

SOUTH AFRICA / JUDGMENT

Belrex 95 CC v Barday (4364/2020) [2020] ZAWCHC 149; 2021 (3) SA 178 (WCC) (6 November 2020)

[2020] ZAWCHC 149

COURT

Western Cape High Court, Cape Town

BEFORE

R.C.A. Henney

CASE / FILE NUMBER

4364/2020

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[REPORTABLE]

Case No: 4364/2020

In the matter between:

BELREX 95 CC

Plaintiff / Applicant

vs

MOHAMMED ZUBAIR BARDAY Defendant / Respondent

Date of hearing: 13 August 2020

Date of Judgment: 6 November 2020 (to be delivered via email to the parties' legal representatives at 11h30)

JUDGMENT:

6 NOVEMBER 2020

HENNEY, J

Introduction:

[1] The question for consideration in this matter is whether an application for summary judgment can be granted, in terms of the

amended Rule 32, where the defendant amended his initial plea after the application for summary judgment had commenced.

[2] The plaintiff's claim is based on a mandate given to the defendant, as attorney and sole proprietor, to transfer a property in terms of a written agreement of sale between itself ("the Seller"), and Ozran 55 (Pty) Ltd ("the Purchaser / Ozran") for R12 500 000, plus Value Added Tax ("VAT") of R1 750 000, the total being R14 250 000, that was concluded on 11 October 2018, in terms of which the plaintiff sold the immovable property known as the Remainder of Erf 10295, Grassy Park ("the property") to the purchaser.

[3] The defendant orally accepted the mandate, and accepted instructions from plaintiff to transfer the property from Belrex 95 CC to the purchaser. The purchase price was paid into the defendant's trust account in instalments amounting to R14,250,000.

[4] It is common cause that the defendant provided the plaintiff with a statement of account, on 25 January 2019, stating that the net sum payable to the plaintiff from the proceeds of the sale was R12 564 721,76. Transfer of the property was registered by the defendant at the Deeds Office, Cape Town, on 25 January 2019.

[5] The plaintiff demanded payment of the balance on 5 March 2019, whereafter the defendant, on the same day, paid an amount of R1 067 520,55. On 14 March 2019 he paid a further amount of R1 500

000. On 29 March 2019 the defendant provided the plaintiff with 20 x R500 000 trust cheques, issued in favour of the plaintiff, post-dated to the 2nd and 3rd April 2019, which in total amounted to R10 000 000.

[6] On 4 March 2020 the plaintiff issued summons out of this court against the defendant, claiming that the defendant provide the

plaintiff with a full detailed statement of account; payment of the amount of R11 814 721,76, including payment of interest on this amount, at the rate of 10% per annum from 25 January 2019 to the date of final payment; and for costs on an attorney and client scale.

[7] In response thereto the defendant filed a Notice of Intention to Defend on 18 March 2020. On 17 June 2020 the plaintiff filed a Notice of Bar, wherein the defendant was requested to file his plea within 5 days of receipt of the Notice.

The initial plea:

[8] On 19 June 2020 the defendant filed his plea ("the initial plea"), wherein he raised various defences, amounting to the following: he denied the accuracy of the terms of the agreement; denied that his firm accepted instructions to pay the balance of the purchase price; denied

that the plaintiff became entitled to receive the VAT payable in terms of the transaction between itself and the purchaser; denied that he was indebted to the total amount of R14 314 721,76; denied that he was liable for interest in terms of the written agreement as varied by the subsequent agreement between the parties; denied that he ever countermanded the payment of any cheques; and denied that the amount claimed as the balance of the purchase price was R11 814 721,76.

The Summary Judgment Application:

- [9] The plaintiff made an application for summary judgment, that was filed on 9 July 2020 together with a supporting affidavit, as required in terms of Rule 32(2)(a) and (b), in response to the initial plea dated 19 June 2020. The supporting affidavit was dated 8 July 2020, and dealt extensively with the defendant's initial plea.
- [10] On 4 August 2020 the defendant filed a Notice of Intention to Amend his plea and also raised a special plea. On 7 August 2020, after this matter had already been set down for hearing on 13 August 2020, the defendant filed his opposing affidavit. At paragraph 7 of his opposing affidavit, he states that the grounds of defence in opposing the application had not all been set out in his initial plea. Further, that towards the end of July 2020 he had consulted with his attorneys, and Counsel who had recently been instructed to come on record in this matter, and that during that consultation it had come to light that pertinent facts, going to the heart of his defence to the plaintiff's claim, had not been pleaded in his initial plea. He was then informed by his legal representatives that it would be necessary to amend his initial plea, so as to ensure that all the facts in support of his defence would be placed on record. They subsequently drafted a Notice of Intention to Amend his initial plea. In his opposing affidavit he deals with his amended plea as well as the special plea.

The Special Plea:

- [11] In his special plea, he alleges that the particulars of claim do not disclose a cause of action, and/or that the plaintiff does not have local standi to claim payment of the balance of the proceeds of the sale (or any amount) from him. The particulars of this special plea are stated as follows: that the agreement was subject to a suspensive condition that the loan of R11 750 000 was to be secured by a mortgage bond registered over the property, obtained either by Ozran or the plaintiff on the normal terms and conditions of any registered commercial bank, within a period of 30 days from the date of signature of the agreement, or such extended period as the parties may agree in writing; that in the event of the aforesaid bond not being granted within the period stipulated, or within such extended time period as the parties may agree to in writing, then and in such an event the agreement would lapse and have no force or effect, and the plaintiff would then be obliged to refund Ozran; that the deed of sale constitutes the entire agreement between the parties and no other conditions, stipulations, warranties or representations whatsoever have been made by either party or his agent, other than such as contained in the agreement: and that no modification, variation or alteration of the agreement would be valid unless in writing and signed by both

parties.

[12] In this regard the defendant alleges that Ozran and the plaintiff did not, in compliance with the provisions of the agreement, extend the period within which the suspensive condition could be fulfilled. Therefore, the sale agreement lapsed and was of no force and effect as from the date of signature thereof.

[13] The defendant alleges furthermore that there was no sale agreement, compliant with the provisions of the Alienation of Land Act 68 of 1981, in existence at the time that the property was transferred from the plaintiff to Ozran.

The amended plea dated 4 August 2020

[14] In his amended plea, the defendant avers that the firm had sufficient funds to pay the balance of the sale proceeds. However, in and during March 2019, the trustees for the time being of the Hendrik Venter Family Trust ("the Trust"), in an unrelated

matter, applied to this court to interdict the defendant from operating his trust banking account for a period of 10 days from the date of the order, save for such payments as may be authorised in writing by the Director of the Western Cape Office of the Legal Practice Council, Mr. Frank Dorey. This order was served on Nedbank towards the end of March 2019. There were insufficient funds in the trust banking account to pay all the defendant's creditors. Therefore, Nedbank refused to pay any amounts out of the defendant's trust banking account.

[15] In addition, and on or about April 2019, the Legal Practice Council ("LPC") launched an application against defendant, in this court, as a consequence of which an order was made on 17 April 2019 which, inter alia, interdicted and prohibited the defendant from operating his trust accounts. As from 29 March 2019, the defendant has not been able to operate his trust accounts and,

accordingly, the defendant has not been able to make payments of monies in the trust accounts which are due and payable to the

plaintiff. The plaintiff ought to have lodged a claim for payment of the monies due and payable to Mr. Dorey.

The defendant's opposing affidavit

[16] The defendant, in his affidavit opposing the summary judgment application, essentially confirms the contents of his amended plea, as well as the grounds upon which he based his special plea, as set out therein. Additionally[1], he states that, as pleaded by the plaintiff, the firm paid amounts to the plaintiff in accordance with the terms of its mandate, and that after making such payments, the firm owed the plaintiff a balance which, at the time, he believed to be R10 000 000 ("the balance of the sale proceeds"), and submits that he indicated an incorrect calculation of the balance of the sale proceeds in his initial plea.

[17] He further states that on 29 March 2019[2], his firm provided the plaintiff with 20 post-dated cheques in the amount of R500 000 each, in settlement of the balance of the

proceeds. On 2 April 2019[3], the plaintiff presented the first cheque to Nedbank for payment, which was dishonoured by Nedbank. According to him, the

plaintiff, as a result of this, infers that the dishonouring of this cheque by Nedbank evinces that he failed to pay the balance of the sale proceeds to the plaintiff. He agrees that the firm is liable to make payment of the balance of the sale proceeds to the plaintiff, but states that it is important to differentiate between himself, and the firm (Barday & Associates), even though he practices as a sole proprietor, as an attorney and conveyancer, under the name and style of Barday & Associates. He thereafter repeats the averments made in relation to the interdicting of his banking account by the Trust and later by the Legal Practice Council.

[18] In his affidavit he further disputes the quantum of the plaintiff's claim[4], stating that, as can be seen from the contents of the particulars of claim and his initial plea, the firm made certain payments to the plaintiff and, to the best of his knowledge and belief, the firm owed the amount of R9 952 459,33 as at 29 March 2019. He mentions further that such amount was due and payable at the time that the Trust order, and the first and second LPC orders, was granted. He states that he is uncertain whether Mr. Dorey has made any further payments to the plaintiff, in accordance with the powers bestowed upon him by virtue of the second LPC order.

[19] He further states that, for the reasons as set out in his initial plea, he denies that the firm owes the plaintiff the amount claimed by it. The firm is required to make payment to the South African Revenue Service ("SARS") in the amount of R1 750 000, in respect of VAT, and to the best of his knowledge and belief, there are sufficient funds in the trust accounts and investment accounts to pay same. However, SARS needs to lodge a claim with Mr Dorey, who is the only party that is legally allowed to make payments from the trust accounts and/or investment accounts.

[20] He further states that the plaintiff's claims ought to have been lodged with Mr. Dorey, because he (defendant) is legally

prohibited from making payment of any amounts to the plaintiff.

Amended Rule 32

[21] Before dealing with the question whether the application for summary judgment should be granted or not, it would be appropriate to deal firstly with the provisions of the recently amended Rule 32, which prescribes the procedure that has to be followed when a plaintiff applies for summary judgment.

The applicable portion of the Rule states that:

‘(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only—

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment;

together with any claim for interest and costs.

2)

- (a) Within 15 days after the date of delivery of the plea, the plaintiff shall deliver a notice of application for summary judgment,

together with an affidavit made by the plaintiff or by 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) . . .

(3) The defendant may—

- (a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or
- (b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.
- (4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party

cross-examine any person who gives evidence orally or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.’

(Further sections omitted.)

[22] The plaintiff filed an affidavit in support of its application in terms of subrule (2)(a). In terms of subrule (2)(b) the plaintiff had to deal with the following in its supporting affidavit:

- (a) verify the course of action and the amount claimed;
- (b) identify any point of law relied upon and the facts upon which the claim is based;
- (c) explain briefly why the defence(s) as pleaded does not raise any issue for trial.

This was after the defendant delivered his initial plea on 19 June 2020, whereafter the application for summary judgment was launched in terms of subrule (1).

[23] The plaintiff filed its supporting affidavit, dated 8 July 2020, in answer to the initial plea, dated 19 June 2020, as required by the amended rule. The plaintiff dealt in detail with the defences as pleaded by the defendant in the initial plea, and also briefly explained why such defences did not raise any issue for trial. The plaintiff's affidavit did not deal with the defendant's amended plea (and special plea), because the amended plea was only filed afterwards, on 4 August 2020.

[24] On the other hand, the defendant's affidavit opposing the application for summary judgment, that was filed on 7 August 2020, clearly deals with the amended plea and the special plea. This clearly posed a problem for the court since, unlike under the previous regime, the amended rule only permits the plaintiff to apply for summary judgment after the defendant has delivered a plea, which it did. The plaintiff was clearly at a disadvantage, because it did not have an opportunity, as required in terms of subrule (2)(b), to explain briefly why the defences as pleaded in the amended plea did not raise any issue for trial. This is due to the fact that the institution of the summary judgment application under the amended rule is dependent on the delivery of a plea by the defendant, unlike under the previous regime where the plaintiff could, after the delivery of a Notice of Intention to Defend, proceed with such an application.

[25] Subrule (4) does not permit the plaintiff to adduce any further evidence other than by affidavit in terms of subrule (2). The

plaintiff is therefore confined to what he stated in his initial affidavit, he cannot file a replying affidavit or cross-examine the defendant or any other person who gives evidence. As pointed out by van Loggerenberg[5]: '[t]hese restrictions upon the plaintiff make it clear that an application for summary judgment is in no sense a preliminary trial of the issues involved. The procedure is intended neither to give the plaintiff a tactical advantage in the trial nor to provide a preview of the defendant's evidence or to limit the defences to those raised by the defendant.' The learned author further states that the rule 'is not intended to replace the exception as a test of one or the other party's legal contentions or in effect to shift the onus'.

- [26] During the hearing of this matter this court, in broad terms, requested counsel to address the issue of whether this court may have regard to the defendant's Notice of Intention to Amend his plea, as well as the special plea dated 4 August 2020, when considering the application, since the plaintiff did not file an affidavit in support of its application based on the amended plea and special plea, but on the initial plea dated 19 June 2020, and whether such a procedure is permissible in terms of Rule 32 as amended.
- [27] Mr. Felix, who appeared for the defendant, filed a detailed supplementary note in this regard and made certain submissions, with which Mr. Garces, appearing for the plaintiff, agreed. I am indebted to Mr. Felix for his supplementary note. He referred me to a memorandum of the Task Team of the Rules Board for Courts of Law ("the task team") in which it addresses the pertinent issues in relation to the amendment to the summary judgment procedure. The task team, after having had regard to the practice in other jurisdictions, like the United Kingdom, Australia and the USA, states the following in paragraph 8.5 of the memorandum:
- '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 USA – 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.'
- [28] He referred me to the situation in other jurisdictions, like in Texas in the US[6], regarding the question whether a party may file an amended pleading after it files an application for summary judgment, in the case of a plaintiff, and response to, by a defendant. The case he referred to, in my view, does not assist his case or this court in determining the issue before us. Firstly, because of the different procedural system in use in Texas county, where both a plaintiff as well as the defendant may simultaneously apply for summary judgment. Secondly, the question to consider in this matter is not whether a defendant is entitled to amend his or her pleadings at the summary judgment stage, but rather at what stage during the summary judgment procedure.
- [29] He also referred this court to the situation in the UK[7] where, he submitted, a party to litigation may amend its pleadings prior to the hearing of a summary judgment application. Once

again his reference to this case does not assist this court or his case at all. In this regard it is useful to look at what

Binns-Ward J said about relying on the summary judgment procedures in other jurisdictions, such as England and Australia, in the matter of Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd (3670/2019)

[2020] ZAWCHC 28 (30 April 2020), paras [12] – [13]:

- [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 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 if the matter were to go to trial. 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 . . .’ (Internal footnotes omitted.)

Evaluation

- [30] Rule 28(1) provides that any party desiring to amend any pleading or document, other than a sworn statement, filed in connection with the proceedings shall notify the parties of his or her intention to amend, and shall furnish particulars of the amendment. Rule 28(2) provides that a party desiring to amend a pleading or document shall indicate that, unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected. Rule 28(3) further provides that an objection to the proposed amendments shall clearly and concisely state the grounds upon which the objection is founded. Rule 28
- (5) provides that if no objection is timeously delivered, every party that received notice of the proposed amendment shall be deemed to have consented thereto, and the party that gave notice of the proposed amendment may, within 10 days of the expiration of the

period mentioned in Rule 28(2), effect the amendment in the manner contemplated in Rule 28(7). In terms of Rule 28(10) the court may, at any stage before judgment, grant leave to amend any pleading or document. The defendant in this matter was clearly entitled to amend his plea at any stage of the proceedings before judgment. The provisions of the amended Rule 32 do not prevent a defendant from amending his plea. The Rule does not state so, and any interpretation that a defendant may not do so is in conflict with the provisions of Rule 28(10).

- [31] The mere fact that, in terms of the amended Rule, a plaintiff can only proceed with summary judgment after the defendant has delivered the plea, does not preclude the defendant from amending his plea after the plaintiff has proceeded with an application for summary judgment. This is a lacuna, which can be used as a stratagem by a defendant wishing to frustrate a plaintiff from proceeding with summary judgment. It is also clearly something which the task team of the Rules Board may not have considered.
- [32] The difficulty in this case, however, was that in terms of Rule 28(2) the time period within which the plaintiff was entitled to raise its objection had not expired (being only 6 court days) at the time when the application for summary judgment was heard. The Notice to Amend was served via email on 4 August 2020, as was the filing of the special plea. The amendment therefore had not yet been effected at the time of the hearing of the application for summary judgment. In my view, the initial plea was still effective at the time of the hearing of the application. Van Loggerenberg[8], to a certain extent, addresses the issue which this court is grappling with where he says a court hearing a summary judgment application is not entitled, in the absence of an affidavit as contemplated in subrule 3(b), to give leave to defend on the basis of purely a plea or notice of intention to amend, because rule 32 does not provide for such a procedure.
- [33] The learned authors then posed the question as to what should transpire in the event of the defendant giving Notice of Intention to Amend its plea after an application for summary judgment was delivered, and to which proposed amendment the plaintiff raised an objection as contemplated in rule 28 (2). In regard to this, the authors submit that a defendant must deliver an affidavit which is in harmony with the notice to amend its plea, failing which the summary judgment should be granted, but if the defendant delivers an affidavit which is in harmony with the proposed amendment of the plea and which complies with the provisions of sub rule (3)(b), the application for summary judgment should be postponed sine die in order for the defendant to bring an application to amend its plea.
- [34] In this particular case an initial plea had been filed, on the basis of which the plaintiff is seeking summary judgment accompanied by a supporting affidavit dealing with the initial plea. The defendant's opposing affidavit is not consistent and in harmony with the amended plea, to which the plaintiff will not have a chance to file an additional affidavit because it is prohibited in terms of subrule (4). Once again the amended rule does not make provision for such a procedure and it is also, again, something which Van Loggerenberg states ' . . . was not even considered by the Task Team.'
- [35] In my view, given the manner in which this application unfolded, it would be difficult, if not impossible, to deal with this application in terms of the amended rule, and for the following reasons: firstly, the amended plea was not ripe to be adjudicated upon, for want of compliance with the provisions of Rule 28(2), for it to have been considered during the summary judgment application. Secondly, even if the amended plea was properly before court, the plaintiff did not deliver a supporting affidavit to deal with any of the issues, especially in the relation to whether the defence as pleaded therein, raises any triable issue.

Thirdly, again even if the amended plea would be considered to be properly before the court, the plaintiff would be prohibited from delivering any further evidence, in the form of an affidavit, to address the question whether the defence as pleaded raises a triable issue. Fourthly, should the court ignore the amended plea and ignore the opposing affidavit, because the opposing affidavit is not in harmony with the initial plea, it would defeat the purpose of the amended rule, which requires that the nature and grounds of the defence and the material facts relied upon in the affidavit should be in harmony with the allegations in the plea. Fifthly, it would be manifestly unfair and unjust to the defendant, who has a right to amend his plea at any stage of the proceedings before judgment; even more so if summary

judgment

should be granted in favour of the plaintiff.

Conclusion

[36] I therefore make no order in respect of the summary judgment application.

[37] The defendant's Notice of Amendment shall take effect in terms of Rule 28(2) as of the date of this judgment, for the plaintiff to exercise its rights in terms of the rule.

[38] The plaintiff is given leave to bring a fresh application on the amended plea, should such an application for amendment be allowed.

[39] Costs will stand over for later determination.

R.C.A. HENNEY

Judge of the High Court

[1] Pages 18-19, paras 16-20.

[2] The defendant mistakenly states the date be 29 March 2020.

[3] He once again mistakenly states the date to be 2 April 2020.

[4] Page 23, paras 38-41.

[5] Erasmus: Superior Court Practice - 2nd edition; D1-387, RS 13, 2020.

[6] He referred to Cluett

v. Medical Protective Co., 829 S.W2d 822 (Tex. App. 1992).

[7] He referred to Agents Mutual Ltd v Moginnie James Ltd

[2016] EWHC 3384 (Ch) (30 December 2016).

[8] Ibid fn 5 D1-416A, RS 13, 2020.

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