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DISPUTE RESOLUTION **ALERT**

Not as speedy as its predecessor: The new Rule 32

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"What you do have is my word. And it's stronger than oak."

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Legal practitioners know that there are three remedies available to them to obtain a judgment without any undue delay: (i) Default judgment; (ii) Summary judgment; and (iii) Consent and confession to judgment. Summary judgment is provided for in terms of Rule 32 of the Uniform Rules of Court. Unlike a default judgment where the defendant fails to file an opposition, the old Rule 32 dealt with situations where an opposition is filed, however, the court proceeds to grant judgment against the defendant on the plaintiff submission that the defendant's only reason for opposition is to delay the matter. In other words, judgment is granted without hearing the version of the defendant.

Naturally, for a lawyer the *audi altarm partem* ("listen to the other side") bells starts to ring. The *audi alteram partem* principle emphasises the importance of giving each party an opportunity to respond to the evidence against them. Some would argue that the *audi alteram partem* principle is the secret ingredient to natural justice. Be that as it may, the old Rule 32 was extraordinary and was permitted in very limited circumstances as will be discussed below. The new Rule 32 seems to show more reverence to the *audi alteram partem* principle by the introduction of the plea of the defendant prior to the plaintiff making an application to court for summary judgment.

The legal position under the old Rule 32

Importantly, the old Rule 32 was designed as an extraordinary measure which circumvented the *audi alteram partem* principle in that a defendant was not afforded an opportunity to place his/her version before the court prior to judgment being obtained. The old Rule 32 was indeed a "quick fix" relief. That being said, there were various mechanisms in place to prevent injustices and/or prejudice to the defendant. For instance, under the old Rule 32(1) a plaintiff was only permitted to apply for summary judgment if his/her claim was: (i) based on a liquid document; (ii) for a liquidated amount of money; (iii) for delivery of specified movable property; or (iv) for ejectment.

Based on these grounds a court would grant a summary judgment if satisfied that the plaintiff had a *very clear case* and the defendant had no *bona fide* defence. Under the old Rule 32 the plaintiff was required to apply for summary judgment within 15 days after the defendant gave notice of intention to defend. Crucially, the plaintiff was not permitted to request summary judgment when he/she was already aware of a *bona fide* and reasonable defence. The defendant also had other avenues at its disposal such as:

(i) filing an affidavit in which the defendant discloses the nature and grounds of his/her defence;

(ii) raising a technical legal point; or

(iii) raising a counter claim (whether liquidated or unliquidated, provided it contained a full disclosure of the nature and grounds thereof as well as the material facts upon which it relies).

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Not as speedy as its predecessor: The new Rule 32...*continued*

Unlike the old Rule 32, the new Rule 32 sets a defendant's plea as a prerequisite before the plaintiff can proceed with an application for summary judgment.

Under the old Rule 32 the defendant's defence was dealt with on an ad hoc basis provided there was a valid and/or *bona fide* defence. Put differently, being provided an opportunity to raise a defence was allowed in limited circumstances - but it was not part and parcel of the "main" procedure.

Way forward under the new Rule 32

The new Rule 32 is anchored in two strict principles: Certainty and *audi alteram partem*. Under the new Rule 32 a plaintiff cannot make an application to court for a summary judgment prior to the defendant delivering his/her plea. Unlike the old Rule 32, the new Rule 32 sets a defendant's plea as a prerequisite before the plaintiff can proceed with an application for summary judgment. This requirement attempts to give a court the last say in determining whether a defence is entered simply to delay proceedings. Previously this decision was with the plaintiff. In other words, if the plaintiff believed that the defendant filed a notice of intention to defend for the sole reason of delaying the proceedings, the plaintiff was at liberty to approach a court for summary judgment.

In terms of the new Rule 32, after receipt of the defendant's plea the plaintiff may approach a court within 15 days for an application for a summary judgment.

Two things are evident: (i) The defendant is given an opportunity to state his/her case as a matter of procedure; and (ii) the plaintiff is not left to speculate whether there is a valid *bona fide* defence. The essence of time evidently plays second fiddle to certainty and *audi alteram partem* under the new Rule 32. This hierarchy is confirmed by the extension of days in which the plaintiff can set down the application: The old Rule 32 required set down within 10 court days, the new Rule 32, 15.

Conclusion

The doctrine of stare decisis is a long-standing doctrine in South African law primarily concerned with creating certainty and uniformity in judicial decisions. The new Rule 32 strives to create a regime where certainty prevails rather than prioritising a speedy relief. Albeit the procedure under the new Rule 32 may be longer, the advantage is in its certainty. The plaintiff is not left to speculate whether the defendant has a valid *bona fide* defence. The prerequisite of a plea by the defendant puts the plaintiff in a better decision-making position as to whether to proceed by way of summary judgment or employ a different legal strategy.

Sam Masombuka

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"What you do have is my word. And it's stronger than oak."

In an attempt to overcome the parol evidence rule, Lourensford argued that the agreement was partly in writing and partly oral.

It is still fairly common for parties to "shake on it". Parties often discuss terms of an agreement before formally putting it into writing. Parties are also known to verbally agree to amendments to a contract. Disputes often arise when such terms are not included in the written agreement, especially when the written agreement doesn't include a "whole agreement clause" (a clause which states that the written agreement contains all the provisions the parties agreed on, and supersedes and novates in its entirety any previous understandings or agreements in respect thereof) and/or a "non-variation clause" (a clause which states that no addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of the agreement will be of any force or effect unless in writing and signed by the parties).

When faced with a situation where one party to an agreement attempts to rely on certain verbal undertakings outside the confines of the written agreement, the South African courts are guided by the parol evidence rule. The parol evidence rule prescribes that where parties to a contract have reduced their agreement to writing, it becomes the exclusive memorial of the transaction, and no evidence may be led to prove the terms of the agreement other than the document itself, nor may the contents of the document be contradicted, altered, added to or varied by oral evidence.

In the recent case of *Mike Ness Agencies CC t/a Promech Boreholes v Lourensford Fruit Company (Pty) Ltd* (922/2018) [2019] ZASCA 159, which was before the Supreme Court of Appeal (SCA), Lourensford Fruit Company (Pty) Ltd (Lourensford) attempted to argue that it had verbally agreed to a certain additional term to an agreement which was concluded with Mike Ness Agencies CC t/a Promech Boreholes (Promech), which term was not included in the written Agreement between the two parties.

In the normal course, taking into consideration the parol evidence rule, the additional term which the parties verbally agreed upon (on Lourensford's version), would not be allowed to form part of the agreement between the parties.

In an attempt to overcome the parol evidence rule, Lourensford argued that the agreement was partly in writing and partly oral (with the oral portion of the agreement being the additional term to the agreement). Lourensford thereby attempted to establish that it was entitled to rely on the verbal agreement between itself and Promech, even though this term was not included in the written portion of the agreement.

In its judgment, the SCA reiterated what it previously held in the case of *Affirmative Portfolios CC v Transnet Limited t/a Metrorail 2009* (1) SA 196 (SCA), namely that, *"where an agreement is partially written and partially oral, then the parol evidence rule prevents the admission only*

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The oral portion of the agreement, as contended for by Lourensford, contradicted and varied the written portion of the agreement and as a result thereof, evidence on the oral portion of the agreement would offend the parol evidence rule and be inadmissible.

of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement. This is often referred to as the 'partial integration' rule."

Considering the above, the SCA held, *inter alia*, that the oral portion of the agreement, as contended for by Lourensford, contradicted and varied the written portion of the agreement and as a result thereof, evidence on the oral portion of the agreement would offend the parol evidence rule and be inadmissible.

Conclusion:

When dealing with contracts, parties should be cognisant of the risks involved when leaving terms agreed upon out of the written contract. Parties should ensure that all the terms agreed upon between them are reflected in the contract. It is also important to include a "whole agreement clause", as well as a "non-variation clause" in the contract, in order to avoid future disputes.

Lastly, if the parties agree on an oral portion of the contract, outside the confines of the written portion of the contract, parties should ensure that the terms of the oral portion of the contract do not contradict or vary the written portion of the contract, because if this is the case, the South African courts will be reluctant to allow it.

Kylene Weyers and Stephan Venter

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OUR TEAM

For more information about our Dispute Resolution practice and services, please contact:

Tim Fletcher
National Practice Head
Director
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Thabile Fuhrmann
Chairperson
Director
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Timothy Baker
Director
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester
Director
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Lionel Egypt
Director
T +27 (0)21 481 6400
E lionel.egypt@cdhlegal.com

Jackwell Feris
Director
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Anja Hofmeyr
Director
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Julian Jones
Director
T +27 (0)11 562 1189
E julian.jones@cdhlegal.com

Tobie Jordaan
Director
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis
Director
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Richard Marcus
Director
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer
Director
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Zaakir Mohamed
Director
T +27 (0)11 562 1094
E zaakir.mohamed@cdhlegal.com

Rishaban Moodley
Director
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com

Mongezi Mpahlwa
Director
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng
Director
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Byron O'Connor
Director
T +27 (0)11 562 1140
E byron.oconnor@cdhlegal.com

Lucinde Rhoodie
Director
T +27 (0)21 405 6080
E lucinde.rhoodie@cdhlegal.com

Belinda Scriba
Director
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit
Director
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Willie van Wyk
Director
T +27 (0)11 562 1057
E willie.vanwyk@cdhlegal.com

Joe Whittle
Director
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse
Executive Consultant
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Pieter Conradie
Executive Consultant
T +27 (0)11 562 1071
E pieter.conradie@cdhlegal.com

Willem Janse van Rensburg
Executive Consultant
T +27 (0)11 562 1110
E willem.jansevanrensburg@cdhlegal.com

Nick Muller
Executive Consultant
T +27 (0)21 481 6385
E nick.muller@cdhlegal.com

Jonathan Witts-Hewinson
Executive Consultant
T +27 (0)11 562 1146
E witts@cdhlegal.com

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR