

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 2023/102299

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED: YES/NO

01 October 2025

IN THE MATTER BETWEEN:

JOSHUA FEIGIN
(Identity Number: 8[...])

FIRST PLAINTIFF

NUKO MEDIA (PTY) LTD
(Registration Number: 2016/531649/07)

SECOND PLAINTIFF

and

SEAN LESLIE BUTKOW
(Identity Number: 8[...])

DEFENDANT

In re the Summary Judgement Application between:

JOSHUA FEIGIN
(Identity Number: 8[...])

FIRST APPLICANT

NUKO MEDIA (PTY) LTD
(Registration Number: 2016/531649/07)

SECOND APPLICANT

And

SEAN LESLIE BUTKOW
(Identity Number: 8[...])

RESPONDENT

JUDGMENT

This Judgment is handed down electronically by circulation to the Applicant's Legal Representative and the Respondents by email, publication on Case Lines. The date for the handing down is deemed 01 October 2025 at 10h00.

NAIR AJ

INTRODUCTION:

[1] This is an opposed application for summary judgment in terms of Rule 32 of the Uniform Rules of the High Court (the "Uniform Rules of Court"). The first applicant, *Mr Joshua Feigin*, and the second applicant *Nuko Media (Pty) Ltd (the "first and second plaintiffs in the main action")*, seek repayment of moneys from the respondent, *Mr Sean Leslie Butkow (the "defendant in the main action")*, alleged to have been entrusted to the respondent for remittance to the South African Revenue Service ("SARS"). Summons in this matter was issued on 11 October 2023 and the respondent's plea was filed late on 6

February 2024. The applicants subsequently lodged the application for summary judgment timeously in terms of Rule 32 (2)(a) of the Uniform Rules of Court on 23 February 2024.

- [2] The first and second applicants' claims are for payment of R3,526,328.79 and R1,822,571.00 respectively. They allege that these funds were paid over a period of five years under an oral mandate with the respondent and further that these amounts were not remitted to SARS by the respondent, leaving the applicants indebted for substantial arrears and penalties to SARS.
- [3] The respondent resists summary judgment and applied to strike out substantial portions of the plaintiffs' founding affidavit under Rule 6(15) of the Uniform Rules of Court arguing that it introduces impermissible new material. The respondent has in addition to this raised several points *in limine*.
- [4] The matter was allocated for hearing on the opposed motion court roll on 22 May 2025. There was no joint practice note filed by the respondent as per Consolidated Practice Directive 25.17 of Directive 1/2024 or Heads of Argument on behalf of the respondent. The applicant filed a unilateral practice note. On the day of the hearing, the respondent sought a postponement on the basis that his previous attorneys firm, Shapiro & Ledwaba Inc had withdrawn at short notice on 15 May 2025. The

respondents new attorneys on record, GGD Attorneys, were only substituted as attorneys on record on 21 May 2025, a day before the hearing.¹ As a consequence thereof the respondent averred that his new attorneys on record were unable to timeously prepare for the argument of this summary judgment application and further advise the respondent on whether to oppose the summary judgment application by the filing of a supplementary affidavit or by serving a notice to amend the respondent's plea in the main action.² The respondent later in his founding affidavit indicated that he requests the postponement as his new attorneys on record intended on giving notice to the applicant that the respondent intended on amending his plea in the main action.³ The Respondent tendered the wasted costs occasioned by the request for a postponement which included the costs of counsel.

[5] It is trite that a postponement is not simply there for the asking, but rests in the discretion of the Court, to be exercised judicially upon consideration of all the facts *Persadh versus General Motors South Africa (Pty) Ltd*.⁴ The Court was satisfied that the withdrawal of the respondent's previous attorney on record occurred at a stage where it would be unfair to expect the respondent's

¹ See court bundle at 28-1

² Respondent's founding application in postponement application at court bundle 27-27 par 5.3

³ Respondent's founding application in postponement application at court bundle 27-28 par 5.9

⁴ In *Persadh versus General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SECLD) at para 13 the court set out the following:

'The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural

right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.'

new legal representative, to prepare and argue the matter on short notice. I was mindful of the prejudice to the applicant in the form of wasted costs which could be ameliorated by an appropriate costs order. On these reasons, the postponement sought on 22 May 2025 was granted with the respondent to pay the wasted costs of the applicants occasioned by the postponement which included the costs of counsel on scale C.

- [6] The matter was rescheduled for hearing on 11 June 2025 to allow the respondents new attorneys on record to prepare for argument on the summary judgment application. During the course of the postponement no notice of amendment of the respondent's plea nor an application to supplement the respondent's affidavit resisting Summary judgment was made as alluded to in the respondents founding affidavit in the postponement application.⁵

FACTUAL BACKGROUND:

- [7] The first applicant, Mr Joshua Feigin, is the sole director of the second applicant, Nuko Media (Pty) Ltd. In May 2016, the first applicant engaged the respondent, Mr Sean Leslie Butkow, in an oral agreement to provide tax and accounting services in respect of the first and second applicants. According to the applicants the respondent represented himself as a chartered accountant and auditor, trading through SLB Finance and Accounting Services, and undertook to calculate provisional tax liabilities, prepare tax

⁵ Respondent's founding application in postponement application at court bundle 27-27 par 5.3 and 27-28 par 5.9

returns and financial statements and receive funds from the applicants and remit them to SARS.

[8] Between 3 July 2018 and 18 May 2023, the first applicant made payments totalling R3,526,328.79 and on behalf of the second applicant made payments totalling R1,822,571.00 all into the respondent's FNB account (Account No. 62601299482), as evidenced by annexures POC1 and POC2.⁶ In March 2022, the applicants appointed Matthew Saunders of Arbor Taxation and Accounting Services to investigate their tax affairs and report thereon (the "Arbor Report"). The investigation revealed that:

[8.1] SARS had not received the payments from the respondent;

[8.2] The unpaid company and personal tax exceeded R4,5 million in unfiled returns and penalties;

[5.3] None of the payments made to the respondent were traceable to SARS;

[8.4] The applicants remained non-compliant with SARS.

⁶ See court bundle at 25-23 to 25-26

[9] The respondent failed to provide proof of payment or SARS allocation confirmations, despite repeated requests via whatsapp and email⁷ The applicants subsequently instituted action and lodged this Summary judgment application.

RESPONDENT'S VERSION AND PLEA:

[10] The respondent's plea appears on pages 02-18 to 02-27 of the court bundle.

The respondent in his plea admits to receiving payments but claims these were for professional services and not for onward payment to SARS.⁸ The respondent denies any misrepresentation and asserts he never claimed to be a chartered accountant.⁹ The Defendant raised the special pleas of prescription, arguing claims prior to October 2020 have prescribed.¹⁰ He also challenged the *locus standi* of the first applicant.¹¹ In his answering affidavit¹² he denied the liability for the damages, and maintained that the Plaintiffs were aware of their SARS debts prior to the appointment of Arbor. It was argued on behalf of the respondent that the applicants' claim is not for cancellation of the professional services agreement but only for damages.

COMMON CAUSE FACTS:

[11] The following are common cause between the applicants and the respondent:

⁷ Annexures JF3.1–JF3.2, JF4–JF14.9 of the applicants founding affidavit

⁸ Defendant's Plea in the court bundle at 02-23 par 18

⁹ Defendant's Plea in the court bundle at 02-21 par 5

¹⁰ Defendant's Plea in the court bundle at 02-19

¹¹ Defendant's Plea in the court bundle at 02-21 par 5

¹² Defendant's answering affidavit in the court bundle at 12-92 to 12-96

[11.1] An oral agreement was concluded on or about 5 December 2016 between the applicants and the respondent;¹³

[11.2] The agreement contemplated that the respondent would provide tax and accounting-related services to the applicants;¹⁴

[11.3] The respondent was to calculate the applicants' provisional tax liabilities and communicate the amounts due;¹⁵

[11.4] The applicants made multiple payments to the respondent, amounting to R3,526,328.70 in respect of the first applicant and R1,822,571.00 in respect of the second applicant;¹⁶

[11.5] The payments were made between 3 July 2018 and 18 May 2023 in respect of the first applicant, and between 15 August 2018 and 15 December 2021 in respect of the second applicant;¹⁷

[11.6] The respondent acknowledges receiving the funds from the applicants.¹⁸

¹³ The Respondent/ Defendant's plea at par 14, Applicants' founding affidavit at par 17.

¹⁴ The Respondent/ Defendant's plea at pars 14 to 16, Applicants' founding affidavit at par 17.1.

¹⁵ The Respondent/ Defendant's plea at par 17, Applicants' founding affidavit at par 17.1.1.

¹⁶ The Respondent/ Defendant's plea at pars 21 to 22, Applicants' founding affidavit at paras 18.1 and 18.2

¹⁷ The Respondent/ Defendant's plea at pars 21 to 22, POC 1 and POC 2 of the Plaintiff's Particulars of Claim.

[11.7] The respondent was not registered with SAICA¹⁹

ISSUES TO BE DETERMINED:

[12] The following are issues which the court is required to decide on:

[12.1] Whether the applicant's claims, in whole or in part, have prescribed specifically from 9 October 2020;

[12.2] Whether the applicants, as a prerequisite to claiming repayment, had to first cancel the oral agreement with the defendant.

[12.3] Whether the first applicant's fiduciary duty as a director of the second applicant company affects the merits of the claim with regards to the alleged prescription.

POINTS IN LIMINE 1 – THE STRIKING OUT APPLICATION

[13] The respondent, in terms of Rule 6(15) of the Uniform Rules of Court, seeks an order striking out paragraphs 31, 31.1, 31.2, 31.3, 32, 32.1, 32.2, 33, 34,

¹⁸ The Respondent/ Defendant's plea at pars 21 to 22, Respondent's affidavit resisting summary judgment at para 2.7

¹⁹ The Respondent/ Defendant's plea at par 5 and 9

35, 35.1, 35.2, 35.3, 35.4, 45, 45.1, 45.2, 46, 46.1, 46.2, 46.3, 46.4, 46.5, 46.6, 46.7, 46.8, 46.9, 46.10, 46.11, 46.12, 46.13, 46.14, 47, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65 of the applicants' founding affidavit, where it relies on the aforementioned, as constituting evidence as well as annexures JF3.1 to JF3.2, JF4, JF5, JF6.1 to JF6.2, JF7.1 to JF7.4, JF8.1 to JF8.2, JF9, JF10, JF11, JF12.1 to JF12.2, JF13.1 to JF13.31 & JF14.1 to JF14 from the applicants' founding affidavit, on the grounds that they are scandalous, vexatious, or irrelevant.²⁰

[14] The respondent contends that the applicants' founding affidavit introduces new evidence and documents not referred to in the particulars of claim, in contravention of Rule 32(2)(b) of the Uniform Rules of Court.²¹ The respondent argues that summary judgment proceedings are to be determined on the strength of the particulars of claim and not on additional evidence or annexures introduced for the first time in the summary judgment application.²² The respondent submitted that the inclusion of such material is an abuse of process and prejudices the respondent's right to a fair trial. The respondent alleges the following with regards to the inclusion of additional documents and annexures to the applicants' founding affidavit that:

²⁰ The respondents head of argument paras 2.1 to 2.32, Respondent's notice in terms of Rule 6(15) of the Uniform Rules of Court at page 04-12

²¹ See court bundle at page 04-10

²² See court bundle pages 04-10 to 0-12 and respondent's heads of arguments at par 2.32

[15.1] Annexure JF3.1 to JF3.2 are purportedly “whatsapp” correspondence between the parties and a proof of payment which was not attached to the Particulars of Claim;

[15.2] Annexure JF4 is purportedly “whatsapp” correspondence between the parties, which was also not attached to the particulars of claim;

[15.3] Annexure JF5 is purportedly email correspondence between the parties that, again, found no attachment to the particulars of claim;

[15.4] Annexure JF6.1 to JF6.2 & JF12.1 to JF12.2 – purportedly letters of authority, for which no basis is laid in the particulars of claim;

[15.5] Annexure JF7.1 to JF7.4 – purportedly the invoices for preparation of the provisional tax payment and emails between the parties;

[15.6] Annexure JF8.1 to JF8.2 – purportedly email correspondence between the parties and a tax return form;

[15.7] Annexure JF9 & JF10 – purportedly “Whatsapp” correspondence between the parties, which was not attached to the particulars of claim;

[15.8] Annexure JF11 – purportedly the invoices for preparation of the provisional tax payment;

[15.9] Annexure JF13.1 to JF13.31 & JF14.1 to JF14 – Purportedly proof of payments which are provided without context or basis being set out in the particulars of claim as to how they quantify the alleged damages, or which particular regard to professional services rendered against which such documents are to be appreciated;

[15.10] That the purported evidence in paragraphs 31, 31.1, 31.2, 31.3, 32, 32.1, 32.2, 33, 34, 35, 35.1, 35.2, 35.3, 35.4, 45, 45.1, 45.2, 46, 46.1, 46.2, 46.3, 46.4, 46.5, 46.6, 46.7, 46.8, 46.9, 46.10, 46.11, 46.12, 46.13, 46.14, 47, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65 of the applicants' founding affidavit, where it relies on the aforementioned, as constituting evidence in support of the attached annexures.

[16] In response thereto the applicants argue that the annexures and paragraphs in question are not scandalous, vexatious, or irrelevant, but are necessary to establish the cause of action and to respond to the respondent's defences. The applicants submit that the evidence is directly relevant to the issues in

dispute, particularly the nature of the payments, the existence of misrepresentation, and the running of prescription.

[17] An application to strike out any matter from an affidavit is regulated by Rule 6(15) of the Uniform Rules of Court, which read as follows:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.”

[18] Mahomed CJ in *Beinash versus Wixley*²³ had the following to say:

“What is clear from this Rule is that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the Court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.”

²³ Beinash versus Wixley 1997 (3) SA 721 (SCA) at page 733A-B.

[19] Rule 6(15) of the Uniform Rules of Court empowers the court to strike out any matter in an affidavit which is scandalous, vexatious, or irrelevant, with an appropriate costs order. The following was held in the matter of *Smith NO versus Brummer*²⁴:

“It has been found that the relevant factors, when orders of this kind are considered, will be (a) the reasons for non-compliance with the rules, request, notice, order or direction concerned and, in this regard, whether the defaulting party has recklessly disregarded his obligations; (b) whether the defaulting party’s case appears to be hopeless; and (c) whether the defaulting party does not seriously intend to proceed. In addition, prejudice to either party is a relevant factor.

[20] In essence the test is whether the matter is relevant to the issues in dispute and whether its inclusion would prejudice the other party.²⁵ In summary judgment proceedings, the court must be cautious not to allow the application to become a trial by affidavit, but must also ensure that the applicant can establish its claim and respond to the defences raised.

²⁴ *Smith NO versus Brummer* 1954 (3) SA 352 (O) at page 357

²⁵ *Ibid* at page 357

[21] Wanless J as he then was AJ, had the following to say in *Absa Bank Limited versus Mphahlele N.O.*²⁶

“What is apparent to this court, is the need to draw a clear distinction between points of law and the facts as envisaged in subrule (2)(b). A plaintiff is now required to “identify any point of law relied upon and the facts upon which the plaintiff’s claim is based”. These may not necessarily be related to one another. Whether they are or not, what is abundantly clear is that the points of law relied upon by a plaintiff and the facts upon which a plaintiff’s claim is based as contemplated in the subrule, are not related to the defence of the defendant but relate solely to the plaintiff’s cause of action which has to be verified in the same affidavit and in terms of the same subrule. As to the “brief explanation as to why the defence as pleaded does not raise any issue for trial”, this must be confined solely thereto. This brief explanation does not open the door to entitle a plaintiff to introduce new evidence as to why, at Summary judgment stage, a defendant should not be given leave to defend an action and to attempt to show that a plaintiff has an unanswerable case. This would be contrary to the very nature of Summary judgment procedure both in terms of Rule 32 in its original and amended forms.”

[22] The heads of argument filed on behalf of the respondent referred to the matter of *Petso and Others*.²⁷ Crutchfield J, after considering the *ABSA Bank* case

²⁶ *Absa Bank Limited versus Mphahlele N.O and Others* (45323/2019, 42121/2019) [2020] ZAGPPHC 257 (26 March 2020) at par 33

²⁷ *Petso and Others* (017371/2022) [2024] ZAGPJHC 129

supra held that a plaintiff in summary judgment proceedings may not introduce new evidence or documents as to why a defendant should not be given leave to defend an action and to show that the plaintiff has an unanswerable case. She found that new evidence or new documents may not be introduced in circumstances where they were not referred to by the plaintiff in the particulars of claim.

[23] I find myself in agreement with the reasoning in both the *ABSA Bank* and *Petso* cases *supra* that a plaintiff in summary judgment proceedings is not entitled to introduce new evidence or documents not contained in the plaintiff's particulars of claim as to why a defendant should not be given leave to defend an action and show that the plaintiff has an unanswerable case.

[24] In my view the evidence sought to be included is not scandalous or vexatious, but its relevance is apparent from the factual issues in dispute. The respondent's objection is, in substance, an objection in respect of the applicants' ability to prove their claim on the facts without the respondent being given the opportunity to lead evidence, cross-examine and test the evidence presented by the applicants through trial proceedings. A summary judgment application is *sui generis* and has its own set of procedure. In terms of subrule 32(4) of the Uniform Rules of Court no evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule 32(2)²⁸, nor

²⁸ " Rule 32(2)

may either party cross-examine any person who gives evidence orally or on affidavit. The simple interpretation is that no extrinsic evidence outside what is in the particulars of claim and plea may be considered. I am therefore satisfied that no regard can be had to the inclusion of the alleged impugned paragraphs and annexures for the fair adjudication of the summary judgment application as they would not be admissible in summary judgment proceedings, thereby also rendering the evidence irrelevant for the purposes of the Summary judgment application. The respondent has furthermore set out that the inclusion of the whatsapp messages, emails and annexures not contained in the Particulars of Claim are prejudicial to the respondent's case and the respondents defence as he would be deprived of an opportunity to challenge the evidence through cross-examination at a trial.

[25] It is common cause between the parties that the respondent is not a registered chartered accountant with SAICA. Paragraphs 55, 56 and 57 of the applicants founding affidavit address these facts as raised by the respondent in his plea. In my view this is in response to the defence raised by the respondent in his plea and I am not satisfied that these paragraphs should be struck from the applicants' founding affidavit. Similarly paragraphs 60 to 63 and annexures JF6.1 to JF6.2 & JF12.1 to JF12.2 are in response to the respondent's defences of *fiduciary duty* and *locus standi* of the first applicant

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- (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."

that was raised by the respondent in his plea. I am not satisfied that these paragraphs are scandalous, vexatious or irrelevant so as to be struck from the applicants' founding affidavit. This application for striking out of the aforementioned paragraphs in the applicants founding affidavit in terms of Rule 6(15) of the Uniform Rules of Court is dismissed.

[26] The proof of payments of the first applicant's claims are annexed as JF 13.1 to JF 13.31 whilst the second applicants proof of payment is annexed as JF 14.1 to JF 14.9. These are not contained in the particulars of claims and were added presumably to prove the payments listed in POC 1 and POC 2 of the Particulars of Claim. Annexures JF3.1 to JF3.2, JF4, JF9 and JF10 are whatsapp messages which were not part of the Particulars of Claim. Annexure JF 5, JF 8.1 and JF8.2 are email correspondence not included in the Particulars of Claim. Annexure JF7.1 to JF 7.4 and JF.11 are invoices not included in the Particulars of Claim. Paragraphs 31, 31.1, 31.2, 31.3, 32, 32.1, 32.2, 33, 34, 35, 35.1, 35.2, 35.3, 35.4, 45, 45.1, 45.2, 46, 46.1, 46.2, 46.3, 46.4, 46.5, 46.6, 46.7, 46.8, 46.9, 46.10, 46.11, 46.12, 46.13, 46.14, 47, 50, 51, 52, 53, 54, 58, 59, 64 and 65 all relate to additional evidence not set out in the applicants' Particulars of Claim and which refer to the aforementioned annexures. Applying the *ABSA Bank* case these paragraphs, documents and annexures should not be allowed in this summary judgment application as it did not form part of the Particulars of Claim. Under the circumstances I find that the said paragraphs 31, 31.1, 31.2, 31.3, 32, 32.1, 32.2, 33, 34, 35, 35.1, 35.2, 35.3, 35.4, 45, 45.1, 45.2, 46, 46.1, 46.2, 46.3, 46.4, 46.5, 46.6, 46.7, 46.8, 46.9, 46.10, 46.11, 46.12,

46.13, 46.14, 47, 50, 51, 52, 53, 54, 58 , 59, 64 and 65 of the applicants' founding affidavits as well annexures JF 3.1 to JF 3.2, JF 4, JF5, JF7.1 to JF7.4, JF8.1 to JF8.9, JF9, JF10, JF13.1 to JF 13.31 and JF 14.1 to JF 14.9 are irrelevant to the summary judgment application at hand as they did not form part of the Particulars of Claim and are accordingly struck from the applicants' founding affidavit in terms of Rule 6(15) of the Uniform Rules of Court.

POINT IN LIMINE 2 - LOCUS STANDI:

[27] The respondent challenged the *locus standi* of the first applicant to act on behalf of the second applicant but provided no factual basis for this.²⁹ The respondent's challenge is vague and unsupported.³⁰ The first applicant is the sole director of the second applicant and the applicants have provided company documents and resolutions.³¹ The applicants have shown that payments were made from their respective accounts. The payments made by Nuko Media were from its corporate account and the first applicant having made payments from his own account³² I am therefore satisfied that locus standi of the first applicant to act on behalf of the second applicant is established.

POINTS IN LIMINE 3 – CONTRACT NOT CANCELLED:

²⁹ Defendant's Plea in the court bundle at 02-21 par 5

³⁰ See court bundle page 02-20, para 3

³¹ See court bundle page 12-24 to 12-26

³² See court bundle page 12-44 to 12-86

[28] The third point *in limine* raised by the respondent is that the applicants did not expressly plead in the Particulars of Claim the cancellation of the professional services contract and as such the applicants are barred from claiming damages resulting from the respondents breach. It is generally accepted in law that cancellation of an agreement should be in the form of a pleaded case. In the present case it is difficult to follow that the applicants should be precluded from claiming damages as a result of failing to plead cancellation of the respondent's professional services when considering the alleged misrepresentation by the respondent as pleaded by the applicants. It is disputed that the amounts claimed by the applicants were for professional services but rather for moneys that were due to SARS and paid to the respondent for payment to SARS in the course of his accounting services to the applicants. It is common cause that these amounts were never paid by the respondent to SARS and thus the applicants allege a fraudulent misrepresentation and misappropriation of the funds by the respondent. In my view under such circumstances of a fraudulent misrepresentation such cancellation of the agreements would not necessarily be required to be pleaded before a plaintiff would be entitled to the plaintiff's claim. To require a cancellation of an oral agreement to be pleaded in the Particulars of Claim before a plaintiff can be entitled to claim damages resulting from a misrepresentation would be encouraging delinquent defendants who have misrepresented on an agreement and thereby breaching it, the opportunity to evade liability for any resultant damages which flow from their actions of misrepresentation merely because the cancellation of the agreement is not

pleaded. This is certainly prejudicial to a plaintiff who has a legitimate claim against a defendant based on a misrepresentation.

[29] In the present case the respondent stated in his affidavit resisting summary judgment that the applicants terminated his services.³³ The only inference that can be drawn from the termination of the respondent's services to the applicants, is that the applicants cancelled the oral agreement with the respondent. The respondent's argument regarding cancellation of the oral agreement occurring first before the applicants may be entitled to their claim must therefore fail.

POINTS IN LIMINE 4 - PRESCRIPTION:

[30] The third point *in limine* raised by the respondent is that all amounts claimed by the applicants prior to 9 October 2020 have prescribed. Section 11 of the Prescription Act 68 of 1969 (the "Prescription Act") provides for the periods applicable to the prescription of debts as follows:

" 11 Periods of prescription of debts

The periods of prescription of debts shall be the following:

(a) thirty years in respect of-

(i) any debt secured by mortgage bond;

³³ Respondents affidavit resisting Summary judgment at par 2.1.2

- (ii) any judgment debt;*
- (iii) any debt in respect of any taxation imposed or levied by or under any law;*
- (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;*
- (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);*
- (c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) or (b);*
- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.”*

[31] The respondent contends that the claims of the applicants prior to 9 October 2020 are prescribed. In terms of section 12(3) of the Prescription Act³⁴, a debt is not deemed due until the creditor has knowledge of the facts giving rise to the debt. The applicants' claims are subject to a three-year extinctive

³⁴ “Section 12 of the Prescription Act 68 of 1969 - When prescription begins to run

- (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

prescription period and the applicants allege that they only became aware of the misappropriation of funds in September 2023, upon receipt of the Arbor Report. In terms of section 12(2) of the Prescription Act, if the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt. Prior to the receipt of the Arbor Report it is undisputed that the respondent did not disclose that payments were not being made to SARS. The respondent averred that the payments made to him by the applicants were for his professional fees but did not provide any invoice of his professional fees indicating that he was entitled to the amounts for professional services.

[32] In *Truter v Deyssel*³⁵, the Supreme Court of Appeal held the following:

“Cause of action’ for the purposes of prescription thus means –

‘...every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

[33] The Supreme Court of Appeal further held that:

³⁵ *Truter v Deyssel* 2006 (4) SA 168 (SCA) at par 18

*“in accordance with the so-called ‘once and for all’ rule, a plaintiff must claim in one action all damages, both already sustained and prospective, flowing from one cause of action. Therefore, a plaintiff’s cause of action is complete as soon as some damage is suffered, not only in respect of the loss already sustained by him or her, but also in respect of all loss sustained later.”*³⁶

[34] Applying the *Truter* case *supra* the applicants cause of action would be complete and the debt of respondent became due as soon as the first known misappropriation came to the knowledge of the applicants. The applicants allege that this was on 1 September 2023 when the Arbor Report was made available. The applicants also contend that they appointed Mathew Saunders to compile the Arbor report after they became suspicious thereof in 2022. The respondent avers that prescription commenced from 11 October 2020. This in my view raises the triable issue of the actual date when the debt of the respondent became due. Even if partial prescription is accepted, the applicants would in the very least be entitled to judgment for the portion of the claim arising after 11 October 2020, amounting to R3,430,641.33 as the date when the respondent alleges the applicants claim became prescribed. The quantification of the actual amounts that the applicants would be entitled to repayment of would then become a triable issue as there are varying dates of when the applicants would have become aware of the debt due by the respondent and the quantification thereof.

³⁶ Ibid at par 21

[35] In support of the defence of prescription the respondent further alleged that the first applicant failed in his fiduciary duties under section 76 of the Companies Act 71 of 2008 (the “Companies Act”), and that if the first applicant had acted with the necessary care and skill required of a director under section 76(3)(c) of the Companies Act, the first applicant would have gained the requisite knowledge of the applicants’ cause of action during 2022.³⁷

[36] Section 76(4)(b)³⁸ of the Companies Act, however, entitles directors to rely on professional advisors. The first applicant relied on the respondent’s representations and documentation that the applicants moneys were being paid to SARS, which were later proven false in the Arbor report. In my view the fiduciary duty defence does not absolve the respondent of liability and does not constitute a triable issue. The respondent’s argument that the first applicant should have detected the fraud earlier is speculative and unsupported. In my view the first applicant acted reasonably and diligently upon discovering discrepancies. The aspect of prescription however may become a triable issue as to when the applicants’ gained knowledge of the alleged misrepresentation and when the respondents debt became due in terms of section 12(3) of the Prescription Act as well as the resultant quantification of the applicants claim if the prescription point *in limine* is upheld. This can only be done if the respondent is afforded an opportunity to test the evidence of the applicants at trial.

³⁷ Respondent’s affidavit resisting Summary judgment at par 2.2

LEGAL PRINCIPLES:

[37] Summary judgment is an extraordinary remedy intended to prevent defendants from delaying final judgment where no genuine defence exists. It is governed by Rule 32 of the Uniform Rules of Court.³⁹ In terms of Rule 32(2)(a) read with Rule 32(2)(b), the Plaintiff must:

[37.1] Swear positively to the facts;

[37.2] Verify the cause of action and amount claimed;

[37.3] identify any point of law relied upon and the facts upon which the plaintiff's claim is based,

[37.4] Explain briefly why the defence as pleaded does not raise any issue for trial.

[38] The onus in summary judgment applications rests on the applicant to establish a prima facie case and on the respondent to show, on affidavit, that

³⁹ **“Rule 32. Summary judgment**

(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—
(a) on a liquid document;
(b) for a liquidated amount in money;
(c) for delivery of specified movable property; or
(d) for ejectment,
together with any claim for interest and costs.

there is a triable issue or bona fide defence. In *Maharaj versus Barclays National Bank Ltd*⁴⁰, the Appellate Division held that the Plaintiff must set out facts clearly and verify them. Once this is done, the onus shifts to the Defendant to disclose facts which, if proved at trial, would constitute a valid defence. The court further held that the principle is that, in deciding whether or not to grant summary judgment, the court looks at the matter 'at the end of the day' on all the documents that are properly before it. Corbet JA also had the following to say:

*“Under Rule 32 (3), upon the hearing of an application for Summary judgment, the defendant may either give security to the G plaintiff for any judgment which may be given, or satisfy the Court by affidavit or, with the leave of the Court, by the oral evidence of himself or any other person who can swear positively to the fact that he has a bona fide defence to the action. Such affidavit or evidence must disclose fully the nature and grounds of the defence and the material facts relied upon therefor. If the defendant finds security or satisfies the H Court in this way, then, in terms of Rule 32 (7), the Court is bound to give leave to defend and the action proceeds in the ordinary way. If the defendant fails either to find security or to satisfy the Court in this way, then, in terms of Rule 32 (5), the Court has a discretion as to whether to grant Summary judgment or not (see *Gruhn v. M. Pupkewitz & Sons (Pty.) Ltd.* 1973 (3) SA 49 (AD) at p. 58). If on the hearing of the application it appears that the defendant is entitled to defend as to part of the claim, then, in terms of Rule 32 (6), the Court is bound to give him leave to defend as to that part and*

⁴⁰ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 422, 423 and 424

*to enter judgment against him for the balance of the claim, unless he has paid such balance into Court*⁴¹

[39] In *Joob Investments versus Stocks Mavundla Zek Joint Venture*⁴², the Supreme Court of Appeal emphasised that summary judgment is not a mechanism to shut out genuine defences, but to prevent abuse of process. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights. The court referred to the *Maharaj* case *supra*⁴³ where Corbett JA was keen to first ensure, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded, and secondly whether the defence so disclosed must be both *bona fide* and good in law. The Supreme Court of Appeal held that a court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment.

[40] In *Cohen NO and Others versus D*⁴⁴ at paragraph 31 the Supreme Court of Appeal reiterated that the core test from the *Joob Joob* case remains valid even after the amendment to Rule 32 of the Uniform Rules of Court in 2019. The critical question is whether the defence is genuine, not whether it will necessarily succeed. The court found that the High Court failed to consider whether the facts raised a "triable issue" and a "sustainable defence in law"

⁴¹ Ibid page 426

⁴² *Joob Joob Investments versus Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at par 31

⁴³ *Maharaj versus Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G to 426E

⁴⁴ *Cohen NO and Others v D* (368/2022) [2023] ZASCA 56 handed down on 20 April 2023

for the defendants. All that a defendant has to do is set out facts which if proven at trial will constitute a good defence to the claim.

CONCLUSION:

[41] It is not in dispute that the applicants claims are liquidated amounts. The respondent admits receipt of the amounts paid by the applicants as set out in schedules annexed to the particulars of claim as “POC1” and “POC2”, but denies that he is liable to repay these amounts as ‘the claim in this regard has wholly prescribed’.⁴⁵ Additionally, the defendant pleads that the applicants’ payments were the fee paid to the respondent for a professional service which was rendered, not money owed to SARS’.⁴⁶ The first applicant swore positively to the facts and verified the applicants claims and cause of action. The applicants did not however rely on any points in law but only on the facts which gave rise to their cause of action wherein they claim repayment of the amounts of R3,526,328.79 and R1,822,571.00 respectively. The applicants attempted to explain why the defences as pleaded by the respondent does not raise any issue for trial but some of these facts were based on evidence placed before this court which has been struck out from the founding affidavit of the applicants and no regard was had to it.

[42] The applicants rely on POC 1 and POC 2 in the Particulars of Claim to reflect payments that were made to the respondent for payment to SARS. No proof

⁴⁵ Respondent’s plea par 21 to 22

⁴⁶ Respondent’s plea par 20

of these payments were attached in the applicants Particulars of Claim and this would be a triable issue for the applicants to prove considering the respondents defence that it was payments made for professional services rendered. In my view, this supports the respondent that he has a *bonafide* defence to some of the applicants' claims. The difficulty I also have is quantifying these amounts as this would only be possible at trial after scrutinising any proof of payments that may be led at a trial.

[43] Applying the principles in the *Cohen*, *Joob Joob* and *Maharaj* cases, I am not persuaded that the plaintiffs have established that the respondent's defences are a complete sham. Genuine disputes of fact exist, and these must be resolved at trial. In light of this and my earlier finding that the date of when the applicants became aware of the debt becoming due by the respondent in terms of section 12(3) of the Prescription Act being also a triable issue, I am of the view that the respondent has raised a *bona-fide* defence to the applicants' claims. I therefore refuse the application for summary judgment and grant the respondent leave to defend the action.

ORDER:

[44] Under the circumstances I make the following order:

[44.1] The respondent's application in terms of Rule 6(15) of the Uniform Rules of Court to strike out is partially granted in that paragraphs 31, 31.1, 31.2, 31.3, 32, 32.1, 32.2, 33, 34, 35, 35.1, 35.2, 35.3, 35.4, 45,

45.1, 45.2, 46, 46.1, 46.2, 46.3, 46.4, 46.5, 46.6, 46.7, 46.8, 46.9, 46.10, 46.11, 46.12, 46.13, 46.14, 47, 50, 51, 52, 53, 54, 58, 59, 64 and 65 of the applicants' founding affidavits as well annexures JF 3.1 to JF 3.2, JF 4, JF5, JF7.1 to JF7.4, JF8.1 to JF8.9, JF9, JF10, JF13.1 to JF 13.31 and JF 14.1 to JF 14.9 are struck out from the applicants' founding affidavit;

[44.2] The respondent's point *in limine* in respect of the first applicant's locus standi to act on behalf of the second applicant is dismissed;

[44.3] The respondent's point *in limine* in respect of the cancellation of the contract is dismissed;

[44.4] The respondent's point *in limine* regarding prescription and quantification of the applicants claims are considered triable issues and thus summary judgment application is refused;

[44.5] The respondent is granted leave to defend that action.

[44.6] The costs of the summary judgment application is reserved for determination at the end of the trial.

M NAIR
ACTING JUDGE OF THE
HIGH COURT
JOHANNESBURG

Date of appearance: 11 June 2025

Date Judgment delivered: 01 October 2025

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