REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

APPEAL CASE NUMBER: HCAA10/2024

COURT *A QUO* CASE NUMBER: 10146/2022

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO
(3) REVISED.

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……………………

DATE 11 · 08 · 2025 SIGNATURE [redacted]

In the matter between:

ELLISRAS BRANDSTOF AND OLIEVERSPREIDERS (PTY) LTD	**1ST APPELLANT**
ANTON VERSTER	**2ND APPELLANT**
MARIUS LUBBE	**3RD APPELLANT**
FRANS PETRUS FABER	**4TH APPELLANT**
MARENTIA 471 CC	**5TH APPELLANT**

-and-

Q4 FUEL (PTY) LTD

RESPONDENT

Delivered	:	**11 August 2025** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **11 August 2025** at **10:00 am**.
Date heard	:	**28 April 2025**
Coram	:	**Bresler AJ *et al* Ngobeni J, Mangena AJ**

JUDGMENT

<u>BRESLER AJ:</u>

<u>Introduction:</u>

[1] The Appellants appeal against the whole of the judgment and order of the Honourable Madam Justice Naude-Odendaal J granted by the above Court on the 27th of July 2023. The Respondent opposes the Appeal.

[2] Leave to Appeal was granted by the Supreme Court of Appeal on the 12th of March 2024.

Factual synopsis:

[3] The First Appellant conducts business as a petroleum retaining and distributor. The Respondent is a wholesale fuel supplier.

[4] The Respondent issued out an application claiming payment in an amount of R1,541,217.00, being the alleged outstanding balance due and payable to the Respondent in respect of a Loan Agreement concluded between the First Appellant and the Respondent, and ancillary relief.

[5] The Appellants opposed the application raising *inter alia* the objection that the Respondent should have issued out summons having regard to the dispute pertaining to the outstanding balance raised prior to the issuing of the application. The Appellants specifically raised clause 6 that provides for a monthly reconciliation and for the parties to sign off on same.[1] This was not addressed in the Founding affidavit.

Judgment in the Court *a quo:*

[1] Paragraph 35.2.4 on paginated page 111 of Volume 2 of the Appeal record.

[6] Judgment was delivered on the 27th of July 2023 in favour of the Respondent. The Court *a quo* correctly stated that the Respondent (Applicant in the Court *a quo)* bore the onus to prove the elements of its cause of action. It was additionally found that the Applicant discharged the *onus* and that the Respondents' version is not as such as to raise a real, genuine or *bona fide* dispute.

[7] It was correctly surmised that the only possible dispute is the amount due and payable. The Court *a quo* then stated that nothing in the papers before court indicated that the reconciliation and certificate of balance is incorrect and accepted the evidence accordingly.

<u>Grounds of Appeal:</u>

[8] The Appellants relied on the following grounds in their Appeal:

8.1 The Court *a quo* erred in finding that no dispute of fact existed between the parties and in doing so, failed to consider that *inter alia* that:

8.1.1 the Appellants seriously and unambiguously addressed the issues in dispute in their Answering affidavit;

8.1.2 The disputes of fact that existed between the parties were of such a nature that it could only be ventilated through oral evidence canvassed during trial proceedings;

8.1.3 The alleged indebtedness to the Respondent was not supported by accurate and correct reconciliations as envisaged under the loan agreement concluded between the parties.

8.2 The Court *a quo* erred in not finding that the Respondent erroneously proceeded to enforce its claim by way of application procedure as opposed to action procedure.

8.3 The Court *a quo* erred in striking out the Applicant's court application on the basis that the claim was not proper in that it lacked the necessary averments to sustain a cause of action.

[9] The Appellants consequently applies for the appeal to be upheld and for the order of the Court *a quo* to be substituted with an order dismissing the application, alternatively referring the application to trial.

<u>Issues that require determination:</u>

[10] This Court is called upon to determine if the court *a quo* correctly decided the matter on affidavit and if a material factual dispute was present that required oral evidence. In this Court's view, this aspect lies at the heart of the determination of the Appeal.

<u>The Applicable Legal Principles:</u>

[11] Rule 6(5) of the Uniform Rules of Court provides:

> *'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'*

[12] In ***National Director of Public Prosecutions v Zuma***[2] the Supreme Court of Appeal stated:

> *'[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities.'*

[2] 2009 (2) SA 277 (SCA) at [26]

[13] In the well-known decision of ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd***[3] it is stated:

> *'[The] affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E – G, to be:*
>
> > *" ... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the fact in the applicant's affidavits justify such an order ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted." '*

[14] A failure to heed this basic proposition can (and generally should) result in the application being refused when the disputes of fact on material issues were foreseeable.[4]

[15] *In casu* the Appellant has raised the issue of the calculation of the claim amount upon receipt of the letter of demand. Although not articulately and extensively addressed in the Answering affidavit, it is quite clear that the Appellants placed the calculation of the quantum in dispute. The determination is, after all, subject to a

[3] 1984 (3) SA 623 (A) at 634E – 635D
[4] BR Southwood, **Essential Judicial Reasoning,** Lexis Nexis on p 23.

prescribed methodology, which methodology was not followed. The Founding affidavit, that should have been the stated case of the Respondent, is silent in this regard. A blanket statement is made that there was 'full compliance' with the respective agreements. In the Replying affidavit only did the Respondent concede that no such procedure was adopted to determine the outstanding balance as the Applicants allegedly failed to participate effectively in the procedure and upon being requested to do so.

[16] During argument, counsel for the Respondent had difficulty to persuade this Court, that, on a balance of probabilities, the calculation of the outstanding balance was done substantially in accordance with the Loan agreement. It was pertinently highlighted to him that the purported calculation does not appear to include the amount of R1,000,000.00 (one million rand) in respect of branding costs.

[17] Contrary hereto, an allegation is made in the Founding affidavit[5] that the loan amount is comprised on a capital amount of R2,700,000.00 plus a further amount of R1,000,000.00 in respect of branding costs. These branding costs will be included in the loan amount and paid directly by the Respondent to the relevant suppliers.[6] The papers before Court does not portray the inclusion of this calculation in the determination of the outstanding balance.

[5] Paragraph 36.1 on paginated page 18 of Volume 1 of the Appeal record.
[6] Paragraph 36.2 on paginated page 18 of Volume 1 of the Appeal record.

[18] This Court is therefore in the dark as to what exactly is claimed insofar as no provisions is made for the branding costs. This explanation of the claim amount should have been contained in the Founding affidavit and not presented from the bar.

[19] It is furthermore apposite to note that the Loan agreement provides for an express formula to determine the amount repaid per month (the 'claw back' amount). Of particular importance is Clause 6 of the Loan Agreement that states:

> *'... The capital, interest and branding cost is to be paid back in full to Q4 FUEL in the form of a set margin per litre as set out in Annexure 'A'.*
>
> *A monthly account reconciliation will be done at the end of every month by both parties to determine the outstanding balance (capital, interest and volume) owing to Q4 FUEL and signed off once agreed between both parties.'*

[20] The parties are *ad idem* that this consensual determination of the outstanding balance did not take place in respect of each amount portrayed on the reconciliation. As stated herein before, the allegations regarding the Appellants failure to co-operate, resulting in the Respondent to compile a reconciliation on his own, is only contained in the Replying affidavit. This is contrary to the stated case in the Founding affidavit that there was full compliance with the terms of the Loan Agreement and the Bulk Consumer Agreement.

[21] In applying the aforesaid well known *Plascon-Evans* rule, one must accept the version of the Respondent and then, taking into account the common cause facts, determine if a case has been made out by the Applicant. Motion proceedings are, after all, not aimed at determining probabilities.

[22] The mere fact that the Respondent's counsel had to spend a considerable part of his argument in explaining how the claim was calculated, can lead to no other conclusion but a finding that the Respondent did not make out its case on a balance of probabilities.

[23] The Court *a quo* correctly surmised that the outstanding balance is in dispute but erred in her finding that the dispute is not a genuine, *bona fide* dispute. The formula to determine the outstanding balance was flawed as it contradicted the prescribed formula in the Loan Agreement that the Respondent intended to enforce. Since the matter came before Court as a motion, the procedure was not appropriate to determine the dispute. Especially in lieu of the contradicting versions of the Respondent to the extent that full compliance was alleged, only to concede afterwards that there was in fact a failure to comply allegedly as a result of the conduct of the Appellants. In this Court's view, this is a critical dispute.

[24] The only justification that the Respondent had for its version of the claim amount, is the certificate of balance prepared in terms of the provisions of the **Electronic Communications and Transactions Act**, Act 25 of 2002. It is trite law that a certificate of balance is only *prima facie* proof of any balance that it may portray.

The Appellants have placed the calculation in dispute premised on the common cause fact that no reconciliation was conducted and no outstanding balance was therefore determined on a monthly basis. In this Court's view, this is sufficient to disturb the *prima facie* evidential value of the certificate of balance and the Court *a quo* thus erred in accepting the correctness thereof.

[25] It is thus manifest that no amount of argument can deter from the fact that there was insufficient compliance with the terms of the Loan Agreement pertaining to the quantification of the outstanding balance. The Respondents were forewarned to the extent that a detailed reconciliation was requested from them prior to the institution of the application.

[26] The dispute between the parties was not susceptible to determination on application, and action proceedings should have been preferred.

[27] In ***Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO***[7] the court remarked:

> *'Ek het met die oog hierop die getuienis in die eedsverklarings sorgvuldig nagegaan en, ná oorweging van die aard en omvang van die feitegeskille wat daaruit voortspruit, tot die slotsom gekom dat die Regter a quo nie genoegsame rede gehad het om te aanvaar dat die oorwig van waarskynlikhede, wat na sy mening in Western Bank se guns is, nie deur die*

[7] 1978 (4) SA 281 (A) at 293H – 294E

aanhoor van getuienis viva voce versteur sal word nie. Die riglyne wat by die oorweging van hierdie vraag geld is goed gevestig en die gewysdes op dié punt word saamgevat in 'n onlangse saak, Sewmungal and Another NNO v Regent Cinema 1977 (1) SA 814 (N). Ek volstaan met 'n verwysing na die volgende. In Da Mata v Otto NO 1972 (3) SA 858 (A) het Van Blerk AR die posisie op 865G - H soos volg saamgevat:

> *"It is normal procedure to resort to motion proceedings as the more expeditious and less expensive course of proceedings in claiming ejectment. But the permissibility of motion proceedings as opposed to trial action is not a question of any difference of character between the various kinds of claims which is being enforced, but a question of the proper method of determination in each case of the facts upon which any claim depends. If the dispute of fact is genuine, and is of such a nature that it cannot be satisfactorily determined without the advantages of a trial, which affords the opportunity of estimating the credibility of witnesses, and observing their demeanour, it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed by the affidavit evidence. In every case the Court must examine the alleged dispute and ascertain whether it is of the aforementioned kind and not fictitious.'"*

[28] Likewise, reference can be made to the often-quoted matter of ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd***[8] where Murray J stated:

[8] 1949 (3) SA 1155 (T) at 1162

> *'Inasmuch as the ascertainment of the true facts is effected by the trial Judge on considerations not only of probability but also of credibility of witnesses giving evidence viva voce, it has been emphasised repeatedly that (except in interlocutory matters) it is undesirable to attempt to settle disputes of fact solely on probabilities disclosed in contradictory affidavits, in disregard of the additional advantages of viva voce evidence...'*

[29] The Court is therefore of the view that the Court *a quo* erred in determining the probabilities solely on the basis of the contradictory affidavits and with disregard to the additional advantage that *viva voce* evidence may yield. In saying so, it cannot be said that the Court *a quo* should have dismissed the application. The version of the Respondent was not untenable and would have been resolved had the matter been referred to trial.

[30] On this basis, the Appeal must therefore succeed pertaining to the main application, and the order of the Court *a quo* substituted with an order referring the matter to trial.

Counter Application:

[31] The Appellants applied for a Counterclaim in their Answering affidavit. It stands to be noted that the manner in which the Counterclaim is presented in the Answering affidavit, leaves quite a lot for the imagination. On the Appellant's own version, they are still in the process of quantifying the claim.

[32] The Court *a quo* was thus correct in surmising that the cause of action was not fully articulated. In this Court's view, although the said paragraphs are headed by the word 'Counterclaim', the statements that followed could not, and did not, constitute an effective and proper Counterclaim and no relief was prayed for.

[33] It must also be noted that the Court *a quo* made no order on the alleged Counterclaim. An appeal does not lie against reasoning but rather against a judgment or order. Insofar as no order was made, and the Court *a quo* simply made no final determination on the Counterclaim, this Court is of the view that no appeal consequently lies against these remarks or findings as it did not result in a judgment or order on the alleged Counterclaim.

[34] This ground of the Appeal can therefore not succeed. Having regard to the order made herein, the Appellants are free to pursue any Counterclaim in the normal course of the exchange of pleadings.

<u>Costs:</u>

[35] The Appellants were substantially successful in their appeal notwithstanding their failure to succeed in respect of the Counterclaim. There is no reason why the cost order should not follow the outcome of the proceedings. Having regard to *inter alia* the nature of the proceedings and the importance thereof to the parties, costs to counsel on Scale B is warranted.

Order:

[36] **In the result the following order is made:**

36.1 The Appeal is upheld partially in respect of the main application.

36.2 The Appeal is dismissed in respect of the Counterclaim.

36.3 The order of the Court *a quo* is substituted with the following order:

36.3.1 The Application is referred to trial;

36.3.2 The Notice of motions shall stand as a simple summons;

36.3.3 The Applicant is directed to file its Declaration within 20 (twenty) days from the date of service of this order setting forth the facts and issues to be decided at the trial;

36.3.4 Thereafter, the Uniform Rules of Court shall apply to the delivery of further pleadings and notices and all matters incidental to the conduct of the trial;

36.3.5 The costs of the application are reserved for determination by the trial court.

36.4 The Respondent is directed to pay the costs of the appeal inclusive of costs to counsel on Scale B.

[redacted]

M BRESLER AJ

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

I concur,

[redacted]

J NGOBENI J

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

I concur,

[redacted]

M MANGENA AJ

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

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