Republic of South Africa

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

Case number: 14191/2019

Before: The Hon. Mr Justice Binns-Ward
Order made: 19 February 2020
Reasons furnished: 26 May 2020

In the matter between:

PROPELL SPECIALISED FINANCE (PTY) LTD Plaintiff

and

POINT BAY BODY CORPORATE SS 493/2008 First Defendant

POINT BAY BODY CORPORATE SS66/2009 Second Defendant

REASONS FOR POSTPONEMENT ORDER

(Transmitted electronically to the parties' attorneys and posted on SAFLII, these reasons are deemed to have been handed down at 11h00 on 26 May 2020.)

BINNS-WARD J:

[1] In this matter, which is an opposed summary judgment application, I made an order in the Third Division postponing it for hearing in the Fourth Division on the semi-urgent roll on 4 June 2020. The order was made in accordance with the terms of a draft to that effect that

was handed up by counsel. It was apparent at the time I made the order that practitioners were uncertain as to what the practice should be in such matters consequent upon the changes wrought by the amendments to Uniform Rule 32 that came into effect on 1 July 2019. I was given to understand that some guidance in this respect would be appreciated to lend certainty and consistency. I agreed that this was desirable and therefore undertook to provide written reasons for making the order that was sought. The subsequent intervention of a succession of more pressing matters and the general disruption caused by the Covid-19 lockdown resulted in these taking longer to produce than I had intended.

[2] It had been the long-established practice, prior to the coming into effect of the aforementioned rule amendments, for opposed summary judgment applications to be heard on the Third Division roll in the court that is ordinarily reserved for the hearing of unopposed matters. The reason for this was manifest; summary judgment was intended to afford a quick and cost-effective route to final judgment in a confined category of cases in which a plaintiff's entitlement to relief was amenable to easy and ready proof and when it was demonstrable that a defendant had entered appearance to defend only as delaying tactic. Sending an opposed summary judgment application off to be heard on the opposed motion roll would involve a delay of at best a number of weeks, often months, and also entail the incurrence of materially increased costs. It would therefore be a course that would tend to thwart the achievement of some of the primarily intended advantages of the procedure. Indeed, I had occasion, more than once over the years, to forcefully deprecate the occasional unjustified deviation from the established practice that resulted in such matters coming up in the Fourth Division; see *Absa Bank Ltd v Walker* [2014] ZAWCHC 92 (17 June 2014) at para 18 -19, *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd and Others* [2016] ZAWCHC 118 (12 September 2016) at para. 27 and *Santoro and Others v Mortgage Secured Finance (Pty) Ltd and Other*s [2019] ZAWCHC 103 (22 August 2019) at para 8 – 9.

[3] In the last-mentioned case, being mindful of the possible effects of the then recently introduced rule amendments, I did add the qualification that '[t]*he position might well be different in respect of applications for summary judgment under the very different procedure in terms of the recently substituted rule 32, but that is a subject for another day*'. The contemplated other day is now upon us.

[4] The number of summary judgment applications on the court roll has dropped off significantly since the rule amendments came into operation, and apart from my very recent judgment in *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security*

*Systems CC v National Security and Fire (Pty) Lt*d [2020] ZAWCHC 28 (30 April 2020), I am not aware that there has yet been any jurisprudence concerning the working of the amended rule 32. As noted in *Tumileng* (which was heard in the Fourth Division), it is clear that amended rule, which provides that an application for summary judgment may be brought only after the delivery of the defendant's plea, no longer provides for the degree of expedition contemplated in terms of the pre-amendment regime. If the initially delivered plea were to be the object of an exception or rendered the subject of amendment for any other reason, which is by no means unusual, especially when a defendant seeks to advance dubious defences, the ripeness of a claim for summary judgment for hearing could actually be very considerably delayed beyond the time within which the rules provide for the delivery of a plea in the ordinary course.

[5] It is also evident that the effect of the amendments has been to render availing of the remedy materially less cost-effective. In most cases the application can be brought only after the pleadings have closed, for it is only in a minority of cases that the exchange of pleadings continues after a plea has been delivered. A plaintiff contemplating making application for summary judgment now not only has to consider the defendant's plea before instituting the application, it also has to support the application with a more elaborate affidavit than was previously required, dealing not only with a motivated reiteration of the grounds of its own case, but also engaging with the content of the defendant's plea. Quite apart from the possibility of supervening interventions such as exceptions or applications to amend the originally delivered plea, the additional input required from legal representatives before an opposed application for summary judgment is ready for hearing means that the attendant expense will be appreciably higher than it used to be in respect of such applications brought prior to the rule amendments; in some cases, such as those in which exceptions and amendments intervene, very considerably higher.

[6] The time and costs factors that militated in favour of the exceptional treatment of opposed summary judgment applications by permitting their hearing on the unopposed motion court roll have consequently been negated in large measure.

[7] An additional consideration is that the papers in opposed summary judgment applications may now be expected to often be more voluminous than used to be the case. This is because of the new requirements introduced in terms of the amendments concerning the content of the papers, which I discussed at some length in *Tumileng*. This effect needs to be considered in the context of the generally increased reading burden on judges sitting in the

Third Division brought about in recent years as a result of the requirements of the National Credit Act 34 of 2005 and the related jurisprudence of the Supreme Court of Appeal and the Constitutional Court and also the new rules pertaining to applications for execution against fixed property that is a defendant's primary residence. There is a limit to the extent to which the unopposed roll judge's already heavy reading burden can reasonably be increased if he or she is to be able to prepare properly for the roll call.

[8] Regard being had to the cumulative effect of all of the aforementioned factors, it would be appropriate, in my judgment, for summary judgment applications brought in terms of the amended rule 32 that are opposed to be heard and determined on the semi-urgent roll in the Fourth Division, and no longer in the Third Division as was the case before the amendments were effected. It was for those reasons that I acceded to making the order proposed by counsel in the current case.

A.G. BINNS-WARD
Judge of the High Court