

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 060411/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
 11 November 2025 _____ DATE SIGNATURE	

In the matter between:

ABSA BANK LIMITED

Plaintiff /Applicant

and

WASEEM FAREED

Defendant / Respondent

JUDGMENT

DOMINGO, AJ

Introduction

- [1] This is an opposed application for summary judgment, in which the plaintiff seeks payment for the total sum of R21 000 875.15 plus interest thereon at the rate of 12.75% against the defendant in respect of three facilities that were entered into with the principal debtor, White View Investments ("the principal debtor").

Background

- [2] The plaintiff has three claims which it pleads in its particulars of claim and has separated these claims into claim A, B and C. The first claim A relied upon by the plaintiff relates to a term loan facility whereby the sum of R4 820 607.12 was due, owing and payable as at 29 February 2024. The second claim B relates to an overdraft facility whereby the sum of R10 372 856.20 was due, owing and payable as at 4 March 2024. The third claim C relates to a commercial property finance loan agreement whereby the sum of R5 807 411.83 was due, owing and payable as at 7 February 2024.
- [3] It is common cause that the defendant signed suretyship agreements in favour of the plaintiff for all debts due, owing and payable by the principal debtor. The first suretyship agreement contained a limitation in the sum of R16 420 000 and the second a limitation in the sum of R39 160 000 for the debts owing by the principal debtor to the plaintiff.
- [4] The following is a chronological sequence of events agreed upon by the parties, save points 4.11, 4.12 and 4.14, where the plaintiff believes that they contain legal argument, which will be addressed in the part dealing with the exception arguments:
- 4.1 On 13 June 2016, the defendant signed the suretyship agreement in favour of the plaintiff for the debts owing by the principal debtor.
 - 4.2 On 24 June 2016, the plaintiff and the principal debtor concluded a loan facility whereby the sum of R11 600 000 was advanced.
 - 4.3 On 9 April 2019, the defendant concluded another suretyship agreement in favour of the plaintiff for the debts owing by the principal debtor.
 - 4.4 On 24 June 2019, the defendant signed another suretyship agreement in favour of the plaintiff for the debts owing by the principal debtor.
 - 4.5 On 4 August 2023, the plaintiff and the principal debtor concluded a term loan commercial facility.
 - 4.6 On 4 August 2023, the plaintiff and the principal debtor concluded an overdraft facility for R10 000 000.

- 4.7 On 19 April 2024, the plaintiff delivered a demand upon the principal debtor.
- 4.8 On 4 June 2024 summons was issued.
- 4.9 On the 11 June 2024, the summons was served on the defendant.
- 4.10 The defendant entered a notice of intention to defend dated 26 June 2024.
- 4.11 On 3 July 2024, the plaintiff filed a new Annexure E which constituted seven pages. The defendant averred that his was in non-compliance with rule 28 of the Uniform Court of Rules because the plaintiff's particulars of claim served on the defendant, Annexure E constituted one page.
- 4.12 On 5 July 2024, the plaintiff filed and served a notice in terms of Rule 28(1) of the Uniform Court of Rules to address the defendant's notice of an irregular step.
- 4.13 On 8 July 2024, the plaintiff delivered summons upon the defendant.
- 4.14 On 11 July 2024, the plaintiff filed and served a second notice in terms of Rule 28(1) of the Uniform Court of Rules to address the defendant's notice of an irregular step.
- 4.15 On 22 July 2024, the defendant filed a notice to oppose the plaintiff's amendment of the particulars of claim.
- 4.16 On 5 August 2024, the plaintiff filed and served a notice to withdraw the Rule 28 of the Uniform Court of Rules amendment.
- 4.17 On the 22 August 2024, the plaintiff filed and served the amended particulars of claim on the defendant.
- 4.18 On 3 September 2024, the defendant served its Notice of Exception to the particulars of claim on the plaintiff, and it was filed on Court Online on 4 October 2024.

- 4.19 On 11 October 2024, the plaintiff filed and served a Notice of Bar on the defendant.
- 4.20 On 18 October 2024, the defendant filed and served its plea and special plea on the plaintiff.
- 4.21 On 8 November 2024, the plaintiff delivered an application for summary judgment against the defendant.
- 4.22 On 31 January 2025, the defendant filed and served the opposing affidavit to the summary judgment application.

Defendant's defences and Plaintiff's issues for consideration

[5] In summary the defences raised by the defendant within the body of its plea and affidavit resisting summary judgment are as follows:

- 5.1 The plaintiff's particulars of claim are excipiable.
- 5.2 The defendant was married in community of property at the time that he signed the suretyship agreements and therefore, it is averred by the defendant that the absence of his wife's consent renders the suretyship agreements void.
- 5.3 The plaintiff's institution of a liquidation application against the principal debtor inhibits the plaintiff's rights to institute proceedings against the surety which is the defendant in this matter.
- 5.4 The failure to join the principal debtor to these proceedings is limiting to the defendant's rights in this action.
- 5.5 The plaintiff has various alleged claims against the defendant, however the plaintiff's claim B for an amount of R10 372 856.20 exceeds the overdraft facility agreement that was concluded between the plaintiff and the principal debtor. Furthermore, the plaintiff has failed to address the difference in the claim and the signed term facility agreement, and the defendant averred why should the defendant be liable for the R10 372 856.20.

5.6 The plaintiff has introduced new evidence in the application for summary judgment and the plaintiff's heads of argument.

5.7 In its application for summary judgment, the plaintiff averred that the defendant has no *bona fide* defence to the action and has not raised a triable issue for determination. This is vehemently denied by the defendant.

[6] Arising from the defendant's defences to the summary judgment application, the plaintiff contends that the following issues lie for consideration:

6.1 Whether the allegations relating to the exception points are appropriate now that the defendant has already pleaded to the claim?

6.2 Whether there is any merit on the marital regime of the defendant?

6.3 Whether the liquidation proceedings initiated against the principal debtor prohibits the suit against the surety?

6.4 Whether there was an obligation to join the principal debtor to these proceedings?

6.5 Whether the plaintiff has introduced new evidence in the summary judgment application to address the marital dispute of facts and should the matter be referred to trial?

The exception: excipiable particulars of claim

[7] The point *in limine* to be determined is whether the allegations relating to the exception points are appropriate and valid now that the defendant has already pleaded to the claim.

[8] The defendant averred that the plaintiff amended on court online Annexure "E" which initially constituted one page when the summons was served on the defendant, and the plaintiff then uploaded a seven-page Annexure "E" document in non-compliance with the High Court Uniform Court Rule 28. The defendant argued that it would have been prejudiced had the defendant pleaded on the summons, as the plaintiff amended Annexure "E".

[9] Counsel for the defendant pointed out to the court that the defendant filed and served the exception within 10 days of receiving the amended particulars of claim which it is argued is within the timeframes set out in the High Court Uniform Court Rule 23. The plaintiff filed and served the amended particulars of claim on the defendant on 22 August 2024, and the defendant served its Notice of Exception to the particulars of claim on the plaintiff on the 3 September 2024, while it was filed on court online on 4 October 2024.

[10] The plaintiff averred that the defendant failed to deliver the exception timeously and/or at all. The plaintiff notes that the defendant did not seek to impugn the particulars of claim on the basis that it does not bear a cause of action, the defendant's complaints relate specifically to vagueness and embarrassment. In terms of Uniform Court Rule 23, where an excipient seeks to raise the complaint that the pleadings are vague and embarrassing; it is argued by the plaintiff that the defendant was required to deliver such pleading within a period of 10 days from the date the pleading was delivered upon them.

[11] In this regard, Uniform Court Rule 23(1) states as follows (my own emphasis):

“23(1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence as the case may be, the opposing party may within the period allowed for filing any subsequent pleading, deliver an exception that you may apply to the registrar to set it down for hearing within 15 days after delivery of such exception: provided that –

(a) where a party intends to take an exception that a pleading is vague and embarrassing such party shall, by notice, within 10 days of receipt of the pleading, afford the party delivering the pleading, an opportunity to remove the cause of complaint within 15 days of such notice, ...”

[12] Thus, the plaintiff averred that it is not the date of delivery of the amended particulars of claim that the 10 days are counted from, it is the date of receipt of the pleading.

[13] Furthermore, it is also averred by counsel of the plaintiff, in which I am in agreement, that in any event and although not applicable in this case, a vague

and embarrassing type exception cannot be raised if an excipient argues that a pleading became vague and embarrassing by virtue of an amendment. This is because if the causal effect of the amendment would be an excipiable pleading, the excipient is at liberty to deliver an objection to the proposed amendment.

[14] The amendment of the particulars of claim in this matter, having looked at it, deals with the full inclusion of the terms and conditions of the commercial term loan agreement and the facility letter: commercial terms. The exception complaints raised by the defendant are not limited to the amendments made in the amended particulars of claim. I am therefore of the view that the exception should have been delivered at the onset of the receipt of the pleading within 10 days and not within 10 days from the date of the delivery of the amended particulars of claim.

[15] Furthermore, the averment made by the defendant that the notice of exception “remains hanging” and that there was nothing precluding the plaintiff from enrolling the defendant’s exception, I agree with counsel for the plaintiff, is unmeritorious. I am in agreement with the plaintiff that upon receipt of the Notice of Bar and if the defendant believed that it was still within its rights to persist with the exception, it was required to deliver a Rule 30 of the Uniform Court of Rules notice wherein it should have sought to impugn the Notice of Bar. Instead, the defendant delivered a plea within the bar period and in this matter, it was the defendant who in terms of Rule 23(1) of the Uniform Court of Rules was obligated to “apply to the registrar to set down the exception” after giving the plaintiff an opportunity to remove the cause of the exception complaint(s). Counsel for the plaintiff, correctly notes that this is because the rule makes a distinction between the notice of exception and the exception proper, in that the former is a notice giving an opportunity to remove the cause of complaint and the latter being a pleading in that it constitutes the exception which the excipient must deliver. Accordingly, as a result of the delivery of the plea within the bar period, any complaint that the defendant may have laboured in respect of the notice of bar falls away because the defendant not only failed to deliver a Rule 30, irregular step notice in terms of the Uniform Court of Rules, but the defendant also took a further step in the proceedings by delivering it plea on the merits. In other words,

I am in agreement with the plaintiff that the particulars of claim could not have been so vague and embarrassing that the defendant was incapable of pleading to it.

- [16] In the premises, I am of the view that the defendant cannot rely on the “exception” in resisting the summary judgment application.

Validity of the suretyship agreements: marriage by the surety

- [17] In the second special plea of the defendant, he contended that his suretyship agreements incorrectly reflect him as unmarried. The defendant attached a marriage certificate which reflects that the defendant was married on 12 May 2014 in Pakistan and the date of the issue of the Pakistani marriage certificate is 19 September 2019.

- [18] The argument made by the plaintiff is that the defendant cannot rely on the alleged marriage because the marriage was concluded in Pakistan and therefore section 15 of the Matrimonial Property Act 88 of 1984 (“the MPA”) read with Marriages Act 25 of 1961 would not apply, thus disputing the validity and recognition of the marriage in South Africa. The defendant correctly points out that this is a new argument introduced by the plaintiff in its head of arguments, however, this is due to the fact that the defendant in its founding affidavit incorrectly cited the defendant’s marriage as taking place on 12 May 2024, which would have made the validity of the suretyship agreements moot, since the suretyship agreements took place before 2024. The defendant argued that the the plaintiff intentionally misled this honourable court by stating that the defendant entered into the marriage on 12 May 2024. While the defendant argued that the plaintiff seeks to raise new facts in their heads of argument the defendant does same, by informing this court that the defendant had applied for more than five years ago to register the marriage in South Africa and to obtain citizenship for his wife, and the defendant cannot be held responsible for the delay at Home Affairs.

- [19] Neither of the parties raised the issue of *Lex Domicilli Matrimonia* that in terms of South African law when a South African marries a foreign national the marriage will be governed by the matriomonal property law of the domicile of the husband

at the time of the marriage. This rule is still one of the gender specific rules in family law in South Africa, where a couple's matrimonial domicile is the place where the husband is domiciled on the day of the wedding. I raised this issue with both parties at the hearing, and it was agreed that following the *Lex Domicilli Matrimonia* rule, the marriage of the defendant is recognised in South African Law in terms of the South African Matrimonial Property Act. The marriage certificate did not include an antenuptial contract, therefore it can be concluded that the defendant is married in community of property, which is the default matrimonial property system in South Africa.

- [20] In terms of s15(1) of the MPA both spouses have equal powers to deal with the assets of the joint estate, without the consent of the other spouse; however, this power is limited in terms of s15(2) and s15(3) of the MPA where it is a requirement that the consent of the other spouse must be obtained before certain transactions may be entered into. The legal position in terms of s15(2)(h) is such that a spouse married in community of property in South Africa may not bind himself as surety without the written consent of his or her spouse. However, in terms of s15(6) of the MPA, a spouse can enter into a deed of suretyship even though he or she may be married in community of property provided that it is in the ordinary course of his or her profession or business. Section 15(6) states as follows:

"The provisions of paragraphs (b), (c), (f), (g) and (h) of Subsection 2 do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business."

- [21] Counsel for the plaintiff directed the court to the Supreme Court of Appeal case of *Almalgamated Banks of South Africa v De Goede en Andere* ("*Almalgamated*")¹ where the court was faced with the same defence as in this matter whereby the defendants in an application for summary judgment sought to escape the consequences of their deeds of suretyship by contending that they were married in community of property and that the spousal consent was not obtained as contemplated by section 15(2)(h) of the MPA. The relevant issue before the Supreme Court of Appeal was whether or not non-compliance with

¹ 1997 (4) SA 66 (SCA).

s15(2)(h) meant that the deed of suretyship was invalid and specifically where the provision of s15(6) applied because if it did, in that the defendant had signed the suretyship within the ordinary course of his business, the deed of suretyship would be valid irrespective of non-compliance with s15(2)(h) of the MPA.

[22] The court in the *Almalgamated* case² held importantly as follows:

“The respondents claim that they had been only paper members of the CC did not accord with the underlying facts: when they had signed the deed of suretyship, they had been aware of the underlying loan agreement between the bank and the CC and the fact that they had signed the deed as members of the CC meant that they had also approved the said loan agreement in that capacity. The signing of the deed was a step the respondents had deliberately taken in light of all relevant facts.”

[23] Counsel for the plaintiff, averred that similarly in this matter, directors of a company (the principal debtor) who signed deeds of suretyship within the spectrum of the ordinary course of business constitutes an act contemplated in terms of s15(6) of the MPA.

[24] The defendant in its Heads of Argument averred that the plaintiff failed to plead in the particular of claims and/or summary judgment application that the defendant was acting in the course of the scope of his business when the defendant entered into the suretyship agreement. Likewise, the defendant in turn in its Heads of Argument informed the court for the first time that the primary debtor is a registered car dealership and had obtained a floor plan facility from the plaintiff in the ordinary course of business, however, the subsequent term loan, overdraft facility and the property finance loan had not been established in the ordinary course of the primary debtor's business nor the suretyship agreement signed by the defendant. Therefore, the validity of the suretyship is disputed by the defendant and on the facts on paper it has not been established that the overdraft, term loan and property finance facility were in the ordinary course of the defendant's business, therefore the honourable court ought to dismiss the application for summary judgment and refer the matter to trial.

² *Supra* at paras 73H-74A.

[25] In *Strydom v Engen Petroleum Ltd*³ the Supreme Court of Appeal had another opportunity to consider the nature of s15(2) and s15(6) of the MPA. Mr Strydom who was married in community of property entered into a suretyship agreement in favour of Engen. He stood suretyship for debts incurred by a private company of which he was the director. Mrs Strydom was aware of the suretyship agreement, she was opposed to her husband, Mr Strydom signing the suretyship agreement and did not provide her consent. In considering the nature of s15(2) and s15(6) of the MPA the Supreme Court of Appeal held the following:⁴

“The argument before us on behalf of the appellant proceeded on the footing that, once Mr Strydom said that he was married in community of property and that his wife has not consented to his executing of the deed of suretyship, -an onus rested on Engen to prove that he had nonetheless bound himself as surety in the ordinary course of his business. Whilst in my view the evidence before the court demonstrated that this was indeed the case the approach was in my view wrong. The reason is that it treated the provisions of s15(2) as distinct from s15(6). However, that is not appropriate as a matter of interpretation, which requires statutes to be construed in the light of their context not as isolated fragments of words. The requirement that spousal consent be obtained before concluding certain defined financial transactions as set out in ss15(2) and (3) of the Act cannot be read in isolation. Section 15(6) says expressly that in respect of certain of those transactions, including binding oneself as surety, section 15(2) does not apply if the act in question is performed in the ordinary course of the spouse’s business, trade or profession. What one knows therefore is that ss15(2) and (3) operate in respect of some, but not other, financial transactions depending on whether or not they are performed in the ordinary course of the spouse’s business, trade or profession. Accordingly, it does not suffice for a person seeking to rely on s15(2)(h) to say that they were married in community of property and that their spouse did not consent to the transaction to bring themselves within the ambit of the section. That is because the section only operates in certain limited circumstances. If they wish to rely upon it, they must bring themselves within the full range of operation.

[26] Having regard to the *Strydom* case *supra*, it would be for the defendant to demonstrate that he was entitled to the protection of s15(2), and that, in order to do so, he was required to show that he did not bind himself as surety in the

³ 2013 (2) SA 187 (SCA).

⁴ *Supra* at para 13.

ordinary course of his business, it is immediately apparent from the the evidence that he has not discharged this onus. From the papers it can be gleaned that, the defendant signed the term loan and the overdraft facility agreement in his capacity as director, while the Business Client Agreement did not provide for the designation of capacity to be recorded it can be inferred that the defendant signed it in the course and scope of his business as the facility is called a "Business Client agreement" and relates to a commercial property finance loan agreement. It is therefore disingenuous for the defendant to raise the defence that these three agreements were not established in the ordinary course of the principal debtor's business. In my view, the defendant when he signed the deed of suretyship, he had been aware of the underlying contractual agreements between the plaintiff and the principal debtor; and he was aware of the fact that he signed all three agreements in his capacity as a director. This means that the said deed of surety agreements had also been signed in that capacity, that is, in the course and scope of the defendant's business, trade or profession. Considering the context and all the relevant facts the signing of the deed of suretyships was another step in the course and scope of the defendant's business.

[27] Furthermore, the defendant signed all the documents describing his marital status in bold as "unmarried." In each of the deeds of suretyship which he signed voluntarily between 2016 and 2019, the defendant's status is recorded as unmarried. Throughout this period the defendant did not disclose to the plaintiff that in fact he was married to a Pakistani woman, that the marriage took place in Pakistan and that he was firstly uncertain whether his marriage is legal in South African and secondly, that he was in the process of getting his marriage registered by Home Affairs. Instead, he remained silent and now wants to raise the issue of his marriage as a defence not to be bound to the suretyship agreements by contending that the suretyship agreements, incorrectly reflects his marital status as unmarried and that the plaintiff incorrectly captured his details.

[28] In the premises, I am of the view that the defendant cannot rely on his marriage as a triable defence/issue to resist summary judgment.

Pending Liquidation and Non-joinder

- [29] The defendant contended that the claim instituted against it in this action is premature because the plaintiff must first excuss the principal debtor before looking to the defendant as surety. He suggests in his affidavit resisting summary judgment that, “*the plaintiff is double counting by attempting to enforce the security against the defendant and to gain from the proceeds of the winding-up of the principal debtor.*”
- [30] The plaintiff averred that this argument is flawed because there is nothing in our law that prohibits the plaintiff from exploring all forms of debt collection mechanisms in order to recover the outstanding indebtedness owed to it. Where it receives proceeds through the insolvency process relating to the principal debtor, the plaintiff would be at liberty to simply reduce its claim in this action. The plaintiff further averred that in *Neon and Cold Cathode Illuminations (Pty) v Ephron*⁵ the court said that the impact of signing a deed of suretyship and co-principal debtor is that the surety renounces the benefit of *inter alia* excussion. The plaintiff contended that in fact, our courts have sanctioned the method of collection whereby a creditor is at liberty to institute liquidation proceedings against the principal debtor and simultaneously continue with action proceedings or application against the sureties. Considering that this is permissible, the submission of claims in an insolvent estate is similarly permissible and the plaintiff averred that the suggestion made in the affidavit by the defendant resisting summary judgment that the applicant is attempting to claim twice for the same thing is unfounded.
- [31] The plaintiff directed the court to the case *Firststrand Bank Ltd v Keliana Group (Pty) Ltd*⁶ where the court had the following to say to a very similar defence, and in fact, concluded that the cause of action in a liquidations differs from the *causa* in alternative mechanisms used to recover the debt through the proceedings against sureties:

⁵ 1978 (1) SA 463 (A).

⁶ [2023] ZAGPJHC 711 (13 June 2023) at para 15.

“Prima facie, it is vexatious to bring two actions in respect of the same subject matter. In this instance however, as the applicant correctly pointed out, the action instituted against the surety is premised upon a different cause of action to that of liquidation which is to collect the outstanding debt against the surety which debt the surety is liable for in solidum with the Respondent. The application before this court is statutory for the purposes of liquidating the Respondent pursuant to the section 345 letter, and the Respondent’s failure to act thereupon. Moreover, the action instituted is not between the same parties as that of the application before this court. In this instance, the Respondent is a legal entity with obligations separate from those of the director in her personal capacity. Accordingly, the *lis pendens* defence is without merit.”

[32] In the circumstances, I am in agreement with the plaintiff that the course of action in a liquidation differs from the cause of action in these proceedings, where the plaintiff seeks to collect the outstanding debt against the surety. Furthermore, from the papers, in terms of clause 10.1 of the surety agreement, the defendant renounced his right to demand that the plaintiff explores its debt collection procedure against other debtors or co-sureties before seeking full payment from the defendant. Accordingly, the plaintiff correctly points out that there is no basis in both fact and law to prevent the plaintiff from relying upon the strategy employed by the plaintiff to recover the outstanding indebtedness both through the insolvency process and simultaneously this action.

[33] Regarding joinder of the principal debtor to these proceedings, the defendant contended that there was an obligation imposed upon the plaintiff to join the principal debtor as an interested party. To not do this is to prejudice both the defendant and the principal debtor. The plaintiff averred that the reliance on the non-joinder argument by the defendant is flawed because the action that was instituted under case number 52086/2024 relates to a different agreement, namely the floor plan agreement, which was to be used for purposes of assisting the principal debtor during the course and scope of its business as a motor vehicle dealer. It is in that application that the defendant has raised a counterclaim wherein it seeks the sum of approximately R18 000 000 due to alleged losses that were suffered as a result of the alleged breach of the negotiations which were being conducted between the representatives of the principal debtor and that of the plaintiff. The defendant contended that, but for

the conduct of the plaintiff the principal debtor would not have defaulted on the loans and the plaintiff making a claim against the surety. Thus, the defendant pointed out that this court therefore ought to consider all facts and the various pending litigations in order to come to the correct order.

- [34] The pending litigation under case number 52086/2024 deals with a breach of a floor plan agreement, that agreement and the aforesaid counterclaim is not before this court; I am in agreement with the plaintiff that it has nothing to do with the cause of action *in casu* and therefore, there is no basis to conclude that the principal debtor had to be joined in these proceedings. Furthermore, I am in agreement with the plaintiff, that in so far as the defendant contended that the principal debtor's joinder was necessary, nothing precluded the defendant from joining the principal debtor to these proceedings and providing evidence to this court that such principal debtor has a legal interest in the outcome of this action against the surety. Accordingly, this defence by the defendant, falls.

New Evidence

- [35] The defendant accused the plaintiff of introducing new evidence in the summary judgment application. It is contended that the plaintiff introduced new evidence by attaching Annexure "LG1", "LG2" and "LG3" to the application for summary judgment. Annexure "LG1" is a document setting out an ABSA Resolution, it documents the signing authorities within the relationship banking risk office. Annexure "LG2" is an extract of minutes which records a decision made to provide authority to the defendant to enter into the overdraft facility of R10 000000 in his capacity as director and Annexure "LG3" is a document setting out the overdraft history equity.
- [36] The defendant directed the court to *ABSA Bank Limited v Mphahlele NO and Others*⁷ where the court held the following:

"[A]s a general proposition, a plaintiff should not be entitled to introduce evidence of facts which do not appear in a plaintiff's particulars of claim or declaration.

⁷ [2020] ZAGPPHC 257 (26 March 2020) paras 32, 33 and 37.

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.

In the premises, the identification of points of law and facts by a plaintiff must be confined to those as set out in a plaintiff's particulars of claim or declaration: be set out succinctly without the introduction of any further documentary evidence and the explanation pertaining to why the defence as pleaded by a defendant does not raise any issue for trial should, as specifically required by the subrule be brief. Certainly, the explanation, like the identification of points of law and facts, cannot be supported by a plaintiff attaching further documents to the affidavit in support of summary judgment.”

[37] Furthermore, the court in *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd and Another*⁸, relying on *Mphahlele supra*, held that:

”Rule 32(4) expressly precludes the applicant in summary judgment proceedings from adducing evidence otherwise than by the affidavit referred to in subrule 2. No annexures to a plaintiffs verifying affidavit are allowed except if the claim is founded on a liquid document, in which instance a copy of the document must be annexed to the affidavit, although the inclusion of evidence in the affidavit, or the annexing of documentary evidence, will not invalidate the application, but will simply be ignored by the court.”

[38] I am of the view that the attachment of Annexures “LG1”, “LG2” and LG3” by the plaintiff constituted new documentary evidence, while it may be an elaboration of the plaintiff’s averments, I am in agreement with the defendant that it does introduce new evidence in the application for summary judgement. Having regard to the case law authorities discussed above, the inclusion of the Annexures does not invalidate the plaintiff’s application for summary judgement, however, I will simply ignore the Annexures.

[39] It is also contended by the defendant that the plaintiff introduced new evidence in regard to its arguments in relation to the defendant’s marriage. In response the plaintiff pointed out that the defendant ignored the provision of Rule 32 of the

⁸ [2023] ZAGPJHC 303 (5 April 2023) at para 29.

Uniform Court of Rules as amended and specifically subparagraph 32(2)(b) which states as follows:

”(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 the defence as pleaded does not raise any issue for trial.”

[40] In *Tumileng Trading CC v National Security and Fire (Pty) Ltd*⁹ it was held that the words “brief explanation as to why the defence as pleaded does not raise any issue for trial” cannot be taken literally, for a plea that does not raise any issue for trial would be excipiable. The court accordingly adopted a “reading-in” approach as follows to give meaning to the words (emphasis my own):¹⁰

“I consider that the amended rule 32(2)(b) makes sense only if the word “genuinely” is read before the word “raise” so that the pertinent phrase reads “explain briefly why the defence as pleaded does not genuinely raise any issue for trial.” In other words, the plaintiff is not required to explain that the plea is excipiable. It is required to explain why it is contended that the pleaded defence is a sham. That such is implicit in what the Task Team said in para. 8.3 of its memorandum. The position would have been made clearer had the words ‘does not make out a *bona fide* defence’ been used. That would have made for a more clearly discernible connection between the respective requirements of subrules (2)(b) and (3)(b). That there be such a connection is necessary if the amended rule as a whole is to be workable.

What the amended rule does seem to do is to require the plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a *bona fide* defence. This is because the plaintiff’s supporting affidavit now falls to be made in the context of the deponent’s knowledge of the context of a delivered plea. That provides a plausible reason for the requirement of something more than a ‘formulaic’ supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not *bona fide* and has been raised merely for the purposes of delay.

⁹ 2020 (6) SA 624 (WCC).

¹⁰ *Supra* at paras 21, 22, and 40.

However, does the fact that the *bones* of a triable defence have been made out in the plea mean that summary judgment must be refused? The answer is clearly “no”! The reason for the negative answer is that the enquiry is not whether the plea discloses “an issue for trial” in the literal sense of those words, it is whether the ostensible defence that has been pleaded is *bona fide* or not. As discussed earlier, that is the relevant enquiry in a summary application follows from the rule-maker’s decision to leave subrule 32(3) substantively unamended.”

[41] The plaintiff therefore contended that it was fully within its rights to deal with the defences raised by the defendant. I am in agreement with the plaintiff that insofar as the plaintiff has provided its responses to allegations made in the affidavit resisting summary judgment read together with the defendant’s plea, such responses fall within the category of briefly discussing the defences raised as contemplated by Rule 32(2)(b) of the Uniform Court of Rules.

[42] The defendant also accused the plaintiff of failing to explain the basis on which the “conditions precedent” was suspended and the fact that the plaintiff was reckless in overextending credit to the primary debtor. Furthermore, the defendant contended that the the plaintiff has not addressed the fact that the defendant was not informed in writing of the variations to the agreements. In response the plaintiff stated that between paragraphs 42 and 51 of its founding affidavit, the plaintiff deals with the defendant’s special plea wherein the defendant suggests that the agreement is subject to suspensive conditions that were not fulfilled. The plaintiff averred that this is a sham defence. The plaintiff further averred that it has explicitly demonstrated that insofar as there were conditions contained in the agreement, they were certainly not suspensive conditions considering that the plaintiff was always at liberty to advance the credit before the fulfilment of conditions as contemplated by the agreement. Notwithstanding, that I will not take the LG Annexures into account, in the premises, I am of the view that the defence raised by the defendant is not *bona fide*, as the papers indicate that the defendant signed in his capacity as director and was aware that the credit had been advanced. The defendant, furthermore, accused the plaintiff that it failed and refused to aver when and how the R7 500 000 reduction was made in terms of the special conditions? This is in regard to the overdraft facility agreement special condition which is set out in clause 8 of

the agreement. The plaintiff submitted that it has complied with the special condition. Having regard to the papers, in my view clause 8 sets out clearly when the reduction should have taken place, it states “once-off reduction of R7 500 000 on 30/10/2023 or on payout of MMBL whichever occurs first.”

[43] In addition, the defendant accused the plaintiff of not including the board resolution and the constitutional documents supporting that the defendant was duly authorised to enter into the agreements. I am of the view, that if the defendant wanted to contend that he did not have authorisation to enter into the agreements, the onus is on him to raise the defence and provide proof thereof.

[44] The defendant contended that the plaintiff failed to take the court into its confidence as to why the defendant should be liable to pay R10 372 856, 20 when the second term facility, advanced to the primary debtor for an overdraft of R10 000 000 was approved and the amount claimed by the defendant has since increased to R10 372 856. 20, as per claim B. It is further contended by the defendant that it is unclear from the papers before the court whether the plaintiff increased the overdraft facility and/or the amount is incorrect. The plaintiff correctly pointed out to the defendant that the outstanding debt amount regarding the overdraft facility has interest running which would lead to an increase in the amount and exceeding a facility limit is not a defence. Having regard to the overdraft facility agreement it does make provision in clause 16.1 “overdraft facility terms” for the extension of the credit limit. In my view, the defendant does not take the court into his confidence by disclosing or producing any evidence to show that the overdraft facility limit was not exceeded and/or that payments were made which would render the amount reflected in the certificate of balance as incorrect. The defendant simply makes a bare and blanket denial that the amount is disputed. In the premises, I am of the view that the defence raised by the defendant in regard to claim B is not a *bona fide* defence and does not establish a triable issue.

[45] The plaintiff directed the court to the case of *Blakes Maphanga Inc v Outsurance Insurance Company Ltd*¹¹ where the Supreme Court of Appeal cited with approval the concept of “liquidated amount in money” as set out in *Tredoux v Kellerman*¹² case:

”A liquidated amount of money is an amount which is either agreed upon or which is capable of ‘speedy and prompt ascertainment’ or put differently, where ascertainment of the amount in issue is a ‘mere matter of calculation.’”

[46] In regard to claims A, B and C the defendant submitted that the amounts claimed by the plaintiff are disputed by the principal debtor; it has been disputed by the principal debtor in the pending winding up application brought by the plaintiff. However, the defendant in this matter does not provide any information regarding the grounds on which the amounts are disputed. There is no defence provided by the defendant as to why and how the amounts reflected in the certificates of balance are incorrect, except for the blanket statement that the amounts are disputed by the principal debtor. I am of the view that the defendant therefore has not challenged the plaintiff’s evidence (certificates of balance) with facts and evidence to the contrary that establishes a *bona fide* defence. The defendant has submitted that for the purposes of a summary judgment application, the defendant’s affidavit opposing summary judgment is not required to deal exhaustively with the facts and evidence relied upon to substantiate them. What is required is that the defendant must disclose his defence and material facts upon which it is based, with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a *bona fide* defence. It is further submitted by the defendant, correctly, that he is not required to formulate his defence with the same level of precision as a plea and the court will not examine the affidavit with the same level of pleadings. However, in the premises, I am of the view that the defendant has not disclosed the material facts upon which his defence is based on with sufficient particularity and completeness to establish a *bona fide* defence.

¹¹ 2010 (4) SA 232 (SCA) at para 17.

¹² 2010 (1) SA 160 (C) paras 18-23.

Business Client Agreement

[47] The defendant contended that the business client agreement is not applicable to the term loan facility because the business client agreement was signed on 10 May 2016 and the term loan facility was concluded in February 2023. In other words, the business client agreement precedes the term loan facility. It is pointed out by the plaintiff that when the defendant signed the business client agreement on behalf of the principal debtor on 10 May 2016, he confirmed that the business client agreement “*covers all business banking products and services...*” Thus, properly construed, I am in agreement with the plaintiff that the provisions of the business client agreement make it clear that they apply to all products signed either at the time that the business client agreement was signed, or all products thereafter. In the circumstances, there is no grounds for the defendant to attempt jettisoning the business client agreement.

The National Credit Act

[48] The defendant contended that the National Credit Act 34 of 2005 applies in this matter. The plaintiff averred that the defendant failed to provide any basis to countervail the allegations already made in the particulars of claim that the agreements constitute large agreements concluded with a juristic person and therefore, such credit agreements are expressly excluded from the applicability of the National Credit Act. I am in agreement that the National Credit Act does not find application in this matter.

Conclusion

[49] In the circumstances, I am of the view that the plaintiff has demonstrated and established a clear and enforceable claim in respect of claims A, B and C. The ostensible defence pleaded by the defendant taken in its totality does not proffer any triable defence or discloses a *bona fide* defence. It therefore follows that the plaintiff is entitled to summary judgment.

Order

[50] Having regard to the totality of evidence, having heard counsel and having considered the matter, I hereby order that summary judgment is granted against the respondent in that he is required to make payment to the applicant in respect of the claims hereunder as follows:

50.1 CLAIM A

50.1.1 Payment in the sum of R4 820 607.12;

50.1.2 Interest on the aforesaid sum at the rate of 12.75% linked per annum, capitalised monthly from 1 March 2024 to date of final payment, both days included.

50.2 CLAIM B

50.2.1 Payment in the sum of R10 372 856.20;

50.2.3 Interest on the aforesaid sum at the rate of 12.5% linked per annum, capitalised monthly from 5 March 2024 to date of final payment, both days included.

50.3 CLAIM C

50.3.1 Payment in the sum of R5 807 411.83;

50.3.2 Interest on the aforesaid sum at the rate of 12.75% linked per annum, capitalised monthly from 8 February 2024 to date of final payment, both days included.

50.4 Costs of this application on the scale as between attorney and client, and on scale C.



W DOMINGO
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was heard in open court on the 12 August 2025. The date for hand down is deemed to be 11 November 2025.

APPEARANCES:

For the Plaintiff/Applicant: MR N ALLI instructed by JAY MOTHOB
INCORPORATED

For the Defendant/Respondent: MS A CHOWAN instructed by SHABEER
JOOSAB ATTORNEYS

