IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no: 6626/2024

In the matter between:

NEDBANK LIMITED	**PLAINTIFF**
and	
MATTHYS JOHANNES LOURENS WESSELS NO	**FIRST DEFENDANT**
MARYNA WESSELS NO	**SECOND DEFENDANT**
JACOBUS ELISA KRITZINGER NO	**THIRD DEFENDANT**
[In their capacities as trustees for the time being of the Kombi Trust, IT1704/2001]	
MATTHYS JOHANNES LOURENS WESSELS NO	**FOURTH DEFENDANT**
MARYNA WESSELS NO	**FIFTH DEFENDANT**
WILLEM CHRISTIAAN HENNING NO	**SIXTH DEFENDANT**
[In their capacities as trustees for the time being of the Ses Is Genoeg Trust, IT569/1995]	

Neutral citation: *Nedbank Limited v Matthys Johannes Lourens Wessels NO and Others* (6626/2024) [2025] ZAFSHC 211 (10 July 2025)

Coram: Ntanga AJ

Heard: 8 May 2025

Delivered: 10 July 2025

Summary: Civil procedure – application for summary judgment – statement of material facts in a plea and/or in affidavit opposing summary judgment required – principles regarding summary judgment restated – application for summary judgment refused.

ORDER

1 The application for summary judgment is dismissed;

2 The defendants are granted leave to defend; and

3 Costs of this summary judgment application to be costs in the course.

JUDGMENT

Ntanga AJ

Introduction

[1] This is an application for summary judgment against defendants for payment of the amount of R7 077 969.37 plus interest on the amount of R7 055 969.37 at the rate of 10.75% per annum, compounded daily and capitalised monthly from 20 November 2024 to date of final payment and other orders ancillary thereto. The defendants have opposed the application for summary judgment and filed an affidavit opposing the application.

[2] Prior to the application for summary judgment, the plaintiff caused summons to be issued against the defendants who defended the matter and filed a plea. After delivery of the defendants' plea, the plaintiff launched an application for summary judgment.

The plaintiff's case

[3] In its particulars of claim, the plaintiff avers that on or about 26 October 2018, the Kombi Trust bound itself as surety and co-principal debtor in solidium with for the repayment on demand of all amounts which Varymix may at any time owe to the plaintiff, arising from whatsoever cause. The terms of the suretyship agreement are set out in the particulars of claim.

[4] The plaintiff further averred that on or about 26 October 2018, the Ses Is Genoeg Trust bound itself as surety and co-principal debtor in *solidum* with for the repayment on demand of all amounts which Varymix may at any time owe the plaintiff, arising from

whatsoever cause. The terms of the suretyship agreement are set out in the particulars of claim.

[5] The plaintiff further averred in its particulars of claim that on or about 21 May 2021, Varymix bound itself as surety and co-principal debtor in solidum with the TNT Trust, IT 1679/2001 for the repayment on demand of all amounts which the TNT Trust may at any time owe the plaintiff, arising from whatsoever cause. The terms of the suretyship agreement are set out in the particulars of claim.

[6] Prior to these proceedings, the plaintiff avers that it launched application proceedings against, *inter alia*, the TNT Trust under civil case number 2036/2023 in terms whereof it claimed payment of the amount of R10 401 716.84, together with interest at the rate of 10.75% per annum. On or about 31 May 2023, the plaintiff and, *inter alia*, the TNT Trust concluded a written settlement agreement in respect of the proceedings and the settlement agreement was made an order of the court. In terms of the settlement agreement, the TNT trust acknowledged its indebtedness to the plaintiff in the amount of R10 401 716.84, including further interest at the applicable contractual rate.

[7] On 16 March 2023, Varymix was provisionally liquidated and, on 11 May 2023, it was finally wound-up. The plaintiff averred that the deemed date of commencement of liquidation of Varymix is 16 February 2023, it being the date upon which the application was launched.

[8] The plaintiff further averred that it proceeded to prove claims in the insolvent estate of Varymix as follows:
(a) In the amount of R21 488.28;
(b) In the amount of R10 247 157.01; and
(c) In the amount of R36 610.10.

[9] The plaintiff further averred that on or about 20 May 2024, the defendants concluded a written settlement agreement with the liquidators of Varymix. It is averred that the defendants unconditionally acknowledged their indebtedness to the liquidated estate in

an amount of R8 000 000 and undertook to effect payment in terms of specified instalments.

[10] The plaintiff averred that on 20 November 2024, the TNT Trust was indebted to the plaintiff in the amount of R7 055 969.37 together with interest at 10.75% per annum compounded daily and capitalised monthly from 20 November 2024 to date of final payment.

[11] The plaintiff averred that, by virtue of Varymix binding itself as surety and co-principal debtor *in solidum* with the TNT Trust, for the repayment on demand of all amounts which the TNT Trust may at any time owe the plaintiff, arising from whatsoever cause, Varymix was on 20 November 2024 indebted to the plaintiff in the amount of R7 055 969.37, together with interest at 10.75% per annum compounded daily and capitalised monthly from 20 November 2024 to date of final payment.

[12] The plaintiff further averred that by virtue of the Kombi Trust binding itself as surety and co-principal *in solidum* with Varymix, for the repayment on demand of all amounts which Varymix may at any time owe the plaintiff, arising from whatsoever cause, the Kombi Trust was on 15 July 2024, indebted to the plaintiff in the amount of R7 055 969.37 together with interest at 10.75% per annum compounded daily and capitalised monthly from 20 November 2024.

[13] The plaintiff further averred that, by virtue of the Ses Is Genoeg Trust binding itself as surety and co-principal *in solidum* with Varymix, for the repayment on demand of all amounts which Varymix may at any time owe the plaintiff, arising from whatsoever cause, the Ses Is Genoeg Trust was as on 20 November 2024, indebted to the plaintiff in the amount of R7 055 969.37 together with interest at 10.75% per annum compounded daily and capitalised monthly from 20 November 2024 to date of final payment.

The defendant's case

[14] In their plea, the defendants averred that their liability to the liquidated estate of Varymix was settled by and between the defendants and the liquidators of Varymix pursuant to the agreement dated 20 May 2024. The defendants averred that in

compliance with their obligations in terms of the settlement agreement, they have paid the total amount of R5 499 000 to the liquidated estate.

[15] The defendants further averred that, additionally, the liquidated estate received payment in the appropriate amount of R1 005 690.65 from the payment of the guarantee in respect of the KLK Build It Kuruman project, an erstwhile project of Varymix. The defendants further averred that the liquidated estate has further additionally received payment of the proceeds of the sale of certain movable assets of Varymix, including various TLBs and other vehicles, in the appropriate amount of R1000 000.

[16] The defendants further averred that, in addition to the suretyships by *inter alia* the defendants in favour of the plaintiff, the debt is secured by registered bonds in favour of the plaintiff over four immovable properties of the TNT Trust. The defendants averred that the plaintiff has partially realised this security and has sold two of these bonded properties pursuant to the order of 1 June 2023, for a purchase price of R4 000 000, and the net proceeds of this sale has been received by the plaintiff. Defendants averred in their plea that the plaintiff's claim against the defendants has become distinguished.

Issues for determination

[17] This court is called upon to determine: (a) whether the defence raised in the defendant's plea and affidavit opposing summary judgment constitute a *bona fide* defence, good in law, and/or whether it raised a triable issue.

Legal framework and analysis

[18] Rule 32(1) and (2)*(a)* provides that:

'(1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only –

. . .

(2)*(a)* Within 15 days after the date of delivery of the plea, the plaintiff shall deliver 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.'[1]

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[1] Uniform Rules of Court.

[19] In *Firstrand Bank Ltd v De Santos and Another*,[2] the court stated that:

'. . . in addition to identifying any point of law relied upon and the facts upon which the plaintiff's claim is based, and to explain briefly why the defence as pleaded does not raise any issue for trial. A plaintiff is required to engage with the content of the defendant's plea in order to substantiate its averments that the defence is not bona fide and has been raised merely as a delaying tactic.'

[20] The purpose of summary judgment is to afford a plaintiff final and speedy relief without undue delay of waiting for trial. The intention is, however, not to close doors of access to justice for the defendant. The defendant is not barred from accessing justice and the principle of *audi alteram partem* is not violated as the defendant is allowed to deliver a plea and affidavit opposing summary judgment before a decision is taken.[3] The court has a significant role to harmonise its decision with the ethos of the Constitution. In this instant, the constitutionally entrenched right to have any dispute resolved and decided in a fair public hearing before court is sacrosanct.[4] The Constitution is the founding principle of our legal system and the court is bound to observe, honour and apply constitutional principles in its decision-making process. In *S v Thebus and Another*,[5] the court stated that:

'A different approach is required when a court deals with a constitutional challenge to a rule of the common law. The common law is its law. Superior Courts are protectors and expounders of the common law. The superior courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power is now constitutionally authorised and must be exercised within the prescripts and ethos of Constitution.

In a constitutional challenge of the first type, referred to in paragraph 28, to a common law rule, the court is again required to do a threshold analysis, being whether the rule limits an entrenched right. If the limitation is not reasonable and justifiable, the court itself is obliged to adapt, or develop the common law in order to harmonise it with the constitutional norm.'

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[2] *Firstrand Bank Ltd v De Santos and Another* [2025] ZAGPPHC 606 para 23.
[3] Van Niekerk et al *Summary Judgment: A Practical Guide* (issue 1) at 5-4.
[4] See s 34 of the Constitution of the Republic of South Africa, 1996.
[5] *Thebus and Another v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC); 2003 (2) SACR 319 (CC) paras 31-32.

[21] This remedy is available to the plaintiff where the defendant has failed to show a *bona fide* defence that is good in law and a triable issue that should be ventilated at trial. Amendment of rule 32 of the Uniform Rules of Court has enabled the court to make proper evaluation of whether the defendant has raised a *bona fide* defence that is good in law and whether the plea raises any triable issues that should be ventilated at trial. This is in addition in certain circumstances, to the defendant's further opportunity to raise a defence in its affidavit opposing summary judgment that was not raised in its plea. A plea is the answer to the plaintiff's claim and the defendant must set out its defence in the plea. The court must balance the interests of both parties, that is, to ensure that a plaintiff is not prejudiced by a frivolous defence that is not *bona fide* to the claim, good in law or raises no triable issues whilst the defendant's right of access to court is not encroached. It is trite that the purpose of the summary judgment application is to prevent frivolous defences from delaying speedy resolution of a dispute to the prejudice of the plaintiff.[6] When adjudicating summary judgment application, the court must exercise its discretion judiciously to ensure that the court's door is not shut to the defendant that is entitled to enjoy its constitutionally enshrined right of access to court.[7]

[22] In *Maharaj v Barclays National Bank Ltd*,[8] the court set out the principles relating to summary judgment as follows:

'Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (*a*) whether the defendant has "fully" disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (*b*) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be.'

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[6] See *Majola v Nitro Securitisation 1 (Pty) Ltd* [2011] ZASCA 180; 2012 (1) SA 226 (SCA); [2012] 1 All SA 628 (SCA) para 25.

[7] See in this regard *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; 2009 (5) SA 1 (SCA) para 31.

[8] *Maharaj v Barclays National Bank Ltd* [1975] ZASCA 102; 1976 (1) SA 418 (A) (*Maharaj*) at 426A-C; see also *South African Land Arrangements CC v Nedbank Limited* [2015] ZASCA 88.

[23] In *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd*,[9] the court stated that:

'The role of pleadings in litigation is well-known and need not be restated in detail. The object of pleadings is to define the issues upon which a court will be called upon to adjudicate and to enable the parties to prepare for trial on the issues as defined. A plea is the answer by a defendant to the claims made against it by the plaintiff and in which his defence is set out. Rule 22(2) of the Uniform Rules provides as follows:

"The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent and shall clearly and concisely state all material facts upon which he relies."

An applicant for summary judgment is therefore entitled to rely on a plea in considering whether to launch an application for summary judgment. Where a defendant has failed to disclose a defence in its plea, a plaintiff would (in most instances) be entitled to the relief sought in its claim. I say this, however, with caution. I accept that there may be circumstances in which a defendant in summary judgment may well be able to raise a defence in the affidavit resisting summary judgment, but which was not raised in the plea. However, this is not the case is the present matter. In the present circumstances the defences raised in the affidavit resisting summary judgment clearly were an afterthought for the reasons I have already alluded to. This is precisely what the drafters of the new rule have tried to avoid.'

[24] I have set out above details of the defendants' defence which, in the main, is that plaintiff's claim against the defendants has become extinguished. The defendants made averments in their plea and affidavit opposing summary judgment that payments were made to the liquidated estate in the amounts of: (a) R5 499 000; (b) R1 005 690.65; (c) R1000 000; and (d) R4 000 000. These amounts total to R11 504 690.65. The amount claimed by the plaintiff against the defendants is the sum of R7 055 969.37.

The plaintiff argued that there is no defence raised by the defendants and that reference to the claim by TNT Trust is wrong. The principal debtor in terms of the surety agreement is not TNT Trust. It was argued that the plaintiff is not a party to the agreement and that what is settled is Varymix's indebtedness to the liquidators and not the plaintiff. The

[9] *Bragan Chemicals (Pty) Ltd v Devland Cash and Carry (Pty) Ltd* [2020] ZAGPPHC 397 para 15-16.

plaintiff further argued that the settlement agreement refers to the liquidators and state that this will not affect the plaintiff's rights.

[25] The plaintiff argued that its cause of action against Kombi Trust and the Ses Is Genoeg Trust is premised on the suretyships concluded by each Trust in favour of the plaintiff. The plaintiff argued that its cause of action is not premised on the settlement agreement concluded between the defendants and the duly appointed liquidators of the liquidated estate of Varymix. The plaintiff further argued that payment of R5 Million was made before the certificate of balance was issued, and this was before the summons were issued. The plaintiff argued that defendants still owe R7 Million. The plaintiff argued that the certificate of balance was issued on 20 November 2024. The plaintiff argued that the payments were made on 18 June 2024, 3 September 2024 and 5 November 2024. The plaintiff acknowledged receipt of the monies accounted for but argued that the defendants owed R10.3 million and that they currently owe R7 million.

[26] The defendants argued that the plaintiff was owed money by the liquidated Varymix and that it proved its claim against the liquidated estate. The defendants argued that, as sureties, they paid the amount owed in full. The defendants further argued that considering periodical payments agreed to by the parties in terms of the settlement agreement among the liquidators and defendants, as at the time that summons were issued, payments were still to be made as set out in clause 4.2 of the settlement agreement. They argued that monies paid are still with the liquidators and that the money paid to the liquidators is more than R10 Million.

The plaintiff referred the court to the decision of *Gruhn v Pupkewitz and Sons (Ty) Ltd*,[10] where the Court set out the principles relating to summary judgment in the translated English summary version as follows:

'. . . Where the seller applies for summary judgment against the surety, and the surety alleges that he has reason to believe that the amount claimed does not represent the correct price of the goods sold, it cannot be said that he has no defence to the application, and the Court must exercise its discretion and give the surety the opportunity of asking for further particulars and of defending the action.'

[10] *Gruhn v M. Pupkewitz and Sons (Pty) Ltd* 1973 (3) SA 49 (A) at 49. See also *Jacobsen van den Berg S.A. (Pty) Ltd v Triton Yachting Suppliers* 1974 (2) SA 584 (O).

The plaintiff argued that the court when exercising its discretion to refuse summary judgment is limited to where there may be doubt as to the defendant's liability. It was further argued that where the defendant's liability is undisputed, the discretion should not be exercised against a plaintiff to deprive it of the relief to which it is entitled. The issue before this court is whether the defence raised by the defendants that the debt has become extinguished because of the payments made constitute a *bona fide* defence, good in law and whether this is a triable issue to be ventilated at trial

The defendants referred to the decision of *Breitenbach v Fiat (Edms) Bpk*,[11] where the court stated that:

'The discretion under sub-rule (5) should not be exercised against a plaintiff on the basis of mere conjecture or speculation. It should be exercised on the basis of material before Court.'

Courts do not easily grant summary judgment as opposed to granting a defendant leave to defend itself on trial unless a clear case has been established that there is no *bona fide* defence raised from the defendant's plea and affidavit opposing summary judgment. In *ZTE Corporation South Africa v Arbiwizn (Pty) and Others*,[12] the court stated that:

'It was reaffirmed in *Absa Bank Ltd v Mphahlele* that our courts have warned to guard against injustice to a defendant who is called upon, at short notice and without the benefit of further particulars, discovery or cross-examination, to satisfy a court that such a defendant has a bona fide defence. On the one hand the remedy of summary judgment should be available to a plaintiff whose right to relief is being frustrated by the defendant who does not have a defence. However, on the other hand, our courts have always been reluctant to deprive a defendant of his right to defend an action and proceed to trial, except where there is a clear case.

In the matter of *Edwards v Menezes Van den Heever* J expressed a preference for the approach that it is only where the court has no reasonable doubt that the plaintiff is entitled to judgment as prayed and that the plaintiff has an unanswerable case, that summary judgment will be granted.

The fact that there exists a dispute whether the equipment in question is the old, dismantled equipment or whether it is the new equipment that was meant to be installed but was not installed in terms of the agreement, gives rise to a triable issue.'

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[11] *Breitenbach v Fiat (Edms) Bpk* 1976 (2) SA 226 (T) at 229E-F.

[12] *ZTE Corporation South Africa v Arbiwizn (Pty) and Others* [2024] ZAGPPHC 896 paras 33-35. See also *Absa Bank Ltd v Mphahlele* [2020] ZAGPPHC 257. Also see *Edwards v Menezes* 1973 (1) SA 299 (NC).

There is a dispute between the parties on whether defendants owe the monies claimed by the plaintiff. The defendants raised a defence that the primary debt has become extinguished. I have considered the plaintiff's submission that there is no defence raised by the defendants because plaintiff was not party to the agreements. This includes the plaintiff's submission that payment of the sum of R5 Million was made before the certificate of balance was issued and this was before the summons were issued. I have also considered the plaintiff's submission that defendants owed R10.3 million and that they still owe R7 Million. The other issue raised by the plaintiff is a clause in the agreement which provides that the rights of the plaintiff will not be affected by the agreement. The difficulty with this submission lies on the fact that the plaintiff's cause of action has been crafted in a manner that links it with the settlement agreement signed with the liquidator.

There is a clear factual dispute on whether defendants owe the monies claimed by the plaintiff or whether the debt is distinguished as submitted by the defendants. The defence raised by the defendants, in my view, raises a *bona fide* defence and gives rise to a triable issue which must be ventilated at trial. It will not be just and equitable to deny the defendants opportunity to defend this action on trial. The defendants have disclosed fully the nature, grounds and material facts upon which their defence is relied upon. I am satisfied that the defendants have raised triable issues which should be resolved at trial. I am not inclined to deprive the defendants who have raised a triable defence an opportunity to ventilate their defence in the trial proceedings. The plaintiff will not be without remedy as it will have full opportunity to prove its case on trial. On the contrary, the defendants will have no other opportunity except an appeal should summary judgment be granted.

Having considered submission by the parties and relevant case law, the plaintiff's application for summary judgment should, in the discretion of this court, be refused and the defendants be given leave to defend the action.

Costs

The general rule is that the successful party should be granted costs. However, having granted defendants leave to defend, the trial court will be in a better position to determine the issue of costs including summary judgment application.

Order

In the circumstances, I make the following order:

1 The application for summary judgment is dismissed;

2 The defendants are granted leave to defend; and

3 Costs of this summary judgment application to be costs in the course.

[redacted]

NTANGA AJ

Appearances

For the applicant:	S Tsangarakis
Instructed by:	Symington & De Kok Attorneys, Bloemfontein
For the respondents:	E G Lubbe
Instructed by:	Green Attorneys, Bloemfontein.