noted in *City Square Trading*:

*'[27] It is ... clear from the memorandum that the main purpose of the amendment to rule 32 was to avoid the formulaic approach of the old rule to the affidavit supporting a summary judgment application and to allow for proper engagement by the parties with the pleadings.'*

---

<sup>18</sup> The rule was amended with effect from 31 May 2019.

<sup>19</sup> This paragraph of the Rules Board's memorandum is quoted in para 24 of *City Square Trading supra* fn.16.

<sup>20</sup> Insofar as it may have been implied in *Lizinex (Pty) Ltd v FPC Solutions (Pty) Ltd and Others* (2022/17136) [2023] ZAGPJHC 1261 (3 November 2023) paras 31-35 that an amendment of a plea in the face of a summary judgment application would result in summary judgment being refused, I accordingly disagree.



*[28] In this context to interpret the rule so as to allow the amendment of the defence mid-summary judgment proceedings, but then to close the door in those proceedings to the engagement with the very inquiry which the rule requires, would make no sense.'*

[19] I agree with Fisher J that it would not be a sensible interpretation, nor one consistent with the purpose of Rule 32, to construe rule 32(4)<sup>21</sup> as precluding the plaintiff from doing anything more than filing one affidavit, in terms of rule 32(2), within fifteen days of the delivery of the defendant's initial plea, even if the defendant's defence were to change after the summary judgment application has been launched. That is also not required by the language of the rule. Properly construed, all that rule 32(4) stipulates is that a plaintiff should not be able to file a replying affidavit (an issue on which the Rules Board canvassed opinion before settling on the final wording of the amended Rule 32),<sup>22</sup> nor introduce any other evidence or allegations to bolster its case on receipt of an opposing affidavit which accorded with the original plea.

[20] Rule 32(4) does not address a circumstance in which the defendant has changed its case, or sought to amend or supplement its defence, after the summary judgment application was launched. Such a development would, as

---

<sup>21</sup> Rule 32(4) commences by stating that: "No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2) ...".

<sup>22</sup> As pointed out in para 26 of *City Square Trading*, para 8.2 of the Rules Board's memorandum suggested that permitting a less formulaic, and more substantive, founding affidavit to be filed after the defendant's plea had been filed, dealing with the defences advanced in the plea, was considered better than allowing a replying affidavit (as had been mooted a few decades earlier by a report prepared by the Galgut Commission).

Fisher J observed, be regulated by Rule 28. The following remarks in *City Square Trading* are accordingly apposite in this regard:

*[17] Rule 28(8) is deliberately inclusive. It does not specify that it relates only to consequential amendment of pleadings (it relates to 'documents') and neither does it prescribe how the 'adjustment' contemplated should take place. The only constraint is that it should be consequential on the amendment. Subrule (8), thus, expressly precludes the raising of issues which are extraneous to the pleading as amended. To the extent that an amendment of pleadings or relief other than one which is consequential is required, subrule (1) must be used and leave to amend must be sought.*

*[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.]*

*[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'.*

*[21] It could not have been the intention of the drafters of the rule to allow the plaintiff to raise points of law arising from the amended plea but to prohibit the*



*raising of factual content arising therefrom. Such a distinction would be irrational.*<sup>23</sup>

[21] The order granted in *Belrex* to deal with the defendant's late amendment of its plea in the matter – namely, granting the plaintiff leave to bring a fresh application on the amended plea, should such an application for amendment be allowed<sup>24</sup> – would therefore seem unnecessary (albeit a potential way of regulating the development in a particular case, should the court consider it appropriate in the circumstances). For, as explained above, the plaintiff would be able to amend its founding affidavit in the summary judgment application consequentially (by way of filing a supplementary affidavit) and the existing summary judgment application could therefore continue in amended form.

[22] Returning to the facts of the present case:

22.1 The defendant has, as mentioned, delivered a last-minute application to amend, which prevented the plaintiff's summary judgment application from proceeding on the postponed set-down date. The defendant is entitled to have its Rule 28(4) application considered on the merits, assuming that it can persuade the court hearing that application to condone its delivery outside the time period provided by rule 28(4). In the event that the defendant is

---

<sup>23</sup> This interpretation, and resulting approach, was agreed with by Janse van Nieuwenhuizen J in *Plus 94 Research supra* fn.9 paras 9-10, as well as in *Compensation Solutions (Pty) Ltd v Compensation Commissioner and Others* (56219/2021;49156/2021) [2023] ZAGPPHC 572 (18 July 2023) para [24].

<sup>24</sup> Para 38.



denied leave to amend, the plaintiff must clearly be permitted to again set down the summary judgment application (in its current form) for determination. On the other hand, if the defendant is granted leave to amend its plea and counterclaim, then, in terms of Rule 28(4), the plaintiff would be permitted to “make any consequential amendment to the documents filed by [it]”. Those documents would include not only its pleadings in the action (with the result that the plaintiff could amend its plea to the defendant’s counterclaim, and also file any replication to the amended plea which it considers appropriate<sup>25</sup>), but also its affidavit in support of its summary judgment application, which could be supplemented to deal with the amended plea and counterclaim, but only insofar as the amendment is concerned.

- 22.2 The relief sought by the plaintiff thus accords with the position under the Uniform Rules, and what should therefore anyway occur subsequent to the defendant’s Rule 28(4) application being determined. It may therefore be unnecessary to grant the prayers contained in paragraphs 2 to 4 of the plaintiff’s draft order. However, as the defendant’s attorney objected to those prayers on the basis that they were purportedly incompetent, it would seem conducive to clarity, as well as in the interests of the smooth progression of this

---

<sup>25</sup> See *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd* 2023 (5) SA 439 (WCC); *Erasmus Superior Court Practice* 2ed at D1 Rule 32-20 to 32-23.

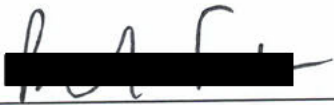
already delayed matter, to grant the orders as prayed. There was no suggestion by the defendant's attorney that the time periods provided for in prayer 3 of the draft order were inappropriate, and those will accordingly be included in the order as well.

**[23] I accordingly make the following order:**

1. The summary judgment application is postponed *sine die*.
2. The First and Second Defendants must, jointly and severally, pay the wasted costs occasioned by the postponement, including the costs of counsel, which are granted on Scale B.
3. In the event of the First and Second Defendants' application in terms of Uniform Rule 28(4), filed on 7 August 2024, being granted and the Defendants perfecting the amendments to their plea and counterclaim pursuant thereto, the Plaintiff is given leave, if so advised, to re-enrol its application for summary judgment for hearing.
4. In the abovementioned event, and should the Plaintiff elect to re-enrol its application for summary judgment for hearing:
  - 4.1 the Plaintiff may supplement its affidavit in support of its application for summary judgment within 10 days of the First and Second Defendants perfecting the amendments to their plea and counterclaim;
  - 4.2 the First and Second Defendants may supplement their affidavit opposing the Plaintiff's application for summary judgment within 10 days thereafter; and

4.3 the parties are to exchange heads of argument in accordance with the Court's practice directives.

5. In the event of the First and Second Defendants' application in terms of Uniform Rule 28(4), filed on 7 August 2024 being refused, the Plaintiff is given leave, if so advised, to re-enrol its application for summary judgment, on the same papers, for hearing.

  
\_\_\_\_\_  
**ACTING JUDGE P FARLAM**

For applicant: Adv C Quinn

Instructed by: Bernadt Vukic Potash & Getz Attorneys (G Ford / M Lottering)

For respondents: Mr P I Sharuh

Instructed by: Sharuh Attorneys (K Singh)