



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 10086/2022P

In the matter between:

**WESBANK, A DIVISION OF FIRSTRAND
BANK LIMITED**

PLAINTIFF

and

**DEPENDABLE ALUMINIUM (PTY) LTD
NICHOLUS DEVANZO PILLAY
JARED ENRICO PILLAY
NIGEL MICHAEL ANGELO PILLAY**

**FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT
FOURTH DEFENDANT**

JUDGMENT

Nicholson AJ:

- [1] The plaintiff seeks summary judgment in terms of rule 32 in the following terms:
- '1. Payment of the sum of R127,912.32;
 2. Interest thereon at the rate of 2% per annum, calculated from 28 July 2022 to date of final payment;
 3. Costs of suit on the scale as between attorney and client.'

[2] It is common cause that on 2 February 2018 that an entity styled, The Rental Company Trust and first defendant concluded a written agreement¹, styled a master rental agreement ('the agreement'), for the rental and delivery of various goods. It is further common cause that the Rental Company Trust ceded and assigned its rights and obligations arising out of the agreement to plaintiff². Further still, it is common cause that on 25 January 2019, second, third and fourth defendants executed a deed of suretyship, in terms of which second, third and fourth defendants accepted liability jointly and severally along with first defendant for any debt arising out of the agreement³.

[3] The material terms of the agreement were that first defendant would take possession of the goods against monthly payments of R4 444.86 inclusive of VAT, from 7 February 2018 for a period of 36 months. The plaintiff asserts that the first defendant failed to comply with its obligations in terms of the agreement, and as of 28 July 2022, remained indebted to the plaintiff in the amount of R127 912.32.

[4] The defendants dispute the debt on two grounds. Firstly, a plea of prescription is raised, where it is averred that defendants' debt became due and payable on 7 March 2019 alternatively 30 April 2019 in terms of a settlement agreement arising out of an action sued out of the Durban Magistrates' Court under case no 9641/2019; and secondly, whether the quantum of the debt payable, is in terms of the certificate of balance filed with the summons.

[5] Plaintiff confirms that a claim was prosecuted in terms of the agreement out of the Durban Magistrates' Court but asserts that such claim was withdrawn on 21 October 2022 and avers that on 5 December 2019, a payment of R4 000 had been made by defendants, and such amount interrupted prescription in terms of s 14(1) and (2) of the Prescription Act 68 of 1969.

¹ Index to Summary Judgement Application: Paragraph 8 at page 4 read with page 16 / paragraph 9 at Page 37

² Index to Summary Judgement Application: Paragraph 11 at page 6 / While, denied in defendants' heads of argument, the surety is not listed in defendants' heads of argument as a point for determination – See paragraph 2

³ Index to Summary Judgement Application: Paragraph 14 at page 6 read with page 25

[6] In the affidavit opposing summary judgment, the defendants aver that the matter before the Durban Magistrates' Court was concluded on 19 June 2019 when the parties concluded a settlement agreement in respect of the capital sum owing, and the legal costs incurred by the plaintiff in the amount of R130 999.49, which would be paid in monthly instalments of R2 000 per month commencing from 1 July 2019. The defendants averred that the R4 000 paid on 4 December 2019 was therefore in respect of the settlement agreement and not in respect of the agreement. Accordingly, so argued by defendants, the R4 000 did not interrupt prescription.

[7] Defendants further aver, that even if the plaintiff now relied on the settlement agreement, that the debt in terms of that agreement would have prescribed on 31 December 2022.

[8] Rule 32 of the Uniform Rules reads:

'(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 any issue for trial.

(c) If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit and the notice of application for summary judgment shall state that the application will be set down for hearing on a stated day not being less than 15 days from the date of the delivery thereof.

(3) The defendant may —

(a) give security to the plaintiff to the satisfaction of the court for any judgment including costs which may be given; or

(b) satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard), or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

(4) No evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence orally or on

affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.’

[9] In the circumstances, plaintiff’s affidavit is limited to:

- ‘(a) a verification of the cause of action and the amount, if any, claimed;
- (b) an identification of any point of law relied upon;
- (c) an identification of the facts upon which the plaintiff’s claim is based; and
- (d) a brief explanation as to why the defence as pleaded does not raise any issue for trial⁴.’

[10] It is further trite that a plaintiff may not go into the merits of the matter or disclose any evidence and must confine himself to what is allowed by the uniform rules.⁵

[11] It is apparent that the plaintiff went beyond what is allowed in terms of the uniform rules because:

11.1 It not only attempts to expand on the merits contained in the summons in the affidavit supporting summary judgment, but also attempts to use the supporting affidavit as a replication to plead over the issue of prescription. Usually, when a special plea such as prescription is taken, the opposing party delivers a replication, and those papers then serve before the trial court. It is unusual for the replication to be contained in the affidavit supporting summary judgment; and

11.2 Plaintiff went beyond verifying the course of action as contained in the particulars of claim because the explanation of a settlement agreement was for the first time explained by plaintiff in the affidavit supporting summary judgement as it was never pleaded in the particulars of claim.

[12] To resist summary judgment, in their opposing affidavit, the defendants must merely depose to facts that if proved at trial with admissible evidence, would constitute a defence to the plaintiff’s action.⁶

[13] While the thrust of plaintiff’s argument before me was that the settlement agreement did not eliminate or novate the agreement but merely strengthened and/or

⁴ DE van Loggerenberg Erasmus: Superior Court Practice (RS 21, 2023) at D1-402G

⁵ *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and another* 2010 (5) SA 112 (KZP).

⁶ *Standard Bank of SA Ltd v Friedman* 1999 (2) SA 456 (C) at 462G.

reinforced it because the settlement agreement constituted an unconditional agreement as opposed to a compromise. In my view these, together with the point on prescription are for the trial court to determine and not an issue for summary judgment.

[14] Ms Van Reenen, who appeared for the defendants, in my view correctly points out that once the point of prescription together with the point regarding the quantification of the debt was taken, the usual order refusing summary judgment should have been taken, and the matter should not have served before me on the opposed motion court roll. For that reason, despite the fact that in these matters' costs are normally in the cause, I am of the view that the plaintiff must pay the costs.

Order

[15] In the result, I make the following order:

1. The application for summary judgment is refused.
2. The defendants are granted leave to defend the action.
3. The plaintiff is to pay the costs of the summary judgment application.



NICHOLSON AJ

Date heard:	26 July 2023
Judgment handed down:	10 August 2023
Appearances	
For plaintiff/applicant:	Mr S P Anderton
Instructed by:	Allen Attorneys Inc 57 Swapo Road Durban North Ref: G ALLEN/WES7/0769 c/o Botha & Olivier 239 Peter Kerchoff Street, Pietermaritzburg

For first to fourth

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