

SOUTH AFRICA / JUDGMENT

Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another; Steeleedale (Pty) Ltd v Gorrie; Firststrand Bank Limited t/a WESBANK v Sondamase; SA Taxi Impact Fund (RF) (Pty) Ltd v Tau; Masango Attorneys v Transport and Allied Workers Union of South Africa and Another; Hartless (Pty) Ltd v City of Johannesburg Metropolitan Municipality; Standard Bank of South Africa Limited v Schneider; Nedbank v Chibuye and Others; Absa Bank Limited v Mayer Family Trust and Others (2019/8153, 2019/6412, 2017/14846X, 2019/12142, 2019/14229, 2019/10245, 2019/7918, 2019/14870, 2018/37011) [2019] ZAGPPHC 500 (4 October 2019)
[2019] ZAGPPHC 500

COURT

North Gauteng High Court, Pretoria

BEFORE

K E Matojane, R Keightley, S Yacoob

CASE / FILE NUMBER

2019/8153, 2019/6412, 2017/14846X, 2019/12142,
2019/14229, 2019/10245, 2019/7918, 2019/14870,
2018/37011

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

(1)

REPORTABLE: YES
(2)
OF
INTEREST TO OTHER JUDGES: YES
(3)
REVISED.

In the matters between: Case No. 2019/8153
Raumix Aggregates (Pty) Ltd
Applicant
and
Richter Sand CC
Respondent
RICHTER, JAN HENDRIK GYSBERT
Second Respondent
Case No. 2019/6412
Steeledale (Pty) Ltd
Applicant
and
Donald Hugh Gorrie
Respondent
Case No. 2017/14846X
firstrand bank limited t/a
WESBANK
Applicant
and
Nosicelo Promise Sondamase
Respondent
Case No. 2019/12142
SA Taxi Impact Fund (RF) (Pty) Ltd
Applicant
and
Tau, Matemane Evonia
Respondent
Case No. 2019/14229
Masango Attorneys
Applicant
and
Transport and Allied Workers Union of South Africa
First Respondent
mankge, zack
Second Respondent
Case No. 2019/10245
Hartless (Pty) Ltd
Applicant
and
the City of Johannesburg Metropolitan Municipality
Respondent
Case No. 2019/7918
The Standard Bank of South Africa Limited
Applicant

and
Mason Richard Schneider
Respondent
Case No. 2019/14870
Nedbank
Applicant
and
chibuye: Mushili Chris
First Respondent
THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY
Second Respondent
DRYSDALE GARDENS BODY CORPORATE
Third Respondent
Case No. 2018/37011
Absa Bank Limited
Applicant
and
The Mayer Familie Trust
First Respondent
THE SAMANTHA MAYER TRUST
Second Respondent
MAYER: JOHN WILLIAM (SNR) N.O.
Third Respondent
MAYER: SAMANTHA N.O.
Fourth Respondent
MAYER: JOHN WILLIAM (JNR) N.O.
Fifth Respondent
STEP AHEAD TRUSTEES (PTY) LTD N.O.
Sixth Respondent
MEZOWEB (PTY) LTD
Seventh Respondent

JUDGMENT

THE FULL COURT

Introduction

[1] Rule 32 of the Uniform Rules of Court was amended with effect from 1 July

2019. Under the amended Rule, a plaintiff must wait for the defendant to deliver its plea before the plaintiff may initiate summary judgment proceedings. The previous Rule permitted the plaintiff to initiate summary judgment proceedings after the defendant had delivered its notice of intention to defend.

- [2] On 16 August 2019, Grant AJ gave judgment in the matter of FirstRand Bank Ltd v Shabangu and others^[1] (the ‘FirstRand Bank judgment’) in which he found that the new Rule 32 is intended to operate retrospectively, since no substantive rights and obligations would be impaired. Grant AJ removed the summary judgment applications from the roll before him on the basis that all summary judgment applications, with effect from 1 July 2019, fall to be decided under (and must comply with) the amended Rule.
- [3] On 3 September 2019, Siwendu J handed down judgment in the matter of Standard Bank of SA v Rahme and Another (the ‘Standard Bank judgment’),^[2] which is in conflict with the FirstRand Bank decision. In contrast to the finding of Grant AJ, Siwendu J held that the new Rule 32 does not apply retrospectively, and that it only applies to summary judgment applications initiated after 1 July 2019.
- [4] On 5 September 2019, a number of summary judgment applications came before Mdalan-Mayisela AJ. In light of the conflicting decisions as to whether the amended Rule applies retrospectively or prospectively, an order was made referring all the applications to a Full Court to be constituted by the Judge President.
- [5] Confusion has arisen regarding pending summary judgment applications where the plaintiff had applied for summary judgment prior to 1 July 2019, and an affidavit opposing summary judgment has been filed, before the amended procedure came into operation. It is not clear whether the plaintiff is obliged to continue with the application for summary judgment under the old Rule 32 or to wait for a plea, and where it is not forthcoming, place the defendant under bar, then apply afresh for summary judgment in terms of the new Rule, or whether the plaintiff has a choice in this regard.
- [6] The Judge President of this Division has issued a directive referring the matter to the Full Court for the purpose of deciding the issue of the retrospective applicability, if any, of the amended Rule 32 and the continued applicability, if any, of the old Rule 32 regarding applications for summary judgment.^[3]

The legal principles regarding retrospectivity

- [7] When new legislation comes into effect, existing rights or expectations of the parties are often affected. New legislation that affects substantive rights will be presumed to have a prospective effect, unless it is possible to discern a clear legislative intent that it is to apply retrospectively. Mokgoro J in *Veldman v Director of Public Prosecutions*,^[4] held that:

‘Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to “give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed”.’

- [8] Therefore, the general rule is that a statute is, as far as possible, to be construed as operating only on facts which come into existence after its passing.[5]
- [9] Despite this general rule, it has been held that a distinction must be drawn between those amendments that are merely procedural in nature, and those that affect substantive rights. New procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights. Such legislation is presumed to apply immediately to both pending and future cases. However, this rule is not always easy to apply in practice. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately.
- [10] In *Minister of Public Works v Haffeejee NO*,[6] Marais JA explained that:
- ‘[I]t does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply.’
- [11] In *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission*,[7] the SCA considered whether a pending application for a road carrier permit was affected by the introduction of legislation amending the application process that effectively rendered the steps taken in the pending application abortive, and thus whether an amending statute had retrospective effect.
- [12] The SCA stated that to draw a distinction between statutes affecting substantive rights and those affecting procedure was not decisive, as what appears to be a procedural amendment may affect substantive rights. The Court held that the more useful approach was to establish whether a statute amending existing procedures came into effect before the procedure was initiated or once the procedure had commenced. When the statute amending existing procedures came into effect before the procedure was initiated, the new procedure usually applies, unless a contrary intention appears from the legislation.[8]
- [13] In cases where the amendment comes into effect after the action was initiated, but before completion, different considerations come into play. The rule is that unless a contrary intention appears from the amending legislation, the old procedure remains intact. Significantly, the SCA held that unless there is a clear intention to apply the new amendment to the pending application, it would not have retrospective effect if the consequence of this would be to extinguish and render abortive the steps already taken.[9]

[14] Although our discussion of the legal principles deals with the interpretation of legislation, it is our view that, in the circumstances of this case, the same principles would apply to subsidiary legislation such as the Rules of Court. As far as the Interpretation Act 33 of 1957 (the 'Interpretation Act') is concerned, s 1 specifies that it also applies to regulations and rules made under a statute.[10] As far as the common law is concerned, it is sufficient to say that we see no reason why any variation is required for purposes of this

judgment.

[15] Under the amended Rule the applicant is required, 15 days after the date of delivery of a plea or an exception, to deliver a notice of application for summary

judgment, together with an affidavit identifying any point of law relied upon and the facts underpinning the claim, briefly explaining

why the defence, as pleaded, does not raise any triable issue. Under the old Rule, the plaintiff was required to file a brief affidavit

'verifying a cause of action' and opining that the defendant has no bona fide defence. These requirements are no longer applicable under the new procedure. The question is whether this change in procedure would, if applied retrospectively, adversely affect substantive rights.

[16] The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under section 34 of the Constitution.[11]

[17] The retrospective application of the amended rule to pending applications would not deprive the applicant of the right to obtain summary judgment altogether. The applicant could still, under the amended procedure, do so after the plea is filed. It was this that led Grant AJ to form the view that the retrospective application of the amended Rule does not affect substantive rights. However, in our view, the issue is not as simple as Grant AJ made it out to be. If one considers the effect of the amended Rule on pending applications, it is clear that, contrary to Grant AJ's conclusion, to apply the new Rule retrospectively would extinguish the plaintiff's existing substantive right to be heard. Moreover, it is clear that the drafters could never have intended the amendment to apply retrospectively.

The amended uniform Rule 32

[18] It will be helpful to reproduce the relevant portions of the amended Rule 32 which reads as follows:

- (1) 'The plaintiff may, after a 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. 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 day not being less than 15 days from the date of the delivery thereof.'
- [19] The critical question in this case is whether the drafters 'by express words or necessary implication' intended the amended Rule to have retrospective effect. The answer to this question is provided by s 39(2) of the Constitution, which requires legislation to be interpreted in a manner that promotes the spirit, purpose and objects of the Bill of Rights. It follows that a court must consider the language used, as well as the purpose and context, and must endeavour to interpret the statute in a manner that renders the statute constitutionally compliant.[12]
- [20] At paragraph 16 of the FirstRand Bank judgment Grant AJ found that—
- 'The Plaintiff will retain its right to pursue an expedited procedure for summary judgment – but must only wait until it can know what it is that it is declaring indefensible. At most there may be wasted costs – but this cannot amount to a substantive impairment of rights – just as it is not regarded as giving rise to real prejudice in other contexts.'
- [21] This finding assumes that the pending application may simply be suspended, or regarded in some other way as being 'on ice', pending the filing of a plea or exception, and then reactivated thereafter. However, contrary to the above finding, it is simply impossible to graft the amended procedure onto a pending application that was initiated under the pre-amended Rule. In respect of these pending applications, there is no provision for a defendant to file a plea. This is because the initial application was lawfully made under the unamended procedure which must be filed before the plea. Under the old procedure, the defendant would normally only be permitted to file a plea if he or she was granted leave to defend the matter by the court in dismissing the application for summary

judgment.

[22] The only way in which the defendant in pending proceedings would be able to file a plea in accordance with the amended procedure would be if the plaintiff/applicant withdrew the pending application completely and started afresh with a new application for summary judgment under the post-1 July regime. Of course, this would entail the applicant having to comply with the heightened obligations under the amended Rule. In addition, it would entail considerable unnecessary delay in the matter being resolved, contrary to the underlying purpose of the Rule and the applicant's right to a speedy resolution of the dispute – should summary

judgment

ultimately be warranted in the case.

[23] The result of this retrospective application of the amended procedure is that the initial application for summary judgment is not 'retained' but is rendered nugatory, which is a strong indication that the new Rule was never intended to have retrospective effect, as, to hold otherwise, will impair the substantive right to have the existing application determined.

[24] The Rule itself does not indicate that the drafters intended that the amended provisions should apply in respect of pending applications. No provision is made for pending applications to be amended, rectified or supplemented. In other words, there are no transitional provisions. The inevitable result of giving retrospective effect to the new Rule 32, is that all pending applications are automatically doomed to fail without even being considered.[13] With respect, Siwendu J correctly found in the Standard Bank judgment that the amended Rule makes no provision for the costly process of the amendment of existing pleadings or the filing of supplementary papers and re-enrolment of the applications for a hearing. Parliament, or in this case, the Rules Board, is deemed to know the law, and had it been the intention that this provision should apply retrospectively, the provision would have said so explicitly.

The Interpretation Act

[25] Grant AJ found that the Interpretation Act was central to the issue of the retrospectivity of the amended Rule. The relevant sections of the Act in this regard are as follows:

'11. Repeal and substitution

When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.

12. Effect of repeal of a law

- (1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other

law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

- (2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not -
- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
 - (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
 - (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
 - (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
 - (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability,

forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture

or punishment may be imposed, as if the repealing law had not been passed.’

[26] Insofar as the Interpretation Act is concerned, Grant AJ interpreted s 11 and s 12 so as to bolster his finding that the amendment was to operate retrospectively. He drew a distinction between the two sections on the basis that, on his interpretation, the sections apply to two distinct situations. In his view, s 12(2) did not apply to the amendment under discussion. This was because the Rule was not repealed, but only amended. In Grant AJ’s view, section 12 only deals with the situation where a law is repealed, and not where it is simply amended. It is only in this case that an applicant may proceed ‘as if the repealing law had not been passed’, in other words, as if the amendment has no retrospective effect. In contrast, according to Grant AJ, s 11 deals with situations where a law (or Rule, as in this case) is amended and not repealed. On his interpretation of s 11, it makes automatic provision for the retrospective application of the amending law as from the date it comes into operation. This fortified Grant AJ’s view that the amended Rule had to be applied retrospectively, even to pending applications; and that as from 1 July 2019, the old Rule ceased to have any effect.

[27] Siwendu J correctly, in our view, found Grant AJ’s interpretation to be erroneous. It is clear that the two sections are complementary, rather than contrasting. Section 11 states the position as to when the new law takes effect, but it does not deal with the question of retrospectivity at all. The question of retrospectivity is a matter of interpretation of the law

in question, and it is here that s 12(2) is applicable. What s 12(2) does, is to state what the general interpretational principle is with regard to determining the issue of retrospectivity. As correctly found by Siwendu J, s 12 of the Interpretation Act expressly provides that the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed, which includes pending applications before court. Ultimately, however, it depends on the meaning to be ascribed to the new law, and its intended effect, regardless of whether it is labelled an 'amendment' or a 'repeal'.

[28] For the reasons set out above, we find that the amended Rule 32 of the Uniform Rules of Court does not apply retrospectively to pending applications for summary

judgment.

In the result, we make the following order:

1. The amended Rule 32 of the Uniform Rules of Court does not apply retrospectively to pending summary judgment applications initiated

before 1 July 2019. The unamended Rule 32 shall apply to such pending applications.

2. All applications for summary judgment which have been removed from the roll as a result of the judgments of Grant AJ and Mdalana-Mayisela AJ may be enrolled for hearing without delay.

K E MATOJANE

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

R KEIGHTLEY

S YACOOB

Date of hearing:

18 September 2019

Date of judgment:

4 October 2019

Appearances:

Case No. 2019/8153

Counsel for the Applicant:

Adv. K Howard

Applicant's Attorneys:

Telfer & Associates Inc

Counsel for the Respondent:

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Respondent's Attorneys:

Morne Coetzee Attorneys

Case No. 2019/6412

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Counsel for the Respondent:

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Respondent's Attorneys:

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Case No. 2017/14846X

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Applicant's Attorneys:

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Counsel for the Respondent:

No appearance

Respondent's Attorneys:

CSM Attorneys

Case No. 2019/12142

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Applicant's Attorneys:

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Case No. 2019/10245

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Respondent's Attorneys:

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Case No. 2019/7918

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Mr C L Gordon

Respondent's Attorneys:

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[1] FirstRand Bank Limited v Shabangu and Others; Mahomed v Road Accident Fund and Others (2018/43336; 284/2019) [2019] ZAGPJHC 267 (16 August 2019).

[2] Standard Bank of SA v Rahme and Another (17/46904; 27740/2018; 27741/2018; 3765/2019; 11912/2018) [2019] ZAGPJHC 287 (3 September 2019).

[3] Directive issued on 6 September 2019 in terms of s 14 of the Superior Courts Act 10 of 2013, read together with s 173 of Constitution of the Republic of South Africa.

[4] Veldman v Director of Public Prosecutions, Witwatersrand Local Division 2007 (3) SA 210 (CC) para 26.

[5] S v Mhlungu and Others

[1995] ZACC 4; 1995 (3) SA 867 (CC) para 65.

- [6] Minister of Public Works v Haffejee NO [1996] ZASCA 17; 1996
- (3) SA 745 (A) at 753B-C.
- [7] Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission and Others 1999
- (4) SA 1 (SCA).
- [8] Ibid paras 16-24.
- [9] Ibid para 22.
- [10] In terms of s 30 of the Superior Courts Act 10 of 2013, Rules for the High Court are made in accordance with the Rules Board for Courts of Law Act 107 of 1985.
- [11] Section 34 of the Constitution, titled 'Access to courts' provides as follows: 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
- [12] Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) para 28. The Court held that, 'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
- (a) that statutory provisions should always be interpreted purposively;
 - (b) the relevant statutory provision must be properly contextualised;
 - (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).
- [12] Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) para 28. The Court held that, 'A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
- (a) that statutory provisions should always be interpreted purposively;
 - (b) the relevant statutory provision must be properly contextualised;

- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).

[13] Unitrans (note 7 above) para 20.

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