



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Not Reportable

Case no: 2025-010685

In the matter between:

**BMW FINANCIAL SERVICES
(SOUTH AFRICA) (PTY) LTD**

APPLICANT

and

SERAAJ TOEFY

RESPONDENT

Coram: COOKE AJ

Heard: 13 and 31 October 2025

Judgment: 5 November 2025

ORDER

- [1] The summary judgment application is postponed *sine die*.
- [2] The defendant is given leave to deliver a notice of intention to amend his plea in terms of rule 28(1) within ten days of this order.
- [3] If the plea is duly amended, then:
- a. the plaintiff is given leave (i) to supplement its affidavit in support of the summary judgment application, limited to material which is consequential on the amendment, within ten days of the defendant perfecting the amendment to the plea, and (ii) to re-enrol the application on the papers, as so supplemented;
 - b. whereafter, the defendant may deliver a supplementary opposing affidavit, limited to material which is consequential on the plaintiff's supplementary affidavit, no later than five days before the day on which the application is to be heard.
- [4] If the notice of intention to amend is not delivered within ten days, or if the plea is not successfully amended, then the plaintiff is given leave to re-enrol the application for hearing in its current form.

- [5] The defendant shall pay the wasted costs occasioned by the postponement.

JUDGMENT

- [1] This summary judgment application raises a procedural question. How should a court approach such an application where a new defence is raised in the affidavit opposing the application, in circumstances where the defendant has not amended his plea or even delivered a notice of intention to amend? The question arises in the following circumstances.

- [2] On or about 30 June 2020, the parties concluded an instalment sale agreement in terms of which the defendant, Mr Toefy, purchased a BMW X1 ('the vehicle') from the plaintiff, BMW, for some R610 000 ('the agreement'). The purchase price was to be repaid by monthly payments followed by one final balloon payment. In terms of the agreement BMW would remain the owner of the vehicle until amounts payable in terms of the agreement had been paid and Mr Toefy had complied with all his obligations. The agreement also provided that in the event of default by Mr Toefy, BMW would be entitled to cancel and/or terminate the agreement and claim from Mr Toefy the full amount that would have been paid had he fulfilled all his obligations in terms of the agreement. To this end BMW would be entitled to claim the return and repossession of the vehicle, sell the vehicle and, in addition, claim damages.

[3] It is common cause that Mr Toefy fell into arrears. Notice of default was given to Mr Toefy in terms of section 129(1) of the National Credit Act 34 of 2005 by way of a letter dated 15 October 2024. As of 1 December 2024, he owed arrears of about R25 000. According to BMW, on this date the balance owing by Mr Toefy under the agreement was about R320 000 (ie just over half the purchase price). BMW alleged further that it cancelled and/or terminated the agreement due to Mr Toefy's breach, alternatively the agreement was cancelled and/or terminated by the summons. BMW claimed rectification in respect of the engine number, confirmation of cancellation of the agreement, return of the vehicle, the postponement of the claim for damages pending return and sale of the vehicle, interest, and costs of suit on an attorney and client scale.

[4] In Mr Toefy's plea he alleged that on or about 27 March 2025 he settled the arrears in full by paying an amount of R33 117. He alleged further that such payment was made prior to cancellation, and therefore the agreement was revived by operation of law in terms of section 129(3) of the National Credit Act. In this regard reliance was place on the *Nkata* judgment.¹ Mr Toefy also denied that BMW had cancelled the agreement.

[5] BMW then launched a summary judgment application on 13 May 2025. The deponent to the supporting affidavit pointed out that Mr Toefy had not remedied the default prior to cancellation of the agreement as the agreement had been cancelled, at the latest, when the summons was served

¹ *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC).

on 5 February 2025, more than a month before the last payment had been made on 27 March 2025.

[6] The fact that the agreement had purportedly been cancelled prior to the default being remedied created a serious impediment for Mr Toefy. He then shifted ground in his opposing affidavit and, while recognising that he had been in arrears at the time the application for summary judgment was brought, alleged that he had settled the arrears in full by two payments of R17 000 on 1 May 2025 and R7 000 on 27 May 2025. Mr Toefy alleged that BMW's claim was thus no longer due or payable. He alleged further that even if BMW suggested that some residual amount was still owing, the issue would require the hearing of oral evidence and could not be resolved on affidavit. In argument, Mr Toefy's counsel developed the defence further, submitting that it would be contrary to public policy for BMW to enforce its right to take possession of the vehicle. This defence is fundamentally different to that set out in the plea. This notwithstanding, Mr Toefy has not indicated that he intends to amend his plea, and BMW has not had an opportunity to set out its response to the new defence in an affidavit.

[7] In terms of rule 32(3)(b), a defendant who elects to deliver an affidavit in opposition to a summary judgment application must fully disclose the nature and grounds of the defence and the material facts relied upon. The facts should not be inherently and seriously unconvincing and should, if true, constitute a valid defence.² A defendant is, however, not required to

² *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228D-E; *Standard Bank of South Africa Ltd v Friedman* 1999 (2) SA 456 (C) at 461I-462G.

show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant.³ The word 'may' in rule 32(5) confers a discretion on the court so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the court may nevertheless refuse to grant summary judgment if it thinks fit.⁴ If, on the material before it, the court sees a reasonable possibility that an injustice may be done if summary judgment is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant.⁵

- [8] At the hearing counsel for Mr Toefy relied upon the judgment of the Kwazulu-Natal Division in *BMW Financial Services v Ndlangisa Funeral Services CC and Another (Ndlangisa)*.⁶ This was also an application for summary judgment by BMW. In this matter it was common cause that at the time the application for summary judgment was launched, the respondents had brought their account up to date, although this was after the default and the issuance of summons. In considering whether to grant condonation for the late filing of the summary judgment application, the court considered the merits of the claim. The court found that the respondents had remedied the arrears by the time the summary judgment application was filed. According to the court 'while it is true that default occurred, the agreement was effectively reinstated through conduct, and

³ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) para 13.

⁴ *First National Bank of South Africa Ltd v Myburgh and Another* 2002 (4) SA 176 (C) (*Myburgh*) at 180D-E.

⁵ *Myburgh* at 184H.

⁶ [2025] ZAKZPHC 66 (9 July 2025).

the matter is not one deserving of this stringent remedy of summary judgment'.⁷ The court observed that the continued pursuit of cancellation and repossession in those circumstances raised serious concerns about fairness and proportionality.⁸ After referring to the judgment of the Constitutional Court in *Beadica 231 CC and Others v Trustees, Origin Trust and Others*⁹ (*Beadica*) the court held:

‘Applying those principles, I am of the view that it would be contrary to public policy for a credit provider to persist with enforcement action, particularly repossession, in circumstances where the defaulting party has rectified its breach prior to the matter being heard. Enforcement in such circumstances serves no purpose other than to punish the consumer and is entirely at odds with the rehabilitative and equitable principles that underpin both the NCA (National Credit Act) and public policy. This Court cannot lend its imprimatur to litigation that is pursued purely to vindicate a strict contractual right in the face of compliance.’¹⁰

[9] The court had regard to the fact that BMW is a financial service provider that serves vulnerable members of the public and held that it would be contrary to public interest and policy considerations to permit it to enforce its right strictly on the basis of past default, when the underlying indebtedness has been cured.¹¹ The court concluded by finding that BMW’s insistence on the return of the vehicle despite having received the arrears is neither equitable nor in the public interest. According to the court, this weighs decisively against the granting of summary judgment.¹²

⁷ Para 8.

⁸ Para 9.

⁹ 2020 (5) SA 247 (CC).

¹⁰ Para 14.

¹¹ Para 15.

¹² Para 17.

[10] The following passage in *Beadica* is relevant:

‘... a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law including the rule that a court may not enforce contractual terms where the terms or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.’¹³ (Emphasis added.)

[11] In this matter, as in *Ndlangisa*, the evidence adduced in the opposing affidavit suggests that the arrears have been paid. In these circumstances, and having regard to the following factors, it may well be that the repossession of the vehicle is contrary to public policy:

- (a) Mr Toefy has already repaid about half of the total indebtedness.
- (b) On the evidence adduced by Mr Toefy, the arrears have been paid in full. Even if the arrears have not been completely paid, any amount currently owing to BMW would be relatively small.
- (c) The nature of the agreement is such that the parties were probably in unequal bargaining positions when the agreement was concluded.

¹³ Para 80.

(d) Mr Toefy would be prejudiced if the vehicle were to be the subject of a forced sale. The proceeds of such a sale would probably not reflect the actual value of the vehicle.

[12] I am mindful, however, that BMW has not had an opportunity to deliver an affidavit in relation to Mr Toefy's new defence. A similar conundrum arose in *Belrex 95 CC v Barday (Belrex)*¹⁴ where, as in the matter before me, an initial plea had been filed and the plaintiff sought summary judgment with reference to this initial plea. Subsequent thereto, but before the application was heard, the defendant filed a notice of intention to amend his plea and raised a special plea, and a few days later he filed his opposing affidavit. The plaintiff had not had occasion to file an additional affidavit because, so the court considered, it was prohibited from doing so in terms of subrule (4).¹⁵ *Belrex* is different to this matter in that the defendant had filed a notice of intention to amend his plea. Here, Mr Toefy has not signalled an intention to amend his plea. In my view, however, if Mr Toefy is given leave to defend, it is inevitable that he will amend his plea.

[13] In *Belrex*, Henney J held that given the way the application unfolded, it would be difficult, if not impossible, to deal with the application in terms of the amended rule for the following reasons:¹⁶

- a. First, the amended plea was not ripe to be adjudicated upon, for want of compliance with the provisions of rule 28(2).

¹⁴ 2021 (3) SA 178 (WCC).

¹⁵ Para 34.

¹⁶ Para 35.

- b. Second, even if the amended plea were properly before court, the plaintiff did not deliver a supporting affidavit to deal with any of the issues, especially in relation to whether the defence as pleaded therein raised any triable issue.
- c. Third, again, even if the amended plea were properly before the court, in the court's view the plaintiff would be prohibited from delivering any further evidence, in the form of an affidavit, to address the question whether the defence as pleaded raises a triable issue.
- d. Fourth, should the court ignore the amended plea and ignore the opposing affidavit, because the opposing affidavit was not in harmony with the initial plea, it would defeat the purpose of the amended rule, which requires that the nature and grounds of the defence and the material facts relied upon in the affidavit should be in harmony with the allegations in the plea.
- e. Fifth, it would be manifestly unfair and unjust to the defendant, who has a right to amend his plea at any stage of the proceedings before judgment; even more so if summary judgment should be granted in favour of the plaintiff.

[14] It seems to me that materially the same considerations arise in the matter before me. Henney J made no order in relation to the summary judgment application, but directed that the defendant's notice of amendment shall take effect in terms of rule 28(2) as of the date of the judgment, for the

plaintiff to exercise its rights in terms of the rule, and the plaintiff was given leave to bring a fresh summary judgment application on the amended plea, should such an application for amendment be allowed. Costs stood over for later determination.¹⁷

[15] A different remedial approach was adopted in *City Square Trading 522 (Pty) Ltd v Gunzenhauser Attorneys (Pty) Ltd and Another (City Square)*.¹⁸ In this case an affidavit had been delivered for the purposes of supplementing the plaintiff's supporting affidavit consequent upon an amendment of the defendant's plea effected after the filing of the application for summary judgment. The defendant objected to the supplementary affidavit by way of a notice in terms of rule 30. The court found that rule 32(4) does not deprive the plaintiff of its rights under rule 28(8) to make consequential adjustments to its affidavit filed in terms of rule 32(2) pursuant to the amendment of a plea. The court thus allowed the plaintiff to deliver the supplementary affidavit.

[16] These cases were considered by Farlam AJ in *Redefine Properties Limited v Masiqhame Trading 224 CC and Another (Redefine)*.¹⁹ In the view of Farlam AJ, the order granted in *Belrex* to deal with the defendant's late amendment of its plea – namely, granting the plaintiff leave to bring a fresh application on the amended plea, should such an application for amendment be allowed – seemed unnecessary (albeit a potential way of regulating the development in a particular case, should the court consider it appropriate in the circumstances). This was because, in terms of rule

¹⁷ Paras 36-9.

¹⁸ 2022 (3) SA 458 (GJ).

¹⁹ (4851/2022) [2024] ZAWCHC 214 (20 August 2024).

28(8), the plaintiff would be able to amend its supporting affidavit in the summary judgment application consequentially (by way of filing a supplementary affidavit) and the existing summary judgment application could therefore continue in amended form.²⁰

[17] In *Redefine*, the court pointed out that:²¹

‘... an amendment by a defendant faced with a summary judgment application will preclude the summary judgment application proceeding in the form in which it was issued. The summary judgment application would be directed at the initial plea, not the plea as amended. The plaintiff would therefore not have engaged with all the defences that the defendant has, subsequent to the launching of the summary judgment application, indicated that it wants to advance; and it might also have addressed defences which were no longer being persisted with. In the circumstances, the summary judgment application as issued would, at least to some extent, become moot.’

[18] One of the objects of the amendment to rule 32 is to allow the plaintiff an opportunity to address the defendant’s grounds of defence in the affidavit supporting the summary judgment application.²² Generally, a defendant may not raise defences in the affidavit resisting summary judgment that are not pleaded.²³ The rule-maker contemplated a proper engagement by the parties with the pleadings.²⁴ To this end, sub-rule 2(b) provides that the supporting affidavit must ‘explain briefly why the defence as pleaded does not raise any issue for trial’ (Emphasis added). It follows that the

²⁰ Para 21.

²¹ Para 14.

²² See in this regard *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) para 8.

²³ *Vukile Property Fund Limited v True Ruby Trading 1002 (CC) trading as PostNet* (unreported GJ case no 2020/9705 dated 21 May 2021) para 10; *Nedbank Ltd v Uphuhliso Investments and Projects (Pty) Ltd* [2022] 4 All SA 827 (GJ) (*Uphuhliso*).

²⁴ *City Square* para 27.

defence ultimately argued at a summary judgment hearing must be in harmony with the defence pleaded. In circumstances where the defendant introduces a new defence in the affidavit opposing summary judgment, this purpose is subverted, and the court is placed in a position akin to that under the previous form of the rule, where the defendant asks the court to decide the application merely on the defence articulated in the opposing affidavit.

[19] To my mind, if I were to have regard to Mr Toefy's opposing affidavit that would be prejudicial to BMW, as the matter would then be decided without it having had an opportunity to respond to the new defence. On the other hand, if I were to disregard the opposing affidavit, judgment may be given against Mr Toefy in the face of a potentially valid defence. In so far as the new defence only became available to Mr Toefy after the plea was delivered, in my view the mere fact that the plea and the opposing affidavit are at odds, does not mean that the new defence is not genuine and summary judgment should be granted.

[20] To resolve these twin difficulties, I think Mr Toefy should be given leave to deliver a notice of intention to amend his plea in terms of rule 28(1) within ten days of this order. Although Mr Toefy should have delivered a notice of intention to amend his plea as soon as it became evident that a new defence would be advanced,²⁵ in the particular circumstances of this matter I do not think that the failure to do so is demonstrative of a lack of good faith. If the plea is successfully amended then BMW should be given leave to supplement its affidavit in support of summary judgment,

²⁵ *Uphuhliso* para 30.

whereafter BMW may set the application down for hearing on the revised papers and Mr Toefy may deliver a supplementary opposing affidavit. If the notice to amend is not delivered timeously, or if the claim is not successfully amended, then BMW may re-enrol the existing application in its current form.²⁶ The supplementary supporting affidavit should only contain evidence and argument which is consequential on the amendment, and likewise the supplementary opposing affidavit should only contain evidence and argument which is consequential on the material in the supplementary supporting affidavit.

[21] I invited the parties to make submissions in relation to the *Belrex* line of cases, and to this end a hearing was convened on 31 October 2025. Mr Toefy's counsel submitted that I should decide the matter on the papers as they stand. For the reasons given above, I think this would not only undermine the purpose of the rule but, if I had regard to the opposing affidavit, this would also be prejudicial to BMW. Both counsel agreed that if the application were to be postponed, BMW should be given leave to supplement its papers pursuant to any amendment, rather than having to bring a fresh application. I consider that this would be the most practical remedy.

[22] The wasted costs occasioned by the postponement have been caused by Mr Toefy. The initial plea did not disclose a genuine defence. BMW was therefore justified in seeking summary judgment. The prospect of a new defence, based on public policy concerns, arose after the two payments were allegedly made in May 2025. But the second such payment was only

²⁶ See in this regard *Redefine* para 22.1.

made after the summary judgment application was launched. Thus, Mr Toefy's new defence, based as it is on the arrears having been finally settled by the two payments, only became complete after the application had been filed. In these circumstances I consider that Mr Toefy should be liable for the wasted costs.²⁷

[23] For these reasons I grant the order set out above.

Cooke AJ:



DJ COOKE

ACTING JUDGE OF THE HIGH COURT

Appearances

For applicant:	M Alexander
Instructed by:	Velile Tinto & Associates
For respondent:	M Garces
Instructed by:	Sayeen & Co Attorneys

²⁷ See *Redefine* paras 4-6.