RULES BOARD FOR COURTS OF LAW

REPUBLIC OF SOUTH AFRICA

MEMORANDUM TO ROLE-PLAYERS IN RESPECT OF PROPOSED CHANGES TO THE SUMMARY JUDGMENT RULE (UNIFORM RULE 32)

1. The Rules Board for Courts of Law of the Republic of South Africa (the "Rules Board") has appointed a Superior Courts Task Team (the "Task Team") to consider various matters relevant to the Uniform Rules and advise thereon.

2. One of the issues which the Task Team was asked to investigate was the rule relating to summary judgment (Uniform Rule 32). Concerns had arisen in the light of constitutional challenges to Rule 32 (which inevitably resulted in the plaintiff abandoning its summary judgment application, irrespective of the merits of its claim and the weakness of the defendant's substantive defence) and the general feeling that the rule was both ineffective and abused.

3. The Task Team thoroughly considered the summary judgment rule, and concluded that the present summary judgment procedure was unsatisfactory for a number of reasons. In particular:

    3.1 deserving plaintiffs were frequently unable to obtain expeditious relief because of an inability to expose bogus defences (either in their founding affidavit or in any further affidavit – further affidavits not being permitted);

    3.2 opportunistic plaintiffs were able to use the procedure to get the defendant to commit to a version on oath and thus obtain a tactical advantage for a trial in due course; and

3.3 a burden of proof was arguably shifted to the defendant which was not only unfair but led to the kinds of constitutional challenges which have emanated in the High Court.

4. The Task Team recommended the following, which it was thought would best alleviate and address those problems:

- summary judgment should only be able to be sought after a plea (or exception) has been delivered (and not, as at present, after delivery of a notice of intention to defend);

- a plaintiff should not depose to a *pro forma* affidavit, as is now the case, but should instead identify any point of law relied upon and explain briefly why the defence as pleaded does not raise any triable issues.

5. The Rules Board considered those recommendations of the Task Team, as did the High Court Committee of the Rules Board (the "HCC"). Both were of the view that the recommendations of the Task Team might well have merit, and provide a sensible and pragmatic way of improving the current summary judgment rule (Rule 32). It was however thought appropriate to invite comments from role-players on the Task Team's proposal, before the Rules Board and the HCC made any firm decisions, or reached any more definitive conclusions, as well as before any draft amended rule was prepared.

6. Role-players are accordingly asked for their comments on the recommendations of the Task Team as set out in paragraph 4 above.

7. In order to assist role players in their deliberations on the suggested changes, a brief overview of the Task Team's reasoning is set out below. An indication of the sort of changes envisaged to the current Rule 32 is also included at the end of this document. Comments by role-players on the kinds of changes to Rule 32 which would be required by the recommendations are welcomed.

The basis of the Task Team's recommendations

8. By way of a brief overview of the Task Team's reasoning:

8.1 A plaintiff at present does not have to indicate what exactly its cause of action is, or what facts it relies on, or why a defendant does not have a defence. Instead, the plaintiff is merely required (and permitted) to file a brief affidavit, taken from a template, "*verifying the cause of action*" in the vaguest possible way, opining that the defendant has no *bona fide* defence, and stating that "*a notice of intention to defend has been delivered solely for the purpose of delay*" (rule 32(2). This formulaic affidavit is unsatisfactory in many respects.

8.1.1 The plaintiff, when deposing to its affidavit under the current rule, may well not be aware what defence the defendant is intending to advance.

8.1.2 The deponent of the affidavit (who could, for example, be an accounts manager in a bank) is also likely to have little idea as to why exactly the defendant is opposing: the defendant could for example believe (wrongly) that it has a viable defence, or that there is some impediment to the plaintiff succeeding irrespective of the merits (e.g. prescription, jurisdiction or lack of standing), or that the equities are such that a court could well be minded not to grant judgment for the plaintiff.

8.1.3 The current founding affidavit in summary judgment proceedings therefore invariably involves speculation on the part of the plaintiff's deponent. The lack of specificity as to the plaintiff's claim, and the complete lack of detail as to why the defendant's envisaged defence is bogus, coupled with the absence of any replying affidavit, also

means that the plaintiff can easily be frustrated by a defendant who is prepared to construct or contrive a defence, or rely on technical points.

8.2 The best way of addressing these shortcomings would seem to be to require the founding affidavit in support of summary judgment to be filed at a time when the defendant's defence to the action is apparent, by virtue of having been set out in a plea. This course is better than allowing a replying affidavit to be filed (as was suggested by a report prepared a few decades ago by the Galgut Commission). Merely including provision for a replying affidavit would not address the problems with the formulaic nature of the founding affidavit, and the speculation inevitably contained therein.

8.3 In the event of a plaintiff applying for summary judgment after the delivery of a defendant's plea, the plaintiff would be able to explain briefly in its founding affidavit why the defences proffered by the defendant do not raise a triable issue; and should indeed be required to do so in order that the question of whether there is a *bona fide* defence which is capable of being sustained could be considered by the Court in a meaningful way. Requiring the plaintiff to set out why, in its view, it has a valid claim and why the defendant's defence is unsustainable, would also remove the criticism that the defendant is being required to commit itself to a version when the plaintiff is not similarly burdened. Obliging the plaintiff to engage meaningfully with the case in its founding affidavit would moreover have the added benefit of reducing the temptation for a plaintiff to seek summary judgment as a tactical move (and as a way of forcing the defendant to commit to a version on oath, which can be subsequently used in cross-examination to discredit a witness of the defendant).

8.4 A stipulation that a plaintiff can only apply for summary judgment after delivery of a plea (rather than a notice of intention to defend) would also mean that the summary judgment application would be adjudicated on the

basis of the defendant's pleaded defence and thus hopefully avoid a situation (such as not infrequently occurs under the current rule) where a defendant's version in its opposing summary judgment application diverges materially from its subsequently-delivered plea. The summary judgment debate will thus hopefully be a more informed, and less, artificial, one, and engage with the real issues in the matter.

8.5 Although foreign practice must be viewed with caution given the differences between countries and their procedural systems, it is notable, too, that the other jurisdictions considered by the Task Team – the United Kingdom, Canada, Australia and the U.S.A. – all permit summary judgment only after a plea has been filed (and indeed after pleadings have closed). The summary judgment procedure was seemingly introduced in South Africa on the basis of its use in England and Scotland. The fact that summary judgment is only competent in those jurisdictions after at least a plea has been filed (and would thus be premature after merely a notice of intention to defend has been delivered) is thus reassuring, and indicative of the merits of the proposed change.

8.6 If the summary judgment procedure is changed as proposed, the Task Team does not believe that a replying affidavit would either be necessary or appropriate. A plaintiff would have had a chance to address the averments in the defendant's plea in its founding affidavit in support of summary judgment. If the defendant has a further rebuttal in its answering affidavit, then, if that is credible, the summary judgment application would be defeated; but that is not necessarily inappropriate as the matter would then presumably have complexities which render it ill-suited to the summary judgment remedy. For a similar reason, a referral to oral evidence (also mooted in the Galgut Commission report) seems inadvisable.

8.7 The Task Team debated whether, as in the comparative jurisdictions consulted, summary judgment should potentially be available for any kind of

claim (including illiquid claims for damages). It was concluded that this would not be appropriate, and that summary judgment could justifiably be confined to the kinds of matters referred to in section 32(1).

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.

9. An issue floated, but not finally decided, at the meeting of the Task Team was whether there should be a limit on the length of a founding affidavit in a summary judgment application brought under the proposed amended rule. (There could be no limit on a defendant's answering affidavit, as the defendant is, after all, facing final judgment. By contrast, the plaintiff would, if unsuccessful, merely be required to proceed with its action in the normal course.) The Task Team's chair was of the view that there is something to be said for a page limit (of, say, ten or fifteen pages) in a summary judgment founding affidavit; for otherwise there is a danger that an action could involve a lengthy application in which the plaintiff seeks immediate (or summary) relief, followed, if that is unsuccessful, by a trial; and that could impose an intolerable burden on the administration of justice, and also drive up costs for the parties. However, other Task Team members were not convinced that such a restriction should be imposed.

An indication of the kinds of changes proposed to Rule 32

10. If the Task Team's recommendation were to be adopted, the following sorts of changes would be likely to be made to Subrules 32(1) and (2) (words which are struck through are deleted, and words which are underlined are added):

> "(1) Where the defendant has delivered ~~notice of intention to defend~~ a plea or an exception, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only —
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> (a) on a liquid document;
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> (b) in a liquidated amount in money;
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> (c) for delivery of specified movable property; or
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> (d) for ejectment;
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> together with any claim for interest and costs.
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> (2) The plaintiff shall within 15 days after the date of delivery of ~~notice of intention to defend~~ a plea or an exception, deliver notice of application for summary judgment, together with an affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount, if any, claimed, identifying any point of law relied upon and the facts underpinning the claim, and explaining briefly why the defence as pleaded does not raise any triable issues, and thus why, in the plaintiff's ~~stating that in his~~ opinion there is no *bona fide* defence to the action ~~and that notice of intention to defend has been delivered solely for the purpose of delay~~. …"

11. Subrule 32(8A) would also presumably have to be deleted, as any Declaration would already have been filed by the Plaintiff.
