



To Plead or not to Plead: The evidential consequences of a “positive denial” and “non-admission” in pleadings

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Many litigation legal practitioners dealing with litigation are able to prepare and consider a plea to particulars of claim with their eyes closed, but preparing or considering a plea should not be oversimplified as it can have catastrophic results on trial if not done thoughtfully and critically.

It is useful to be reminded of the basics of pleading: that a defendant is required, in his/her plea, to either admit an allegation made by the plaintiff or else deny it.

Where a defendant admits an allegation, the plaintiff is excused from having to prove same and it is accepted as proven.

However, where a defendant denies an allegation, the plaintiff must establish the facts alleged on a balance of probabilities. It is therefore crucial that a plaintiff, when preparing for trial, carefully analyses those allegations which are admitted on the one hand, against those that are denied, on the other hand.

Denials can fall into one of two categories: There are “positive denials” (for example where the defendant pleads that he/she denies the allegation... and puts the plaintiff to the proof thereof), and there are “non-admissions” (where the defendant pleads that he/she has no knowledge of the allegation and can neither admit it nor deny it... and puts the plaintiff to the proof).

It is important to examine the difference between “positive denials” and “non-admissions” which has an effect on what evidence needs to be led by a plaintiff to prove its claim on a balance of probabilities, as well as what evidence needs to be adduced by a defendant to refute a claim or allegation.

Positive denials

A positive denial is a sufficient answer to an allegation made, there being no need for a defendant to set out any facts to support a positive denial.

The plaintiff bears the onus to prove the allegation that has been denied. The only proviso is that a denial must be specific. A defendant cannot competently give a general or “blanket” denial of all of the allegations made in the particulars of claim, but must specifically deny specific allegations made.

There is a difference between a defendant pleading that “the allegations made by the plaintiff are denied” as opposed to it pleading that “the defendant has no knowledge of the allegations pleaded”.

Non-admissions

In the case of a positive denial, the defendant understands the allegation, has knowledge of the facts, but disputes that they are true. In the case of a non-admission, however, the defendant asserts no knowledge of the allegation and expressly says that, accordingly, he can neither admit nor deny it. He claims not to know.

The Cape Court had this to say about the distinction in *Standard Bank Factors Limited vs. Furncor Agencies (Pty) Ltd* 1985 (3) SA 410 (C) at 417I-418C:

To my mind, there is a clear notional distinction between these two stances. A plaintiff faced with a positive denial must anticipate and prepare for the leading by the defendant of rebuttal evidence which contradicts the allegations he has made. A plaintiff faced with a non-admission need not anticipate and prepare to meet contradictory evidence to be adduced by the defendant. Indeed, there is authority for the proposition that he need not even anticipate a limited challenge by way of cross-examination... while that may conceivably be going too far... I think, with respect, that it is undoubtably correct insofar as a plea of non-admission... because of a lack of knowledge, will not entitle the defendant to contradict the plaintiff's averments by leading evidence to the contrary at the trial [because a defendant who does not know something cannot competently put up a different version because he has already pleaded that he has no version to put up].

Furncor Agencies is interesting as it provides that a defendant will be entitled to cross-examine a plaintiff's witnesses on allegations made in the particulars of claim where there is both a positive denial in the plea, as well as a non-admission. However, the defendant can only put up a contrary version - rebuttal evidence - in the case of a positive denial, not in the case of a mere non-admission.

So where does this leave plaintiffs and defendants?

1. Where a defendant has made a positive denial of something that a plaintiff has pleaded in his/her particulars of claim, then -

1.1.1. the plaintiff bears the onus of proving the truth behind the allegation, and will be required

to adduce evidence to establish that what has been stated, or alleged, is true on a balance of probabilities;

- 1.1.2. the defendant will be entitled to cross-examine the plaintiff's witnesses in order to demonstrate, on a balance of probabilities, that what the plaintiff alleges is untrue or unproven; and
 - 1.1.3. the defendant will also be entitled to lead rebuttal evidence to refute the plaintiff's version of events even where the defendant has not pleaded specific facts, so the plaintiff must anticipate a contrary version and prepare for it.
2. Where a defendant has merely pleaded a non-admission, then -
- 2.2.1. the plaintiff still bears the onus of proving the correctness of the allegation that he/she has made in the particulars of claim;
 - 2.2.2. the plaintiff can prove the correctness of an allegation by producing sufficient evidence as to the correctness on a balance of probabilities;
 - 2.2.3. the defendant is entitled to cross-examine the plaintiff on his/her own evidence to satisfy the court that the plaintiff's version is improbable, but the defendant may not produce any evidence of his/her own in rebuttal.

The distinction between a positive denial and a non-admission is therefore not inconsequential.

It is thus of the utmost importance that a defendant should carefully consider whether to plead a denial or non-admission to allegations in the particulars of claim, and for a plaintiff to thoroughly evaluate a defendant's plea, as it can have far reaching effects on what evidence is admissible by a defendant at trial in rebuttal of a plaintiff's claim.

It is also beneficial, when considering what evidence should be led, whether it will be enough for a plaintiff to simply adduce the evidence which would be unequivocal and withstand cross-examination (in the case of a pleaded non-admission) or whether plaintiff should expect rebuttal evidence, in which event plaintiff needs to diligently evaluate his/her own evidence and anticipate an opposing version.

For these reasons a defendant should thoroughly contemplate whether to plead a denial or non-admission, and a plaintiff, on critically evaluating a defendant's plea, for the reasons advanced in the *Furncor Agencies* case, should similarly consider the burden of proof, or of rebuttal, as the case may be, as the manner of pleading will have a significant influence on the way a claim or defence is presented, and on the result.

By Malandi Pieterse | Director : Litigation Department



KEBD
KLAGSBRUN EDELSTEIN BOSMAN DU PLESSIS INC.

220 Lange Street,
Nieuw Muckleneuk,
Pretoria, 0181
PO Box 178, Groenkloof,
South Africa, 0027
Docex 42, Brooklyn
Tel: +27 (0) 12 452 8900
Fax: +27 (0) 12 452 8901
www.kebd.co.za

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