

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

CASE NO: 3288/20

1.	<u>REPORTABLE: YES / NO</u>
2.	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
3.	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

PHOENIX INTERNATIONAL LOGISTICS (PTY) LTD
(Registration Number: 2005/009035/07)

Applicant/Plaintiff

And

QD CELLULAR (PTY) LTD
(Registration Number: 1998/012714/07)

First Respondent/
First Defendant

MICHAEL MAURICE ROSS
(Identity Number: [...])

Second Respondent/
Second Defendant

Summary:

Application for summary judgment against Second Defendant after plea in terms of Rule 32(a) – After delivering affidavit resisting summary judgment, Second Defendant giving notice of intention to amend plea to introduce additional defence – proposed

amendment not opposed – effect hereof that in respect of newly introduced defence by amendment to plea, application for summary judgment not compliant with peremptory requirement in Rule 32(2)(b) that Plaintiff furnish brief explanation why defence as pleaded does not raise an issue for trial – further effect of additional defence in plea as amended is that Second Defendant no longer compliant with requirement that affidavit resisting summary judgment be in harmony with plea due to additional defence in amended plea not constituting one of the defences covered in affidavit resisting summary judgment

Stalemate through no fault of the parties – Second Defendant attempts to break stalemate by delivering an unsolicited supplementary affidavit resisting summary judgment containing additional defence from amended plea – no consent by Plaintiff to supplementary affidavit - stalemate persists

Draftsman of new regime under Rule 32 could not have intended that Second Defendant through unopposed notice to amend plea able to frustrate Plaintiff's right to procedural advantage of extant summary judgment application

But draftsman could also not have intended by extending summary judgment to after the plea to be constraining unqualified right to amend plea enshrined in Rule 28

No provision in amended Rule 32 of steps available to Plaintiff in response to amendment to plea after affidavit resisting summary judgment – lacuna in Rule 32

In casu lacuna overcome by grant of leave to Plaintiff to withdraw application for summary judgment at Second Defendant's cost and to re-initiate proceedings for summary judgment afresh - Second Defendant ordered to pay the wasted costs (excluding the costs of the opposed argument) occasioned by the withdrawal of the summary judgment proceedings pursuant to standard obligation to pay wasted costs occasioned by amendments

The Plaintiff applied for summary judgment after receipt of the Second Defendant's plea. In response, the Second Defendant delivered an affidavit resisting summary judgment based on the plea, but later amended his plea by the introduction of an additional defence. Besides the absence of the required harmony between the amended plea and the affidavit resisting summary judgment, the additional defence introduced by the amendment was not included in the Plaintiff's peremptory brief explanation in its founding affidavit as required by Rule 32(2)(b) why the defence does not raise an issue for trial.

Both parties therefore found themselves non-compliant with Rule 32 without having contravened the Uniform Rules in any way. The Second Defendant invited the Plaintiff to withdraw the application at his cost and to reinstitute the application based on his amended plea. The Plaintiff declined the invitation. The Second Defendant then delivered an unsolicited supplementary affidavit resisting summary judgment in harmony with his amended plea.

The Plaintiff ignored the supplementary affidavit resisting summary judgment and enrolled the application for summary judgment. In argument it pointed to the disharmony

between the amended plea and the first affidavit resisting summary judgment and sought to persuade the Court to reject the Second Defendant's defence on this basis alone. Not to be outdone, the Second Defendant sought summary dismissal of the application due to the absence of his additional defence in his plea as amended from the Plaintiff's brief explanation in its founding affidavit required by Rule 32(2)(b) as to why this additional defence does not raise an issue for trial.

The Court rejected both these overly formalistic attempts to exploit lacunas in a new and developing procedure by granting leave to the Plaintiff to withdraw the summary judgment application and re-launch the same proceedings based on the amended plea. The Court also ordered the Second Defendant to pay all the wasted costs occasioned by the withdrawal of the application for summary judgment, save the costs of the opposed argument

JUDGMENT

KATZEW, AJ

- [1] This is an application for summary judgment by Phoenix International Logistics (Pty) Ltd, the Plaintiff, against Michael Maurice Ross, the Second Defendant.
- [2] On 20 April 2020 the Plaintiff obtained judgment by default against the First Defendant, QD Cellular (Pty) Ltd, for the amount claimed in the summons, namely R2 718 738.58, plus interest and costs.
- [3] The Plaintiff's cause of action for its claim against the Second Defendant is based on a suretyship by the Second Defendant covering the First Defendant's indebtedness to the Plaintiff. The

Plaintiff's claim against the Second Defendant is for R2 718 738.58 plus interest and costs, which is co-extensive with the amount of the Plaintiff's judgment against the First Defendant.

[4] The Plaintiff' application for summary judgment against the Second Defendant is in terms of Uniform Rule Of Court 32 as amended on 1 July 2019. Accordingly, in terms of Uniform Rule Of Court 32(2)(a), the application for summary judgment was delivered after the Second Defendant delivered his **Second Defendant's Plea**.

[5] The evolution of the application through the recently amended Uniform Rule Of Court 32 has brought about a stalemate in the proceedings due to what appears to be a lacuna in the amended rule.

[6] The passage of the matter that led to the stalemate is as follows:

[6.1] The Second Defendant delivered **Second Defendant's Plea** on 23 March 2020.

[6.2] The Plaintiff delivered its **Notice Of Application For Summary Judgment In Terms Of Rule 32** on 12 May 2020.

- [6.3] The Second Defendant delivered **Second Respondent's Affidavit Resisting Summary Judgment** on 17 June 2020.
- [6.4] The Second Defendant delivered **Second Defendant's Notice To Amend [Plea] In Terms Of Rule 28** on 1 July 2020, whereto there was no objection by the Plaintiff.
- [6.5] The Second Defendant delivered **Second Defendant's Amended Plea** on 23 July 2020.
- [6.6] The Second Defendant delivered **Second Respondent's Supplementary Affidavit Resisting Summary Judgment** on 31 August 2020 in order to harmonise the defences in the affidavit resisting summary judgment with the defences in the amended plea.
- [7] The stalemate has resulted from the omission from the **Founding Affidavit: Summary Judgment** of the brief explanation as to why the additional defence pleaded by the Second Defendant in the amended plea does not raise an issue for trial, which is a requirement of Uniform Rule Of Court 32(2)(b).
- [8] Notwithstanding this defect in its **Founding Affidavit: Summary**

Judgment , on 15 March 2021 the Plaintiff delivered a **Notice Of Set Down** of the opposed application for summary judgment on the opposed motion roll for 19 April 2021.

[9] During argument in the week of 19 April 2021, Ms Blumenthal for the Plaintiff submitted that the Court must ignore the supplementary affidavit resisting summary judgment and must dispose of the application for summary judgment on the basis of the first affidavit resisting summary judgment, which is not in harmony with the amended plea. For this reason alone, the argument went, summary judgment should be granted as prayed.

[10] Mr Scholtz for the Second Defendant contended that the application for summary judgment is fatally flawed due to the omission from the **Founding Affidavit: Summary Judgment** of the brief explanation required by Uniform Rule Of Court 32(2)(b) why the additional defence pleaded in the amended plea does not raise any issue for trial. On this score alone, Mr. Scholtz contented, the application for summary judgment should be dismissed and the Second Defendant must be granted leave to defend.

[11] Although both arguments are technically sustainable on a strictly

literal interpretation of Uniform Rule Of Court 32, neither of the arguments are judiciously tenable.

[12] Ms. Blumenthal argued in the alternative (from the Bar – not in her heads) that if the Court is inclined to have regard to **Second Respondent's Supplementary Affidavit Resisting Summary Judgment** wherein the additional defence raised in the amended plea is canvassed, the brief explanation in the **Founding Affidavit: Summary Judgment** why the defences pleaded in the first plea do not raise an issue for trial is wide enough to cover the additional defence raised in the amended plea and in **Second Respondent's Supplementary Affidavit Resisting Summary Judgment**.

[13] This would have been the perfect solution to the conundrum had the brief explanation overlapped the additional defence. Careful scrutiny of both, however, reveals otherwise.

[14] The additional defence pleaded in the amended plea, namely that Mr. Melnick on behalf of the Plaintiff in the principal agreement owed a legal duty to the Second Defendant to limit the credit limits of the First Defendant to R250 000.00, alternatively to R1.5 million, and thereby limit the Second Defendant's co-extensive exposure to the Plaintiff, is

an additional and/or alternative defence to the Second Defendant's main plea on the merits that he signed the application for credit in a representative capacity for the First Defendant mistakenly not realizing due to misrepresentation that the document contained a suretyship.

[15] The Second Defendant has maintained this main plea on the merits through the first plea and first affidavit resisting summary judgment right through to the amended plea and supplementary affidavit resisting summary judgment.

[16] This main defence on the merits by the Second Defendant, underscored by absence of any knowledge of the suretyship on the part of the Second Defendant, is in direct conflict with the Second Defendant's additional alternative defence introduced in his amended plea and supplementary affidavit resisting summary judgment that his personal liability in terms of the suretyship was premised on the First Defendant's credit limit being limited to either R250 000.00 or R1.5 million which amounts were, in the alternative, in the contemplation of the First Defendant (which of course predicates his personal knowledge in contrast with his erstwhile no knowledge of the suretyship) and Mr. Melnick on behalf of the Plaintiff at the time they

concluded the suretyship agreement, together with the legal duty owed to the Second Defendant by Mr. Melnick to maintain those limits, in the alternative.

[17] If, hypothetically, this Court were to rely on the judgment of the Honourable Blieden, J in *Standard Bank Of South Africa Ltd v Roestof*¹ and find that no prejudice has been caused to the Second Defendant by the technical flaw in the **Founding Affidavit: Summary Judgment** with the necessary corollary that the technical flaw in the **Founding Affidavit: Summary Judgment** has been cured by the Second Defendant's delivery of his supplementary affidavit resisting summary judgment with the objective of harmonizing the affidavit with the amended plea, and were to find further that the Second Defendant has furnished two mutually destructive versions under oath and on that basis hold that **Second Respondent's Supplementary Affidavit Resisting Summary Judgment** does not raise an issue for trial and grant summary judgment as prayed, it is not unlikely that the Second Defendant will cry foul due to prejudice caused to him by the omission from the **Founding Affidavit: Summary Judgment** of the required brief explanation on the merits of the additional defence, which, he may conceivably say, would have alerted him to an

¹ 2004 (2) SA 492 (WLD) at 496F-I

apparent weakness in the amended plea, to which he may have had an answer in the supplementary affidavit resisting summary judgment.

[18] The requirement of the brief explanation why the pleaded defence does not raise any issue for trial is precisely to require a plaintiff to identify an issue against a defence in a plea to afford the defendant an opportunity of joining issue with this criticism and of offering a tenable explanation in the affidavit resisting summary judgment.

[19] *A fortiori* if the Court relaxes this requirement in any conceivable way, the Second Defendant would be correct in adopting the cry foul approach from a strictly procedural point of view.

[20] The Court is therefore not disposed to making an order on the summary judgment application. The Court rather sees itself as required to make, or adopt, certain findings on Uniform Rule Of Court 32 in order to guide the parties in the further conduct of this matter.

[21] During May of 2021, a month after this Court reserved judgment in the matter, the case of ***Belrex 95 CC v Barday***² appeared in the May 2021 volume of the South African Law Reports. The Honourable

² 2021 (3) SA 178 (WCC)

Henney, J is reported as follows therein at 186I-187A:

“[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 in proceeding with summary judgment. It is also clearly something which the task team of the Rules Board may not have considered.”

[22] Based hereon, Ms Blumenthal’s submission that this Court must ignore **Second Respondent’s Supplementary Affidavit Resisting Summary Judgment** for the purpose of the summary judgment application, which by definition means ignoring the amended plea too, seeks to impose a limitation in Rule 32 on a defendant’s right to amend a plea, which is not recognized in the unlimited right to amend any time before judgment enshrined in Rule 28. The Honourable Henney, J pronounced hereon as follows in **Belrex 95 CC v Barday** (*supra*) at 186G-I:

“[30] 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)."

[23] On the other hand, Mr Scholtz' argument that the application for summary judgment must be dismissed with costs due to the Plaintiff's failure to take the steps necessary to include in its brief explanation in terms of Uniform Rule Of Court 32(2)(b) the reason why the additional defence in the amended plea does not raise any issue for trial, ignores the express exclusion of amendment of sworn statements from Uniform Rule Of Court 28(1) and the apparent absence of any other regulated procedure for the Plaintiff to have followed to achieve the amendment without offending what appears to be a limitation to one affidavit contemplated in Uniform Rule Of Court 32(4).

[24] While it is important to take note of the Second Defendant's suggestion in paragraphs 13.3 and 13.4 of **Second Defendant's Supplementary Affidavit Resisting Summary Judgment** that the Plaintiff could withdraw this summary judgment application at the

Second Defendant's cost and once again apply for summary judgment on the Second Defendant's amended plea, the Plaintiff cannot be faulted for not taking up this invitation. Doing so would have condoned the delivery of a supplementary affidavit resisting summary judgment, a step that is not sanctioned by Rule 32.

[25] It must be remembered that under the previous summary judgment regime, a defendant was only entitled to one affidavit resisting summary judgment. If he omitted to include a defence in the affidavit, there was no general right available to him to supplement the affidavit. There is no reason why a defendant under the new regime, where summary judgment is sought after the plea, should be better placed to vacillate on the formulation of his true defence.

[26] To that extent, the recognized limitless freedom to amend a plea may be overstated and may require some adjustment, via either a more restrictive interpretation of the interdependence of Rules 28 and 32 or by the introduction of a workable restriction in Rule 32 on the right to amend a plea pending resolution of a summary judgment application.

[27] To hold otherwise opens the door to a defendant to utilise the procedure for amendment to a plea after an application for summary

judgment to frustrate a plaintiff's right, preserved in section 34 of the Constitution, to have the summary judgment application resolved expeditiously by application of the law in a fair public hearing. 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."

[28] The Court in ***Raumix Aggregates (Pty) Ltd v Richter Sand CC And Another, And Similar Matters***³ gave expression to this right as follows at 627E-F:

"[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 the application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as

³ 2020 (1) SA 623 (GJ)

soon as possible. That right is protected under s 34 of the Constitution.”

[29] The opportunity for resort by a defendant to amendment processes for ulterior motives, including delay, is therefore clearly recognizable.

[30] This having been said, this Court intends following the order of the Honourable Henney, J in ***Belrex 95 CC v Barday*** (*supra*) with a view to instilling certainty for the parties in the further conduct of this matter. It needs to be emphasised in this regard that the order of the Honourable Henney, J is quoted in full by the learned authors of Erasmus Superior Court Practice 2nd Edition Van Loggerenberg at D1-416D [Service 16, 2021] in the commentary to Uniform Rule Of Court 32, which exhibits an approval of the reasoning and order of the decision, which should be reassuring to both the Plaintiff and the Second Defendant in the further conduct of the matter. The order of the Honourable Henney, J in ***Belrex 95 CC v Barday*** (*supra*) appears at 188D-E of the judgment as follows:

[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.”*

[31] Unlike *in casu* where the Second Defendant’s plea has already been amended, the only distinguishing feature in ***Belrex 95 CC v Barday*** (*supra*) is that the time period for the plaintiff therein to object to the defendant’s notice of intention to amend his plea still had some time to run. That notwithstanding, a reading of the following final paragraph of the judgment of the Honourable Henney, J in ***Belrex 95 CC v Barday*** (*supra*) at 187H-188C indicates that the fact of a perfected amended plea as *in casu* was contemplated in the order given therein:

“[35] *In my view, given the manner in which the 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 a 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 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.”

[32] In view of the uncertainty that prevailed before the judgment of the Honourable Henney, J in **Belrex 95 CC v Barday** (*supra*), which it is

not inconceivable will continue to prevail until the application and implementation of the amended Rule 32 has become settled through decisions of the courts and possibly even through further amendment, this Court is disinclined to exercise its discretion on costs as a lever to apportion any blame on the parties for the stalemate that has arisen.

[33] In this regard, it needs to be pointed out that the only costs order made is not punitive. It follows the suggestion of the Second Defendant in his **Second Defendant's Supplementary Affidavit Resisting Summary Judgment**.

[34] In conclusion, no order is to be made on the summary judgment application. Certain other relief is, however, to be granted.

The following is ordered:

- 1) The Plaintiff is granted leave to withdraw this application for summary judgment and within 15 (fifteen) days thereafter to initiate a fresh application for summary judgment on **Second Defendant's Amended Plea**, whereafter the provisions of Uniform Rule Of Court 32 are to apply.

- 2) The Second Defendant is to pay the costs occasioned by the withdrawal of this application for summary judgment, save the costs of the opposed argument during the week of 19 April 2021, which are reserved.

S M KATZEW

Acting Judge of the High Court of South Africa

DATE OF JUDGMENT: 4 August 2021.

DATE OF HEARING: 19 April 2021.

APPEARANCES:

For Applicant:
Instructed by:

Ms. R. Blumenthal
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For Second Respondent:
Instructed by:

Mr. R. Scholtz
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