



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

Case number: 9845/2022

In the matter between:

**INGENUITY PROPERTY INVESTMENTS (PTY) LTD**

Plaintiff

and

**IGNITE FITNESS (PTY) LTD**

Defendant

**JUDGMENT DELIVERED ON 29 MAY 2023**

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**VAN ZYL AJ:**

**Introduction**

1. Does the amended Rule 32 allow a plaintiff to deliver a replication simultaneously with an application for summary judgment? This is what occurred in this matter, giving rise to the defendant's application in terms of Rule 30 for the setting aside of the summary judgment application.
2. The question has been answered in the negative in *Arum Transport CC v Mkhwenkwe Construction CC*<sup>1</sup> in the KwaZulu-Natal Division, Pietermaritzburg.
3. On the other hand, on 25 January 2021 this Court in *Quattro Citrus (Pty) Ltd v F & E*

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<sup>1</sup> 2022 (2) SA 503 (KZP).

*Distributors (Pty) Ltd t/a Cape Crops*<sup>2</sup> held that a plaintiff may deliver a replication without waving its right simultaneously to seek summary judgment.

4. The issues to be determined therefore turn predominantly on a proper interpretation of Rule 32, as well as the principles applicable to applications under Rule 30.

### **Background**

5. In June 2022 the plaintiff instituted an action under case number 9845/2022 against the defendant to recover arrear rental due to it under three lease agreements concluded between the parties over the period June 2014 to February 2020. The amounts claimed are for rental that remains unpaid for the period October 2021 to June 2022.
6. After the defendant had delivered a special plea and a plea on the merits, the plaintiff replicated, and simultaneously applied for summary judgment against the defendant. It did so on the strength of legal advice received pursuant to the decision in *Quattro Citrus*. The replication and the application for summary judgment were delivered on the same day, being 12 September 2022, at the same time.
7. On 24 October 2022 the defendant applied in terms of Rule 30 for an order that the plaintiff's summary judgment application be set aside as an irregular step. It did so on the basis that the Uniform Rules "... do not permit a plaintiff to simultaneously replicate in terms of Rule 25(1) and make application for summary judgment in terms of Rule 30(2) ...". The defendant submitted in its application that the Rules "... only permit the plaintiff to do one or the other as its next procedural step" and concluded that, for those reasons, the summary judgment application falls to be set aside as an irregular step.
8. In summary, therefore, the defendant's cause of complaint in its Rule 30 notice is that:

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<sup>2</sup> [2021] JOL 49833 (WCC).

- 8.1 Subsequent to a defendant delivering a plea, the Uniform Rules of Court do not permit a plaintiff to replicate in terms of Rule 25(1) and make application for summary judgment in terms of Rule 32. Instead, the Rules only permit the plaintiff to do one or the other as its next procedural step.
- 8.2 Accordingly, if a plaintiff replicates after its receipt of the defendant's plea, then it is consequently precluded from making application for summary judgment.<sup>3</sup>
9. The plaintiff disagrees, and has not removed the cause of complaint – hence this application.

### **The doctrine of precedent**

10. It is common cause that, in terms of the doctrine of precedent, this Court is bound by the decisions made within its own territorial area of jurisdiction. It is not bound by other provincial and local divisions of the High Court. To depart from a decision of this Division, this Court must find that the decision previously made was clearly wrong.<sup>4</sup>
11. As indicated, in *Quattro Citrus* this Court considered whether the simultaneous delivery of a replication and application for summary judgment constituted an irregular step which fell to be set aside. It found that it did not. Thus, unless this Court concludes that *Quattro Citrus* was clearly wrong, it is bound to apply it.
12. This Court might as well put its cards on the table at this juncture. I do not think that *Quattro Citrus* is clearly wrong. There is no reason why the simultaneous delivery of a replication and an application for summary judgment conflicts with a proper interpretation of Rule 32. The present matter is, moreover, an application

<sup>3</sup> As indicated, in the current matter the replication and application for summary judgment were delivered simultaneously.

<sup>4</sup> See, for example, *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 2 SA 97 (CC)* at para [8]; *Robin Consolidated Industries Ltd v Commissioner for Inland Revenue 1997 (3) SA 654 (SCA)* at 666D-H.

in terms of Rule 30, and the principles applicable to such applications also come into play in the determination of the dispute between the parties.

13. The reasons for this view are discussed below.

### **Rule 32: regulating the launch of summary judgment applications**

#### A textual interpretation

14. Prior to its amendment in 2019, an application for summary judgment in terms of Rule 32 was to be made after the defendant had delivered a notice of intention to defend. The plaintiff was nonetheless permitted, before or after delivering an application for summary judgment, to furnish to the defendant such further particulars as the defendant may have requested for the purposes of pleading.<sup>5</sup>

*“Nothing in the Rule suggests that, if the defendant calls for, and is furnished with, further particulars by the plaintiff, the latter is precluded from proceeding with his application for summary judgment.... The application for summary judgment is made upon the summons issued by the plaintiff, and upon that document in its entirety. Further particulars furnished by the plaintiff in amplification of that document form part of the summons....*

*It does not seem to me to be of any significance whether the application for summary judgment was made by the plaintiff before or after the further particulars were furnished. The Court is concerned with the question whether the defendant is entitled to defend or not. That decision will rest on the facts set out in the plaintiff's summons, whether amplified by further particulars or not, and the defendants' affidavit. Nor does it seem to me, ..., that the plaintiff by furnishing further particulars necessarily abandons his right to claim summary judgment. The furnishing of the particulars by the plaintiff did not in any way constitute a waiver or abandonment of its rights under Rule 32.*

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<sup>5</sup> See *Hire-Purchase Discount Co (Pty) Ltd v Ryan Scholz & Co (Pty) Ltd* 1979 (2) SA 305 (SE) at 307D-E; *BW Kuttle & Association Inc v O'Connell Manthe & Partners Inc* 1984 (2) SA 665 (C) at 666A-C.

15. The furnishing of further particulars was thus not regarded as the plaintiff taking a further step in the litigation, for two reasons: first, Rule 32 did not expressly preclude the plaintiff from furnishing further particulars on the defendant's request (in terms of Rule 21);<sup>6</sup> and, second, the further particulars were regarded as an amplification of the summons and particulars of claim.<sup>7</sup> For these reasons the furnishing of further particulars pursuant to a notice in terms of Rule 21 did not constitute a waiver or an abandonment of the plaintiff's right to apply for summary judgment.<sup>8</sup> I shall return to this reasoning in the context of the replication delivered in the present matter.
16. The defendant contends that the plaintiff's reliance on *Hire-Purchase Discount*<sup>9</sup> is misplaced, because requests for further particulars for the purposes of pleadings were abolished in 1988, and Rule 32 has itself now been amended. I do not agree that this renders the reliance on *Hire-Purchase Discount* meaningless. Rule 32 has not been amended in relation to the issue at the core of the present matter, and past interpretations of what was or was not permissible within the confines of the Rule remain a valuable guide to its current interpretation.
17. Rule 32, in its amended form, remains an important procedural tool with which to prevent a defendant from delaying the inevitable with a spurious defence:<sup>10</sup> "*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*".
18. The onus remains on the plaintiff to show that its claim is clearly established and that the defendant has failed to set up a *bona fide* defence. Courts require strict compliance with the Rule. Technical defects in the procedure may, however, be condoned.<sup>11</sup>

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<sup>6</sup> *Hire-Purchase Discount supra* at 307B-C.

<sup>7</sup> *Hire-Purchase Discount supra* at 307C-E.

<sup>8</sup> *Hire-Purchase Discount supra* at 307F.

<sup>9</sup> See fn 5 above.

<sup>10</sup> See *Raumix Aggregates (Pty) Ltd v Richter Sand CC and similar matters* 2020 (1) SA 623 (GJ) at 631E-F.

<sup>11</sup> *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F-G.

19. The amended Rule 32(1) and (2) provides, in relevant part, as follows:

*"(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 an issue for trial." [Emphasis added.]*

20. The point of departure is the language used in the Rule itself.<sup>12</sup> In the well-known words of *Natal Joint Municipal Pension Fund*:<sup>13</sup>

*"[18] ... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one*

<sup>12</sup> In the context of the discussion in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18]. See also *Absa Bank Ltd v Meiring* 2022 (3) SA 449 (WCC) at paras [9], [16], and [18]-[19] in relation to the interpretation of Rule 32.

<sup>13</sup> At para [18].

*meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. ... The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."* [Emphasis added.]

21. The plaintiff points out that Rule 32 does not expressly preclude the plaintiff from delivering a replication at the same time as an application for summary judgment. Rule 32 also makes no mention of any waiver of the plaintiff's right to apply for summary judgment if a *'further procedural step'* should have been taken. Not even in its original form did Rule 32 contain any bar to an application for summary judgment should a further procedural step have been taken.<sup>14</sup>
  
22. As will be illustrated later, no justification is offered in any of the authorities relied on by the defendant or the Court in *Arum Transport CC v Mkhwenkwe Construction CC supra* as to why there should be read into Rule 32 a waiver of the right to apply for summary judgment if the plaintiff should take a further procedural step but deliver its application for summary judgment within the period provided for in Rule 32(2)(a).
  
23. Rule 30(2), on the other hand, does contain an express prohibition, precluding an application in terms of Rule 30(1) when a further step has been taken. Litigants are prohibited from bringing an application to set aside an irregular step if the applicant has itself taken a further step in the cause with knowledge of the irregularity:

*"(2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if-*

*(a) the applicant has not himself taken a further step in the cause with*

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<sup>14</sup> See *BW Kuttle & Association Inc v O'Connell Manthe & Partners Inc supra*, not following *Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemical Co (Pty) Ltd 1972 (2) SA 81 (O)* at 83A-B on this point.

*knowledge of the irregularity; ... [Emphasis added.]*

24. Rule 30(2)(a) is intended "*to deal with the situation where a party has taken a further step in the cause and thereafter seeks to make application to set aside an irregular or improper step*".<sup>15</sup>
25. The plaintiff submits that if the legislature, Rules Board or Task Team involved in the reformulation of Rule 32 had intended to preclude the plaintiff from delivering a replication simultaneously with its application for summary judgment (or from taking any other "further step"), Rule 32 would have stated so in similar terms as in Rule 30(2)(a). Alternatively, Rule 25 (regulating the delivery of a replication) would have been appropriately amended. Rule 25(2), however, still provides for the delivery of a replication within "*fifteen days after the service upon him of a plea*", which is the same period within which application for summary judgment must be made.
26. The defendant, in contrast, submits that the absence of an express prohibition against a plaintiff replicating and applying for summary judgment in Rule 32 does not allow the plaintiff to do so. The fact that the plaintiff concedes that Courts require strict compliance with the Rule is in itself indicative that it is only the express provisions of the Rule which dictate what a plaintiff is allowed to do should it wish to seek summary judgment. Therefore, one does not look at what the Rule does not say, but rather, in accordance with *Endumeni*, what the language used actually says. In applying the Rule strictly in this manner, one cannot find any language which permits a plaintiff to ask for summary judgment if it has elected to replicate. If one applies the language of the Rule strictly, then it necessarily precludes the plaintiff from doing anything that is not expressly allowed.
27. This, the defendant argues, is in fact an expression of the interpretive maxim *expressio unius, exclusio alterius* (that is, the expression of one thing implies the exclusion of the other), which more than a century ago was referred to in

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<sup>15</sup> *Zoutendijk v Zoutendijk* 1975 (3) SA 490 (T) at 491E.



*Poynton v Cran*<sup>16</sup> as a "principle of common sense". The common sense interpretation of Rule 32 is thus that what is not expressly allowed is necessarily precluded. In the present case, that includes a plaintiff's right to ask for summary judgment after it has elected to invoke Rule 25 and replicates to the plea.

28. I am of the view that the defendant's approach to the interpretation of Rule 32 is too narrow. *Natal Joint Municipal Pension Fund* advocates a broader approach than that one should regard the language actually used (that is, expressed) as the only indicator – which is what the defendant's argument comes down to. The language is the starting point, but what is not said is often as important as what is expressly stated, and there are other factors to consider, too. The maxim *expressio unius, exclusio alterius* is to be used with "great caution", as it is only a *prima facie* indicator of what the legislator's intention is.<sup>17</sup> It is, further, to be used only as a last resort.<sup>18</sup>
29. It is not necessary to take refuge in such last resort in the present matter. I agree with the submission made on the plaintiff's behalf that the lack of reference to the taking of a further step in Rule 32 is significant. The plaintiff points out that as far back as 1991 this Court held that, notwithstanding the wording of Rule 32 requiring the plaintiff to apply for summary judgment 15 days after delivery of a notice of intention to defend, the delivery of a plea was no bar to a subsequent application for summary judgment.<sup>19</sup> In arriving at this decision, the Court observed:<sup>20</sup> "*It is true that the words used in the Rule refer to the notice of intention to defend and do not refer as well to a plea but, on the other hand, they do not exclude an application for summary judgment after plea.*" [Emphasis added.]
30. The maxim *expressio unius, exclusio alterius* did not trouble the Court in *Vesta*.
31. The defendant criticises the plaintiff's reliance on *Vesta* because, in that case, it was the defendant and not the plaintiff who had taken the further step at issue. A

<sup>16</sup> 1910 AD 205 at 222.

<sup>17</sup> *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 16G; *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA and Another* 1958 (4) SA 572 (A) at 648H.

<sup>18</sup> *Administrator, Transvaal and others v Zenzile and others* 1991 (1) SA 21 (A) at 37G-H.

<sup>19</sup> *Vesta Estate Agency v Schlom* 1991 (1) SA 593 (C) at 595C-I.

<sup>20</sup> At 595D-E.

reading of the case indicates however, that such factual difference does not detract from the point that the plaintiff emphasises, encapsulated in the extract from the judgment quoted above.

32. As indicated, the wording of Rule 32 in its amended form also does not exclude an application for summary judgment being brought together with, or even after, delivery of a replication. That such an exclusion was not intended is strengthened by the fact that the time for the delivery of a replication coincides with the time period within which a summary judgment application must be brought. The only limitation on applying for summary judgment is the time period provided for in Rule 32. Once the 15 days provided for in Rule 32 have elapsed, the plaintiff is barred from applying for summary judgment unless condonation or an extension of time is granted under Rule 27.
33. The defendant argues that this interpretation would mean that a plaintiff could effectively apply for summary judgment whenever it unilaterally elects to do so, even after the close of pleadings or, perhaps, after receipt of the defendant's discovery, or even after the defendant's primary witness has given evidence at trial. If the Rule was to be constructed in that manner, then it would not only be at odds with its express wording and purpose (namely to enable a plaintiff expeditiously to dispose of the matter without being put to the expense of a trial), but would also result in an absurdity. When there is an alternative interpretation available to the Court, then the Court will not accept the meaning which would lead to absurd practical consequences.<sup>21</sup>
34. I have no issue with the defendant's suggestion that a Court will not accept an interpretation that leads to absurd results. The examples used in the defendant's argument would clearly be absurd in the context of Rule 32. An application for summary judgment would not be allowed in those circumstances, for various reasons. At a basic level, they ignore the 15-day time limit placed on the launch of summary judgment applications following delivery of a plea. They also do not take account of the prohibition on the furnishing of evidence by a plaintiff in his application

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<sup>21</sup> With reference to *Cape Provincial Administration v Clifford Harris (Pty) Ltd* 1997 (1) SA 439 (A) at 446H-I.

for summary judgment, save for what is set out in his founding affidavit (in terms of Rule 32(4)). Moreover, the purpose of the remedy – namely a speedy conclusion to the dispute – would be rendered nugatory, and applying for summary judgment in those circumstances would be meaningless.

35. These examples are, however, not apposite to the interpretation of Rule 32 by the plaintiff (in relying on *Quattro Citrus*), and are not consequences of such an interpretation. The plaintiff's interpretation is not as limitless as the defendant suggests.
36. On a textual interpretation of Rule 32, therefore, I agree with the plaintiff that the simultaneous<sup>22</sup> delivery of an application for summary judgment and a replication such as in the present matter cannot be regarded as constituting an irregular step in the context of Rule 30.

#### The Task Team report

37. A further consideration in the interpretation of Rule 32 is the "*the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production* " and "*the circumstances attendant upon its coming into existence.*"<sup>23</sup>
38. The amendments to Rule 32 followed an investigation and report by the Superior Courts Task Team of the Rules Board for Courts of Law ("the Task Team"). In its report<sup>24</sup> the Task Team indicated that it hoped that, by amending Rule 32, a Court would be in a position to consider "*the real issues*" at summary judgment stage.<sup>25</sup>

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<sup>22</sup> In *Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemical Co (Pty) Ltd supra* at 83A-B the Court did not regard the simultaneous delivery of a declaration with the summons as a bar to the launch of an application for summary judgment under the "old" Rule 32. This finding was not criticised in *BW Kuttle supra*.

<sup>23</sup> *Natal Joint Municipal Pension Fund supra* at para [18].

<sup>24</sup> The report was discussed in detail in *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at paras [6]-[27].

<sup>25</sup> See the discussion of the Task Team's recommendations in *Erasmus Superior Court Practice* (RS 17, 2021) at D1-384A to D1-384C, and see in particular para 8.4 of the Task Team's report.

39. The Task Team considered foreign practice where summary judgment is permitted after pleadings have closed. It took the view that it would be inappropriate for a plaintiff to have to wait until the close of pleadings to apply for summary judgment, but solely because this was seen to detract from the speediness of the remedy.<sup>26</sup> Retaining the speediness of the procedure was therefore the Task Team's main consideration.
40. The defendant contends, correctly, that the Court must not only have regard to the language used, purpose and context, but also to the material known to those responsible for the production of the Rule. It argues that those responsible for the drafting of the amended Rule 32 were not the Task Team, but the drafters of the Rule. (I do not think that much turns on this. The Task Team was appointed by the Rules Board, and the drafters were guided by the Task Team's recommendations.)
41. In any event, the defendant argues that what was known to the drafters prior to formulating the amendments to Rule 32 was the Task Team's view that to allow summary judgment after a plaintiff replicated would be ill-suited. The Task Team put it as follows:
- “8.8 *The Task Team also debated whether, if summary judgment should no longer be brought after delivery of a notice of intention to amend, it should be allowed only after close of pleadings. It was however decided against requiring a plaintiff to wait until after any replication, rejoinder or rebuttal had been filed. While such a rule would ensure that the debate was fully informed, and based on all pleaded defences and ripostes, it was thought that the speediness of the remedy could be compromised, and also that, as the objective behind summary judgment was to allow judgment to be obtained expeditiously in clearly deserving cases, a matter in which there were replications, rebuttals and the like was probably one ill-suited to summary judgment.” [Emphasis added.]*
42. Rule 32 does not make provision for a plaintiff to ask for summary judgment if it

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<sup>26</sup> Erasmus *op cit* at D1-384B to D1-384C (paras 8.5 and 8.8 of the Task Team's report).

replicates. Moreover, as the Task Team was clearly aware, the delivery of a replication also automatically triggers the defendant's right to deliver a rejoinder. Therefore, the only inference which can be drawn is that when formulating the amendments to the Rule, the drafters followed the recommendations of the Task Team and did not make provision for a plaintiff to ask for summary judgment after it has delivered a replication.

43. I agree, however, with the plaintiff's submission that nothing in the Task Team's report suggests that a plaintiff should be non-suited if it delivered a replication simultaneously with its application for summary judgment. On the contrary, the tenor of the report indicates that the Task Team was anxious to render the procedure more responsive to a decision on the *"real issues"* in dispute. It said only that in matters where a replication (or other pleadings) is delivered, such a matter *"was probably one ill-suited to summary judgment"* as a result of the nature of the disputes that may arise on the pleadings.<sup>27</sup>
44. The Court must therefore adjudicate each case on its own merits and decide for itself whether the matter is ill-suited for summary judgment. This seems to be a sensible approach.

The plaintiff's affidavit in support of summary judgment, and the defendant's affidavit opposing summary judgment

45. Returning to *Natal Joint Municipal Pension Fund*: Rule 32 is to be interpreted in an objective and sensible manner. *"A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document"*.<sup>28</sup>
46. Rule 32(2)(b) requires the plaintiff, in its affidavit in support of its application for summary judgment, to *"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*

<sup>27</sup> Erasmus *op cit* at D1-384C (para 8.8 of the Task Team's report).

<sup>28</sup> *Natal Joint Municipal Pension Fund supra* at para [18].

*raise any issue for trial*".<sup>29</sup> [Emphasis added.]

47. The affidavit must, therefore, contain specificity on why the defendant's envisaged defence is not *bona fide*, and is unsustainable. The plaintiff must now engage meaningfully with the defence raised in the plea so that the application may be adjudicated on the basis of the defendant's pleaded defence.<sup>30</sup>
48. In circumstances where the defendant pleads, for example, a sham denial of the plaintiff's authority, it would be necessary for the plaintiff to answer the defendant's plea with the necessary facts to show that the denial is a sham.
49. The defendant argues that in *Steeledale Reinforcing (Cape) v HO Hup Corporation SA (Pty) Ltd*<sup>31</sup> the Court held that the plaintiff was not permitted to amplify its cause of action by delivering a declaration or further particulars. The plaintiff points out, however, that *Steeledale* cannot serve as support that the plaintiff cannot deliver a replication, as *Steeledale* dealt with a different factual scenario (*Steeledale* is discussed in more detail further below). A plaintiff is required to engage meaningfully with the defence raise in the plea. One of the ways in which the plaintiff can do does so is by delivering a replication. A replication may be necessary where a sham defence is pleaded, and in doing so it does not mean that the plaintiff concedes that the defence is not a sham.
50. A replication also serves as a response to the defences raised in the plea and explains why they do not raise triable issues. It does not serve as amplification of the cause of action.<sup>32</sup> In this sense a replication and the summary judgment affidavit under the amended Rule 32 effectively perform similar functions. There is no reason why a plaintiff should be precluded from delivering its replication simultaneously with its application for summary judgment and incorporating by reference the allegations in the replication.

<sup>29</sup> The word "*genuinely*" is to be read in before the word "*raise*": see *Tumileng Trading CC v National Security and Fire (Pty) Ltd supra* at para [21].

<sup>30</sup> *Tumileng Trading CC supra* at 629B (para 8.4 of the Task Team's report).

<sup>31</sup> 2010 (2) SA 580 (ECP).

<sup>32</sup> On the basis of what was stated in *Hire-Purchase Discount supra*.

51. The defendant does not agree that, in delivering its replication, the plaintiff simply amplifies the reasons why the plea has not raised triable issues. First, the defendant argues, that notion is not borne out by the wording used in Rule 25, whereas the question of whether a plea does raise an issue for trial is recorded in Rule 32(2)(b). Second, the purpose of a replication is for a plaintiff to rebut the defences raised with factual and legal assertions of its own, and then again, only "if necessary", in terms of Rule 25(1) read with Rule 25(3). Third, together with the particulars of claim, the plea and replication are pleadings which identify for the Court the issues for determination at trial. A Court will only grant judgment against a defendant at trial if the plaintiff discharges its onus on a balance of probabilities. That is a far cry from Rule 32(2)(b), which requires the plaintiff to explain in its verifying affidavit why the defence pleaded by the defendant does not raise any issue for trial. Therefore, the purposes of the verifying affidavit and replication, as well as the tests applied by the summary judgment Court and trial Court, are totally different.
52. I am of the view that the answer to the defendant's argument is that "it depends on the issues raised in the plea". A Court dealing with a summary judgment application will have regard to the nature of the response in a replication, if delivered, in relation to the plea. Obviously, if anything in the replication (considered with the plea) indicates that there are issues that should be dealt with at trial, then summary judgment cannot be granted. The matter is then, in the words of the Task Team, "ill-suited" for summary judgment proceedings. That does not mean, however, that a plaintiff who delivers a replication simultaneously with its application for summary judgment takes an irregular step as contemplated in Rule 30.
53. Save for the day on which the opposing affidavit must be delivered, Rule 32(3) was not amended as regards the content of the defendant's opposing affidavit. The defendant is still obliged to satisfy the Court on affidavit that it has a *bona fide* defence to the action, disclosing fully the nature and grounds of it and the material facts relied on by the defendant.<sup>33</sup> The amendment to Rule 32(2)(b) may, however, require the defendant to engage with the plaintiff's averments concerning the

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<sup>33</sup> *Tumileng Trading CC supra* at para [24].

pleaded defence.<sup>34</sup>

54. The defendant therefore still has the final word but now, following the amendment to the Rule, only after the plaintiff has explained why the defence put up by the defendant in the plea does not pass muster. The plaintiff submits that this means that, if the plaintiff should deliver a replication simultaneously with its application for summary judgment, the defendant is afforded an opportunity fully to address the averments and allegations contained in both the plaintiff's supporting affidavit and replication - nothing in Rule 32 prevents the defendant from doing so.<sup>35</sup>
55. A Court will then be able to decide the application on the real issues in dispute, with the defendant having had the last word. I am of the view that this is a sensible interpretation of Rule 32, and gives effect to its purpose.
56. At this juncture, I turn to a discussion of the conflicting decisions in *Quattro Citrus* and *Arum Transport*.

*Quattro Citrus (Pty) Ltd v F & E Distributors (Pty) Ltd t/a Cape Crops*

57. In *Quattro Citrus* the Court, in deciding a Rule 30 application, held that the delivery of a replication may be effected without waiver of a plaintiff's right to apply for summary judgment, as long as both the replication and the application for summary judgment are delivered timeously and in accordance with the Rules of Court.<sup>36</sup>
58. In reaching its decision, the Court considered the report issued by the Task Team explaining the amendment to Rule 32. It also considered the commentary on the Uniform Rules of Court.<sup>37</sup> The Court took account of the Task Team's deliberation that "*the speediness of the remedy could be compromised*" if the plaintiff should be required to wait until the close of pleadings to bring its application for summary judgment, as well as the Task Team's opinion that matters in which replications (and rejoinders or rebuttals) are delivered were

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<sup>34</sup> Ibid.

<sup>35</sup> *Quattro Citrus (Pty) Ltd supra* at para [11].

<sup>36</sup> At para [9].

<sup>37</sup> At paras [4]-[5].



*"probably ill-suited to summary judgment".*

59. The Court considered the Task Team's reluctance<sup>38</sup> to pronounce on whether or not to permit the delivery of a replication simultaneously with an application for summary judgment when it decided the Rule 30 application.<sup>39</sup> It stated that the Task Team *"did not pronounce, and is in fact silent, on whether an application for summary judgment may be brought after the delivery of replications, rejoinders or rebuttals"*.<sup>40</sup> It found, *inter alia* on the basis of such silence, that the delivery of a replication simultaneously with an application for summary judgment would not *"compromise the speediness of the remedy"*.<sup>41</sup>
60. This Court also took into account the purpose of Rule 32 as set out in Erasmus:<sup>42</sup> *"The object of Rule 32 is very much the same: the rule was designed to prevent a plaintiff's claim, based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court"*, that is, to provide a speedy remedy to a plaintiff who has an unanswerable case and where the defendant is abusing the process of the court by defending the action without a *bona fide* defence.
61. Finally, the Court considered the issue of prejudice and found that there could be none. The defendant would be afforded an opportunity to address the allegations contained in the replication in its opposing affidavit to the application for summary judgment, even if those allegations are not repeated in the affidavit in support of the application for summary judgment.<sup>43</sup>

*Arum Transport CC v Mkhwenkwe Construction CC*

62. In *Arum Transport*, which concerned an application for summary judgment, the Court held the following.

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<sup>38</sup> The plaintiff remarks that the reluctance is borne out by the use of the words "thought" and "probably" in para 8.8 of its recommendations (the paragraph is quoted earlier above).

<sup>39</sup> At paras [5] and [9].

<sup>40</sup> At para [5].

<sup>41</sup> At para [9].

<sup>42</sup> At para [4] of the judgment, and see Erasmus *op cit* (RS 20, 2022) at D1-381.

<sup>43</sup> *Quattro Citrus (Pty) Ltd supra* at paras [10]-[11].

63. First, in accordance with what had been held in *Steeledale Reinforcing (Cape) v Ho Hup Corporation SA (Pty) Ltd*<sup>44</sup>, neither Rule 32(2) or (4) (as they were prior to their amendment in 2019) catered for the amplification of the plaintiff's cause of action upon which its summary judgment application is based. After the amendment of Rule 32 the position is no different to what it was previously.<sup>45</sup> There is no reason for extending the scope of summary judgment by allowing such amplification in whatever form, in particular because summary judgment is an extraordinary and stringent remedy.<sup>46</sup>
64. Second, prior to the amendment of Rule 32 a plaintiff could apply for summary judgment as long as it had not taken a further procedural step. By delivering a replication, the plaintiff took a further procedural step.<sup>47</sup>
65. Third, by taking such a step the plaintiff waived its right to apply for summary judgment.<sup>48</sup>
66. In support of its decision the Court referred to the commentary in both *Erasmus*<sup>49</sup> and *Harms*.<sup>50</sup> In *Erasmus* it was recorded that if a plaintiff takes a further procedural step after delivery of the plea (that is, an exception or replication), it waives its right to apply for summary judgment<sup>51</sup> In *Harms*, with reference to the decision in *Esso Standard South Africa (Pty) Ltd v Virginia Oils and Chemical Co (Pty) Ltd*,<sup>52</sup> it was recorded that in respect of Rule 32 in its unamended form, if a plaintiff took a further procedural step it thereby waives its right to apply for summary judgment.
67. Lastly, in arriving at its decision the Court in *Arum Transport* criticised and did not follow the earlier decision of this Division in *Quattro Citrus*. As indicated

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<sup>44</sup> 2010 (2) SA 580 (ECP).

<sup>45</sup> At para [24].

<sup>46</sup> At paras [15] and [19].

<sup>47</sup> At paras [11], [22], and [24].

<sup>48</sup> At para [24].

<sup>49</sup> *Superior Court Practice* (Revision Service 15, 2020).

<sup>50</sup> *Civil Procedure in the Superior Courts* (August 2020).

<sup>51</sup> *Arum Transport* at para [8].

<sup>52</sup> 1972 (2) SA 81 (O) at 83A.

above, in *Quattro Citrus* the Court recognised that the authors of Erasmus were of the view that if a plaintiff takes the procedural step of delivering a replication, then it waives its right to apply for summary judgment; and that there is "a seductive simplicity and elegance" in compelling a plaintiff to make a choice between the one or the other.<sup>53</sup>

68. It was, however, the Court's view that the Task Team had been "silent" on whether an application for summary judgment may be brought after delivery of a replication, rejoinder or rebuttals; and this silence (as the Court called) allows a plaintiff to deliver a replication and apply for summary judgment as long as both are done within the 15 days permitted by Rules 25(1) and 32(2).<sup>54</sup> The Court held that, if the Task Team had intended to compel a plaintiff to choose between a replication or summary judgment, then provision would have been made for it in the Rules.<sup>55</sup>
69. The Court in *Arum Transport* explained its disagreement with *Quattro Citrus* as follows:<sup>56</sup>

*"[10] I respectfully disagree with Gibson AJ's findings and especially the reliance placed on the Task Team's silence on the issue.*

*[11] Uniform Rule 32 has never contained a provision regarding whether a plaintiff could apply for summary judgment after taking a further procedural step. Even before the rule was amended to provide for an application for summary judgment to be brought after a plea has been filed, courts recognised that a plaintiff could still apply for summary judgment if a defendant had filed a plea, as long as the plaintiff had not taken a further step. [Emphasis added.]*

...

*[18] Erasmus expressed a more definitive view, namely that 'if the plaintiff takes a further procedural step after delivery of the plea, ie. an exception or a replication to the plea, he thereby waives his right to apply for summary judgment' (Revision Service 15, 2020 at DI-387-388). It appears to me that, whereas the concern in *Quattro Citrus* was more directed at a replication compromising the*

<sup>53</sup> *Quattro Citrus* at paras [7]-[8].

<sup>54</sup> At paras [5] and [9].

<sup>55</sup> At para [9].

<sup>56</sup> *Arum Transport* at paras [10], [11], and [18].

*speediness of the remedy afforded by Uniform Rule 32 and lack of prejudice to the defendant, this was clearly not the concern expressed by the authorities referred to by me and certainly not the reason why applications for summary judgment failed."*

70. Arising from what is stated in *Arum Transport*, the defendant argues that *Quattro Citrus* is wrong for various reasons, some of which have already been addressed. I deal with those that require additional consideration.
71. First, to the defendant's argues, in *Pettersen v Burnside*<sup>57</sup> it was held that a further step in the cause is some act which advances the proceedings one stage nearer completion, and in *Odendaal v De Jager*<sup>58</sup> it was held that a party takes such a step when it delivers a replication. That difficulty, read together with the authorities canvassed in *Arum Transport*, were not even mentioned in the judgment in *Quattro Citrus*, let alone applied to the facts of the case.
72. I have, in the discussion on the interpretation of Rule 32, already set out the reasons why I am of the view that the "further step" argument does not assist the defendant. *Odendaal* was, ironically, an application to strike out a defendant's plea on the basis of irregularity, and in terms of a rule comparable to the current Rule 30, which contained an express prohibition against taking a further procedural step prior to the launch of such application. *Pettersen* had dealt with a similar type of application. It was in this context that the Court in *Odendaal* discussed the delivery of a replication as taking a step which advances the proceeding one stage nearer to completion:<sup>59</sup>

*"Mnr. van Rhyen, namens die respondente, het betoog, dat aangesien die applikant alreeds 'n replikasie op die verweerskrif ingehandig het, hy nie op hierdie stadium onder Reël 37 van hierdie Hof die aansoek sal kan bring nie. Na my oordeel bestaan daar nie twyfel oor die korrektheid van hierdie stelling nie. Die betrokke Reël bepaal:*

*'When any proceeding in a cause on the part of one of the parties is irregular or improper, the opposite party shall be entitled, before taking any further steps, to apply for leave to cancel such proceeding . . .'*

<sup>57</sup> 1940 NPD 403 at 406.

<sup>58</sup> 1961 (4) SA 307 (O) at 310D.

<sup>59</sup> *Odendaal supra* at 310D-F.

*In die saak van Pettersen v Burnside, 1940 NPD 403, het Regter BROOME soos hy destyds was, op bl. 406 in verband met die woorde 'before taking any further steps', waar dit op derglike wyse voorkom in Reël 54 van die Natalse Hofreëls, gesê:*

*'In my opinion a step in the proceedings is some act which advances the proceedings one stage nearer to completion.'* [Emphasis added.]

73. These authorities are thus not of assistance in the present matter.
74. Second, the defendant submits that *Quattro Citrus'* reading and analysis of the Task Team's recommendations is incorrect. In paragraph [5] of the judgment the Court quotes the Task Team as having decided against requiring a plaintiff to wait until after any replication, rejoinder or rebuttal had been delivered before it could bring an application for summary judgment; and recorded that because allowing summary judgment after replications and rebuttals could compromise the speediness and expedition of the remedy, it would probably be "ill-suited". This notwithstanding, the Court found that the Task Team was silent on whether a summary judgment application may be brought after the delivery of replications, rejoinders or rebuttals, and therefore a plaintiff is permitted to do so. The defendant submits that the Task Team could not have been clearer in recording why such a situation would be ill-advised and compromise the objectives of summary judgment.
75. Further, the result of such recommendations was that the drafters of the Rules amended Rule 32(2)(a) to prescribe that a plaintiff "shall" deliver a notice of application for summary judgment within 15 days after "delivery of the plea". Had they intended to allow a plaintiff to make such application after the delivery of a replication, then that is what the Rule would say. However, it does not.
76. I have already addressed these issues to a large extent earlier. It seems to me that the Task Team was in fact silent on the issue of the right to apply for summary judgment together with or after the delivery of a replication, deliberately so. A reading of paragraph 8.8 of its recommendations indicates that it did not wish to compel a plaintiff to wait until after delivery of a replication or the pleadings that could be delivered thereafter, as such an approach would impede the speediness of the remedy. It was tentative on what the impact of the delivery of further pleadings

would be on the plaintiff exactly because it did not wish to impede the expeditious nature of the remedy, and that is why it indicated that proceedings that required the delivery of further pleadings were “probably” ill-suited for summary judgment. Obviously, whether the case in question was ill-suited for summary judgment would depend on the particular facts and circumstances. The Task Team was, however, silent on whether a plaintiff may deliver a replication and still apply for summary judgment.

77. The defendant argues, with reference to *Khayzif Amusement Machines CC v Southern Life Association Ltd*,<sup>60</sup> that Rule 32(8) provides that the Court may give leave to defend subject to terms such as when further pleadings must be delivered. Prior to the amendment of the Rule, it was held that summary judgment proceedings placed a moratorium on the delivery of a plea pending the final adjudication of the application,<sup>61</sup> as it was then the next pleading in line. There is nothing different about the Rule after the amendment save that the next pleading to be delivered is no longer the plea, but the replication. Accordingly, logic tells one that after the amendment of the Rule, summary judgment proceedings now place a moratorium on the delivery of a replication, which is indicative that the one must come before the other.
78. I do not think that much turns on this. The Court has a discretion to make orders as regards the delivery of further pleadings if leave to defend is given. If a replication has already been delivered, then the order will relate to the pleadings next in line. What happened in *Khayzif* was that, shortly after a summary judgment application had been refused, the plaintiff served a notice of bar on the defendant. The defendant’s attorney regarded the notice of bar as premature, given the provisions of Rule 22(1), and no plea was delivered. The plaintiff thereafter obtained default judgment on the basis that a plea had not been delivered. The Court concluded that the time period for the delivery of a plea as prescribed in Rule 22 would run from the date that leave to defend is granted in the summary judgment application (unless the Court directed different time periods in granting leave), because the latter application stayed the times periods prescribed for the delivery of further pleadings. The notice

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<sup>60</sup> 1998 (2) SA 958 (D) at 961C-E.

<sup>61</sup> *Khavzif supra* at 963F.

of bar was therefore clearly premature, and the default judgment was a nullity.<sup>62</sup>

79. No fault is to be found with the result in *Khayzif*, but I do not think that it assists the defendant in advancing its interpretation of Rule 32, especially in the context of its application under Rule 30.
80. The defendant submits, fourthly, and allied to the previous points, that *Natal Joint Municipal Pension Fund* held that when it comes to interpretation, the "inevitable point of departure is the language of the provision itself". However, in *Quattro Citrus* the Court did not analyse the language of Rules 25 and 32. Instead, the Court relied on what it believed the Task Team had not said in its recommendations; and it interpreted Rules 25 and 32 on the basis of such silence. To make a decision on the basis of recommendations instead of an analysis of the language of the Rules themselves is a significant shortcoming in the reasoning of the Court and further underlines why the decision is legally unsound.
81. I have already indicated above various reasons, based upon an interpretation of Rule 32, upon which I find that the defendant's reasoning does not indicate that the decision in *Quattro Citrus* is clearly flawed. The Court in *Quattro Citrus* was aware of the express wording of both Rule 32 and Rule 25, and it thus considered the Task team's recommendations to see if they had an impact on the issue. The Court found that they did not.
82. The plaintiff contends that *Arum Transport* is in any event distinguishable from the present matter.
83. A reading of *Arum* indicates that it was decided essentially on the issue of waiver. The replication in that matter was not delivered simultaneously with the application for summary judgment. The summons was served on the defendant on 25 May 2021. The defendant delivered its notice of intention to defend and plea simultaneously on 3 June 2021. The replication was delivered thereafter, on 7 June 2021, before the application for summary judgment had been instituted. By 22 June 2021 pleadings

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<sup>62</sup> At 963G.

had closed.<sup>63</sup> After the close of pleadings, on 23 June 2021, the application for summary judgment was delivered (albeit within the 15-day period after the date on which the plea had been delivered).

84. The Court in *Arum Transport* regarded the delivery of the replication as a further procedural step which precluded the plaintiff from applying for summary judgment. In arriving at this conclusion, the Court relied on *Esso Standard South Africa (Pty) Ltd*,<sup>64</sup> *Steeledale*,<sup>65</sup> and *The Standard Bank of South Africa Limited v Trumpie*.<sup>66</sup> None of these authorities are decisions of the Supreme Court of Appeal and, save for *Trumpie*, the authorities relied on were concerned with applications for summary judgment in terms of Rule 32 prior to its amendment in 2019.
85. In *Esso* the plaintiff had delivered a summons to which was attached a declaration. The defendant argued that the delivery of a declaration simultaneously with the summons constituted a further procedural step which precluded the plaintiff from applying for summary judgment. The Court found that the delivery of the declaration with the summons did not constitute a waiver of the plaintiff's right to apply for summary judgment. It held that the declaration merely set out the plaintiff's cause of action in more detail.<sup>67</sup> In an *obiter dictum* the Court agreed with the defendant's counsel that, once appearance to defend had been entered, and a plaintiff delivered a declaration or took a further procedural step, it would be regarded as a waiver of the plaintiff's right to ask for summary judgment.<sup>68</sup> The Court did not pronounce on whether it would constitute a waiver if a declaration was delivered simultaneously with an application for summary judgment.<sup>69</sup>
86. In *Steeledale* the plaintiff issued summons on 20 April 2009. The defendant's notice of intention to defend was delivered on 11 May 2009 whereafter the plaintiff delivered its declaration on 22 May 2009. On 26 May 2009, within the

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<sup>63</sup> *Arum Transport CC* at para [23].

<sup>64</sup> 1972 (2) SA 81 (O).

<sup>65</sup> 2010 (2) SA 580 (ECP).

<sup>66</sup> [2021] ZAGPPHC 247 (11 May 2021).

<sup>67</sup> *Esso Standard South Africa (Pty) Ltd supra* at 83A.

<sup>68</sup> At 83A-B.

<sup>69</sup> Compare *Vesta Estate Agency supra* where summary judgment was applied for (and considered) after the delivery of the plea while Rule 32 required the application to be made 15 days after the delivery of a notice of intention to defend.



15-day period after the date on which appearance to defend was entered, the plaintiff made application for summary judgment.<sup>70</sup> The declaration and application for summary judgment were therefore not delivered simultaneously. The Court refused summary judgment on the basis that the delivery of a declaration in the circumstances constituted a procedural irregularity.

87. *Steeledale* is a judgment of the Eastern Cape High Court. It conflicts with a judgment of this Court on the same issue, namely *BW Kuttle*. In refusing summary judgment, the Court declined to follow the approach in *BW Kuttle*<sup>71</sup> and held, instead, that the underlying justification, that is, that permitting the delivery of a declaration "*allows for a more comprehensive exposition of the case the defendant has to meet, and thus leads to a better assessment of whether a defendant has disclosed a bona fide defence*", was not countenanced by the wording of Rule 32(2) or any binding authority (being authority of a court of higher status or of the Eastern Cape High Court itself).<sup>72</sup>
88. In concluding that it was not permissible for the plaintiff to apply for summary judgment after it had delivered a declaration, the Court in *Steeledale* relied on *Maharaj Barclays National Bank Ltd*<sup>73</sup> and *Fourelmel (Pty) Ltd v Maddison*.<sup>74</sup> These authorities, however, do not lend support to the Court's conclusion that the cause of action may not be amplified. The conclusion conflicts with the authorities which hold that an amplification of the cause of action, and the delivery of further particulars for this purpose, are permissible and does not constitute a waiver of a plaintiff's right to apply for summary judgment.<sup>75</sup>

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<sup>70</sup> *Steeledale supra* at para [1].

<sup>71</sup> The reasons advanced by the Task Team for amending Rule 32 align with the underlying justification advanced in *BW Kuttle*.

<sup>72</sup> *Steeledale supra* at para [15].

<sup>73</sup> 1976 (1) SA 418 (A) at 422A-D. In *Maharaj* the Court reiterated what the contents of the affidavit delivered in support of Rule 32 should be confined to. It did not consider the simultaneous delivery of a replication with the application for summary judgment.

<sup>74</sup> 1977 (1) SA 333 (A) 346B-C. The principle discussed in *Fourelmel* was that the plaintiff could not rely on the affidavit delivered in a default judgment application in its application for summary judgment. Only one affidavit was permitted in terms of Rule 32(2). The Court did not consider the simultaneous delivery of a replication with the application for summary judgment.

<sup>75</sup> Such as *Hire-Purchase Discount Co supra*; *BW Kuttle supra*.

89. In *Trumpie* the defendants pleaded that the written loan agreement upon which the plaintiff's cause of action was founded, reflected a name different from that of the principal debtor for whose debt they had bound themselves as sureties.<sup>76</sup> The plaintiff indicated, in its heads of argument for summary judgment (not in its affidavit in support of its application for summary judgment), that it would ask for rectification of the agreement upon which it relied to hold the defendant liable.<sup>77</sup> The Court held that the plaintiff could only ask for rectification by way of a replication to the plea, and that no replication could be delivered, as doing so would be regarded as taking a further step. This, in turn, would preclude the plaintiff from applying for summary judgment.
90. In coming to this conclusion, the Court relied on *Hire-Purchase Discount supra*. *Hire-Purchase Discount* concerned a plaintiff applying for summary judgment on 5 September 1978 in circumstances where it had, on 12 September 1978 (being a date after the plaintiff had applied for summary judgment), delivered further particulars pursuant to the defendant's request for particulars.<sup>78</sup> The Court held that nothing in Rule 32 (as it read in 1979) suggested that a plaintiff would be precluded from proceeding with its application for summary judgment if further particulars were furnished.<sup>79</sup> The conclusion in *Trumpie* (that the plaintiff was precluded from taking any further step after the plea)<sup>80</sup> is thus not supported by *Hire-Purchase Discount*.<sup>81</sup>
91. As appears from the discussion above, and apart from the factual differences between the present matter and *Arum Transport*, the authorities upon which *Arum Transport* was decided do not, in fact, lend support to the conclusion that the Court came to – certainly not to the extent that *Arum Transport* would persuade this Court that *Quattro Citrus* is clearly wrong.

### **The question of waiver**

<sup>76</sup> *The Standard Bank of South Africa Limited v Trumpie supra* at para [2.8].

<sup>77</sup> At para [4].

<sup>78</sup> *Hire-Purchase Discount supra* at 306D-F.

<sup>79</sup> At 307B-C.

<sup>80</sup> At para [4] of the judgment.

<sup>81</sup> This notwithstanding, where rectification is sought, the claim is not appropriate for summary judgment: see *Trumpie* at para [9].

92. The defendant argues, on the basis of the decision of *Arum Transport*,<sup>82</sup> which in turn relies on *Steeledale*,<sup>83</sup> that the delivery of a replication constitutes a further procedural step and that such a further step constitutes a waiver of the plaintiff's right to apply for summary judgment.
93. At the outset, I agree with the submission made on the plaintiff's behalf that questions of waiver cannot appropriately be decided in Rule 30 proceedings, because waiver is a substantive issue and not one which pertains to an irregularity of form.<sup>84</sup> It is nevertheless addressed in the context of what a plaintiff is entitled to do under Rule 32.
94. Waiver is a factual<sup>85</sup> question that can only be determined once it is found, in the present case, that the plaintiff is in fact entitled to deliver a replication and a summary judgment application simultaneously.
95. In determining whether the delivery of a replication constitutes a waiver, this Court would have to find that the plaintiff intended to waive its right to apply for summary judgment. In the absence of an express waiver, waiver of a right can be inferred from a plaintiff choosing to exercise a right that is inconsistent with another right.<sup>86</sup>
96. The defendant argues that, if the defences raised in the special plea and plea on the merits did not raise an issue for trial, then the plaintiff would not have had to deliver a replication. Thus, the argument goes, the delivery of the replication constituted a waiver of the right to apply for summary judgment, because Rule 25 and Rule 32 present the plaintiff with an election. As indicated earlier, this argument is not necessarily correct. It depends on the circumstances of the matter. With reference to the example mentioned earlier, a replication may be necessary where a sham

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<sup>82</sup> *Arum Transport CC supra* at para [24].

<sup>83</sup> See *Steeledale Reinforcing (Cape) supra* at paras [14]-[15].

<sup>84</sup> *Graham and another v Law Society, Northern Provinces and others* 2016 (1) SA 279 (GP) at par [40].

<sup>85</sup> See *De Villiers v Pyott* 1947 (1) SA 381 (C).

<sup>86</sup> *BW Kuttle supra* at 668H; *Administrator, Orange Free State v Mokopanele* 1990 (3) SA 780 (A) at 787G-788B.

defence is pleaded, and in doing so it does not mean that the plaintiff concedes that the defence is not a sham. The delivery of the replication in itself cannot, therefore, be accepted as an indication of a waiver of the right to apply for summary judgment. It has been held that there is a presumption against waiver.<sup>87</sup> The onus to establish waiver is on the defendant.<sup>88</sup>

97. Previously, as discussed above, the furnishing of further particulars - which may be regarded as a further procedural step - was held not to be inconsistent with the right to apply for summary judgment, because by so doing a plaintiff was not making a choice which was inconsistent with an election to apply for summary judgment.<sup>89</sup>

98. A similar approach was taken in *Paul v Peter*:<sup>90</sup>

*"I cannot see how a plaintiff, by furnishing a defendant with further particulars ... thereby embarks upon a course of conduct which is inconsistent in any way with the exercise by the plaintiff of his right to claim summary judgment. It does not assist ... to describe the practice of summary judgment as being an unusual or extraordinary practice. I am, in any event, by no means certain that it is either unusual or extraordinary. The purpose of summary judgment procedure is to bring an expeditious end to a case where a defendant has no defence and has simply entered appearance for the purpose of delay. It seems to me that there is nothing whatsoever inconsistent between a plaintiff's applying for summary judgment on the one hand and on the other hand, and in case his application might prove to be unsuccessful, expediting the closure of pleadings in the main action itself. ... I cannot conceive of such conduct being inconsistent with an intention to endeavour to bring the proceedings to an expeditious end by making use of summary judgment proceedings."*

99. Reference has already been made to the authorities relied on in *Arum Transport*

<sup>87</sup> *Le Roux v Odendaal* 1954 (4) SA 432 (N) at 441E.

<sup>88</sup> *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A) at 778D-G.

<sup>89</sup> *BW Kuttle supra* at 668H-669E.

<sup>90</sup> 1985 (4) SA 227 (NPD) at 230D-G. See also *Dass and others NNO v Lowewest Trading (Pty) Ltd* 2011 (1) SA 48 (KZD) at paras [11]-[13].

to arrive at the conclusion that the delivery of a replication constitutes a further procedural step resulting in a waiver by the plaintiff of its right to apply for summary judgment. As indicated, I am of the view that *Arum's* application of those authorities is incorrect for the reasons set out above. I accordingly agree with the plaintiff's argument that the approach in *Quattro Citrus* (which is similar to this Court's approach in *BW Kuttle*) is correct.

100. The Court in *Arum Transport* was, in any event, not dealing with an application in terms of Rule 30. It was dealing with an application for summary judgment. The plaintiff's counsel in that case submitted (from the Bar) that the plaintiff had taken a further procedural step by delivering a replication.<sup>91</sup> The Court therefore decided the issue of waiver as a substantive issue of law, and not under Rule 30.<sup>92</sup>
101. As a final remark on this issue, Rule 32, prior to its amendment, did not permit the plaintiff to adduce evidence other than to confirm the cause of action and the amount stated in the summons. The plaintiff could also not deliver a replying affidavit in response to the defendant's affidavit. The amended Rule 32(2)(b) now not only permits, but requires, the plaintiff in its affidavit to "*explain ... why the defence as pleaded does not raise any issue for trial*". Given this obligation, a replication delivered simultaneously with an application for summary judgment cannot be regarded as a waiver by the plaintiff of its summary judgment remedy. On the contrary, in delivering a replication the plaintiff amplifies the reasons why the defence raised in the plea does not raise triable issues. It does not amplify the plaintiff's cause of action.

### **Rule 30 and its purpose**

102. The purpose of Rule 30 is to be considered in the context set out above.
103. The Rule provides as follows:

<sup>91</sup> *Arum Transport CC supra* at para [6].

<sup>92</sup> The appropriate approach in the present case would therefore have been to raise the issue of waiver as a point *in limine* in the defendant's opposing affidavit to the summary judgment application, rather than as an issue to be decided in terms of Rule 30.

- “(1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—
- (a) the applicant has not himself taken a further step in the cause with knowledge of the irregularity;
- (b) the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
- (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
- (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.
- (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.”

104. The purpose of Rule 30 is to remove “a hindrance to the future conducting of the litigation” created by a non-observance of the rules.<sup>93</sup> It is not intended to deal with matters of substance, but should be used to address issues of form.<sup>94</sup>

105. Rule 30 is also not intended to afford litigants an opportunity to delay or non-suit proceedings on frivolous technical grounds. It is for this reason that the Court is afforded a wide discretion, which includes the power to dismiss a Rule 30 application which is a stratagem to delay.<sup>95</sup>

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<sup>93</sup> SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO 1981 (4) SA 329 (O) at 333H.

<sup>94</sup> Graham and another v Law Society, Northern Provinces and others supra at para [4].

<sup>95</sup> Kmat Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd 2007 (5) SA 475 (W) at para [51].

106. Proof of prejudice is a prerequisite to success in an application in terms of Rule 30(1).<sup>96</sup>
107. In its notice in terms of Rule 30 the defendant alleges that the Uniform Rules do not permit a plaintiff simultaneously to replicate and make application for summary judgment in terms of Rules 25(1) and 32 respectively. The Rules, alleges the defendant, only permit the plaintiff to do one or the other "*as the next procedural step*".
108. The defendant argues that the fact that Rule 25 also has a 15-day restriction is not in itself indicative that, on a proper interpretation of Rule 32, it allows the plaintiff to "*do something which is contrary to its express provisions*". (This is, of course, correct as a submission in a vacuum, but it does not take account of the other considerations that come into play in the interpretative exercise.)
109. In any event, the defendant argues that, instead, there is no cross-referencing in the Rules to each other, and the 15-day restriction is their only similarity. This, the defendant says, supports its argument that (1) the two Rules put the plaintiff to an election regarding its next procedural step; and (2) the Rules serve different purposes: Rule 25 is to be invoked if the plaintiff wishes to proceed to trial, and Rule 32 is invoked if it does not.
110. The defendant submits that whether a plaintiff delivers a replication before, simultaneously with or after making application for summary judgment is irrelevant. It is the delivery of the replication which guillotines any right which the plaintiff would otherwise have had in terms of Rule 32. If it were otherwise, the Rule would allow the plaintiff to approbate and reprobate because, whereas a replication is the pleaded answer to the issues for trial raised by the defendant in its plea, summary judgment is to be granted where no such issues appear from the plea. The plaintiff cannot at one and the same time pursue courses of action which are expressly and purposively inconsistent with each other.<sup>97</sup>

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<sup>96</sup> *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and others* 1999 (2) SA 599 (T) at 611C-F.

<sup>97</sup> *Hlatswayo v Mare and Deas* 1912 AD 242 at 259.

111. The plaintiff submits, however, that Rule 32(2)(a), read with Rule 25(1), does not suggest that the plaintiff is not permitted to replicate and make application for summary judgment at the same time. On the contrary, as indicated earlier, the Rules require the plaintiff both to replicate and to make application for summary judgment "[w]ithin fifteen days after the service upon him of a plea" (in terms of Rule 25(1)) and "[w]ithin 15 days after the date of delivery of the plea" (in terms of Rule 32(2)) respectively.
112. The delivery of a replication is, moreover, not "approbating and reprobating". As indicated, a replication also serves as a response to the defences raised in the plea and explains why they do not raise triable issues. The delivery of a replication does not necessarily mean that triable issues exist – and if they do, then summary judgment will not be granted.
113. The defendant delivered its special plea and plea on the merits on 22 August 2022. On 12 September 2022, being 15 days after delivery of the defendant's plea, the plaintiff simultaneously delivered its replication and application for summary judgment. The plaintiff thus delivered the pleadings within the period provided for in Rules 25(1) and 32(2)(a) respectively.
114. The plaintiff argues that, in the circumstances, the defendant's Rule 30 application is inimical to the purpose of Rule 30. I agree.
115. Further, and importantly, it is unclear what prejudice the defendant has suffered or stands to suffer as a result of the simultaneous delivery of the replication and the summary judgment application. In its founding affidavit, the defendant's only allegation in relation to prejudice is that "*...it is impermissible, irregular and therefore prejudicial to the defendant if the plaintiff is allowed to litigate in a manner which is contrary to the Rules and the law*". The issue of prejudice is, for obvious reasons, predicated upon a finding that the decision in *Quattro Citrus* is wrong. The aspect is elaborated upon in the defendant's replying affidavit and heads of argument, but the essence remains the same.
116. As I have found that the plaintiff's conduct does not, in fact, contravene either the



Rules or the law, it follows that the defendant has not, and will not, suffer any prejudice should the matter be allowed to take its course and the summary judgment application be argued. The defendant is entitled in terms of Rule 32(3)(b) to deliver an opposing affidavit disclosing the nature and grounds of its defence and the material facts relied upon in opposition to the application for summary judgment. It will be able to deal, in that affidavit, with any issue that arises from the replication. No prejudice could be occasioned by the defendant doing so. An application for summary judgment remains a summary remedy to be dealt with in accordance with the established principles relevant thereto, and the Court will approach the determination thereof accordingly.

### **Conclusion**

117. In all of these circumstances, and on the particular facts of this matter, the Rule 30 application falls to be dismissed.

### **Costs**

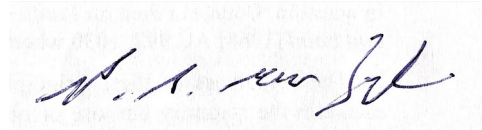
118. The party who succeeds should generally be awarded costs. There is no reason to depart from this approach in the present matter. I am of the view that the employment of two counsel was warranted given the conflicting decisions with which the parties were faced.

### **Order**

119. In the premises, it is ordered as follows:

**(a) The application in terms of Rule 30 is dismissed.**

**(b) The defendant shall pay the costs of the application, including the costs consequent upon the employment of two counsel.**

A handwritten signature in black ink, appearing to read 'P. S. van Zyl', is centered on a light-colored rectangular background.

**P. S. VAN ZYL**

**Acting judge of the High Court**

**Appearances:**

**For the plaintiff:**

J. Muller SC (with him H. Beviss-Challinor),  
instructed by Bernadt Vukic Potash & Getz

**For the defendant:**

R. J. Howie, instructed by M A Hurwitz Attorneys