

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: **52165/2021**

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

Date: 23 October 2025

UNIVERSITY OF JOHANNESBURG

First Applicant/ Plaintiff

FUNDI CAPITAL (PTY) LIMITED

Second Applicant/ Plaintiff

And

**TOTO TSHABALALA CONSTRUCTION AND
PROJECTS CC**

Respondent/ Defendant

REASONS

DE VOS AJ

- [1] This Court granted summary judgment in favour of the applicants for R 4 261 438.30, interest at 7% and costs on scale A. These are the reasons for the order.
- [2] The case concerns the provision of student housing. The applicants and the respondent entered into an agreement for the respondent to provide thirty students with accommodation. The respondent over delivered and provided more accommodation than the contract permitted – R 4 261 438.30 more. The applicant claims back the R 4 261 438.30. The respondent accepts it was not contractually permitted to provide the

additional housing – but claims that it was responding to a high demand for housing. On the pleadings, the terms of the contract, the breach and the amount are not in dispute. The only issue is whether the respondent has raised a bona fide defence to the claim.

- [3] The pertinent facts are that the University administers funding received from NSFAS for students to live in privately-owned accommodation. The accommodation must meet the minimum standards and norms determined by the Minister of Higher Education and Training. The University has – to ensure compliance with the norms and standards – adopted a policy. The policy permits the University to accredit service providers to provide privately-owned student accommodation for the purposes of housing University students who have been granted NSFAS funding. Companies apply for authorisation, in terms of the policy, to be able to provide such accommodation to the students. If approved, a company is authorised to provide a specific number of beds to the students.
- [4] The University accredited the respondent in terms of the policy for the 2018 academic year. As a result of the accreditation the respondent became eligible to receive NSFAS funding for the 2018 financial year. The respondent was authorised to provide thirty beds Pursuant to the authorisation, the parties concluded a contract which limited the housing the respondent was authorised to provide, to thirty beds.
- [5] In breach of the agreement, the respondent sought additional properties which were never authorised by the University, provided accommodation to more students than it was permitted, claimed for their expenses, and received additional payments to the sum of R 4 261 438.30.
- [6] The respondent accepts all these foundational facts. The policy, the authorisation, the terms of the contract – specifically the limit of 30 beds and that it had provided more housing than it was authorised to in terms of the policy or permitted in terms of the contract.
- [7] In essence, the conclusion of the agreement, its terms and the breach are common cause. Even the amount of overpayment is common cause. As the terms, breach and amount are all common cause, the question arises: what is the defence?
- [8] The pleaded defence is that the respondent provided more housing than its contract allowed “out of necessity to meet the overwhelming demand for student housing”. The Court invited the respondent, through an additional opportunity for written submissions, to present the Court with authority that necessity is a defence in these circumstances.

- [9] The submissions received from the respondent presented the position as “trite”, but without precedent to support the position. Reliance was placed on *Barkhuizen v Napier* as an invitation for the Court to declare the contract against public policy. However this was raised for the first time in the supplementary submission with no foundational facts to support the argument.
- [10] Counsel for the University submitted that necessity was not a recognised defence in these circumstances. Centrally, it was submitted that the defence of necessity justifies an act which would otherwise be unlawful. It is only a defence where wrongfulness is an element of the cause of action: such as in delict or criminal cases.
- [11] The submission is sound. Necessity negates wrongfulness. As wrongfulness is not an element of breach of contract, necessity is not a valid defence. If the applicant had to prove wrongfulness, the respondent could have met such claim with a defence of necessity. However, the applicant need not prove wrongfulness, only the terms and their breach. The respondent has raised a defence which does not speak to the elements of the cause of action.
- [12] The respondent has also not pleaded a case for the development of the common law to include that a defence of necessity, which aim to justify why an act should be acceptable by the society, is a competent defence to a breach of contract.
- [13] The Court concludes that necessity is not a recognised defence in law to demand more from a contracting party than what was agreed. The defence raised by the respondent is not a cognisable legal defence, in these circumstances.
- [14] In order to successfully resist summary judgment, the respondent must disclose fully the nature and grounds of the defence as well as the material facts relied on. The court’s discretion should be exercised based on facts placed before it not speculation or conjecture. Bald and vague allegations will not comply with the requirements of the rules.
- [15] The Court considers the facts placed before it. The respondent pleaded that provided more housing than authorised “out of necessity to meet the overwhelming demand for student housing” and “due to high demand for student accommodation”. In the affidavit resisting summary judgment the respondent states that it was in response to “urgent and overwhelming demand for student housing” and it was as out of “necessity for the well-being of the students”.
- [16] This is the totality of what has been placed before the Court to sustain the defence of necessity. There are no primary facts pleaded, only subjective conclusions. The Court

doesn't know the number, names or circumstances of the students. No facts regarding the provision of the additional housing. No information on the housing. At best for the respondent it has pleaded, as a conclusion that there is a high demand for student housing. This does not rise to necessity. And even so, no explanation is given why it was necessary for the respondent to meet this demand.

[17] The Court concludes that even if necessity were a legally cognisable defence, the respondent has failed to plead the necessary facts to resist summary judgment. On this basis alone, the respondent has failed to raise a bona fide defence.

[18] Whilst necessity was the only defence in the plea, in the affidavit resisting summary judgment, a new defence arises. In the answering affidavit, the respondent contends that the applicants ought to have objected to its overspending and failed to issue directives telling the respondent to stop provide more housing than the contract permitted. As the University failed to do so, the argument goes, it had acquiesced in the respondent's conduct.

[19] The Court raised with the respondent's counsel whether this defence was pleaded. It was conceded in Court that it did not appear in the plea and only in the affidavit resisting summary judgment for the first time. The Court invited parties to make submissions in this regard.

[20] Counsel for the respondent relied on *Bragan Chemicals Pty Ltd v Devland Cash and Carry Pty Ltd*¹ for authority that a respondent can rely on a defence disclosed in the answering affidavit for the first time. The full extract from this judgment is necessary:

"An applicant for summary judgment is therefore entitled to rely on a plea in considering whether or not 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 in 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."²

[21] The statement is obiter, as Basson J clearly granted the summary judgment. The authority in *Bragan*, at best for the respondent, is that there are circumstances where it is permitted. The judgment is hardly the permission slip the respondent contends it to be. The

¹ (11096/20) [2020] ZAGPPHC 397 (5 August 2020)

² Id para 16

respondent has made out no case why in these circumstances it is appropriate to raise a new defence for the first time in the answering affidavit resisting summary judgment.

[22] This must be considered against the body of jurisprudence presented by counsel for the applicant. Specifically, in *Jovan Projects (Pty) Ltd v ICB Property Investments (Pty) Ltd*³ where it was held that :“*It follows practice logic that the defendant may not, in his or her affidavit resisting the plaintiff’s summary judgment application, raise defences that have not been pleaded ...*”

[23] Similarly, in *Nedbank Limited v Uphuhliso Investments and Projects (Pty) Limited and Others* this court confirmed that:

“The plaintiff is required in his affidavit to explain why the defence as pleaded does not raise any issue for trial. The plaintiff can only comply with this requirement when it knows what the defences outlined by the defendant are. It follows that the defendant may not raise defences in the affidavit resisting summary judgment that are not pleaded.”⁴

[24] Not only is the authority not as permissive as the respondent submitted, there is no explanation why the additional defence does not appear in the plea. No particulars provided. No facts are pleaded to explain the basis of the alleged acquiescence. The allegations that have been pleaded assume there was an obligation on the applicants to inform the respondent of the breach.

[25] The Court draws the conclusion that the defence of acquiescence, disclosed for the first time in the answering affidavit is an afterthought. It is not bona fide.

[26] Costs should follow the result. There is no reason given why the applicants are not entitled to their costs. The respondent has failed to provide a bona fide defence and has, on its version, committed a breach of contract.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be e-mailed to the parties/their legal representatives.

³ (20/32427) [2021] ZAGPJHC 836 (20 December 2021) para 67

⁴ 2021/6604) [2022] ZAGPJHC 723; [2022] 4 All SA 827 (GJ) (22 September 2022)

Counsel for applicant: Z Raqowa
Instructed by: Lawtons Inc

Counsel for the respondent: R Bvumbi
Instructed by: Mashele Attorneys Inc

Date of hearing: 15 September 2025
Receipt of further submissions: 29 September 2025
Date of order: 2 October 2025
Date of request for reasons: 9 October 2025
Date of reasons: 23 October 2025

