

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2022-009661
& 2023-132503

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
17 November 2025	
DATE	SIGNATURE

In the matter between:

K2012020306 (PTY) LTD

First Applicant

STUART ALAN JOHN SAUNDERS

Second Applicant

and

GERT LOURENS DE WET N.O.

First Respondent

MARTHA ESTELLE SYMES N.O.

Second Respondent

MARCH BRADLEY BEGINSEL N.O.

Third Respondent

SENEKAL SIMMONDS INC

Fourth Respondent

JOHANNES HENDRICK SENEKAL

Fifth Respondent

EWAN RONALD SIMMONDS

Sixth Respondent

SANGONE PRESTON HANGONE

Seventh Respondent

JUDGMENT

Introduction

[1] The applicants launched an application for summary judgment against the first to third respondents (“*liquidators*”) and fourth to seventh respondents (“*attorneys*”). The orders sought are set out in the notice of motion as follows:

Part A1 (as against the First-to-Third Defendants)

- A. Confirmation that the First Plaintiff's cancellation of the Security as to Costs Agreement is lawful.
- B. That the First-to-Third Defendants are ordered to pay jointly and severally, the one paying the other to be absolved, an amount of R 5,982,211.78 as at 15 August 2021 in damages to the First Plaintiff, made up as follows:
 - (i) The return of the net actual amount of Security Capital funding provided, inclusive of the variations to this agreement retained by the Defendants in the amount of R 1,004,261.30 as at 15 August 2021 (see Annexure marked POC 73-1 at A-24).
 - (ii) Default interest calculated on the net Security Capital funding provided from 18 October 2019 to 15 August 2021 of the amount of R 188,157.86 (see annexure marked POC 76 at D-7).
 - (iii) The return of the bank trust interest earned on Capital held by the Fourth Defendants on behalf of the First Plaintiff as at 30 September 2020 being the difference between admitted capital and interest held as per Fourth Defendants admission in the amount of R 1,625,363.09 (see annexure marked POC 58), less actual net capital provided as at 30 September 2020 of R 1,004,261.30 (see annexure marked POC 73A at A-24) in the amount of R 621,101.29.
 - (iv) Default interest calculated on the trust interest earned as at 30 September 2020 of R 621,101.19 to 15 August 2021 in the amount of R 106 821.82 (see annexure marked POC 77 at D-5).
 - (v) The security fee of 15% on total capital provided of R 2,384,261.30 as at 15 August 2021, as per the security as to costs agreement and its variations (see annexure marked POC 73A at B1, B3, B4, B5, B7, B9, B11 and B12) in the amount of R 357,639.20.
 - (vi) The payment of the security interest fee of 15% per annum, calculated on progressive capital balances, from 04 February 2014 to 15 August 2021 of calculated at R 3,414,731.14, the amount not debt interest but agreed annual costs of providing capital (see annexure marked POC 73A at D-25).
 - (vii) The recovery of the security fee of 15% calculated on the misappropriated progressive use of the Plaintiffs trust capital and interest by the Defendants in the amount of R 754 333.51 as at 30 September 2020 (see annexure marked POC 29-1 at E-23) in the amount of R 113,150.03.
 - (viii) Default interest calculated on the 15% security fee of the misappropriated funds of R 113,150.03 to the date of cancellation of 15 August 2021 in the amount of R 17,177.95 (see annexure marked POC 79 at D-7).
 - (ix) The recovery of the Security interest fee of 15% p.a. calculated on the use of the misappropriated capital fund balance of R 754,333.51 from 03 February 2016 to 15 August 2021 of the amount of R 159,171.19 (see annexure marked POC 80-1 at D-22).
 - (x) Default interest on the total amount of R 5,982,211.78, calculated from 15 August 2021 to date of payment at a rate of 7% in terms of the Prescribed Rate of Interest Act, Act 55 of 1975.
- C. In the alternative to prayers in (A) and (B), where the Honourable court may find the cancellation unlawful, that the Defendants be ordered to pay jointly and severally, the one paying the other to be absolved, the amount of R 910,600.46 made up as follows:
 - (i) The Second Plaintiffs bank trust interest earned of R 621,101.29 as at 30 September 2020, and

- (ii) The recovery of the security fee of 15% calculated on the misappropriated progressive use of the Plaintiffs trust capital and interest by the Defendants in the amount of R 754 333.51 as at 30 September 2020 (see annexure marked POC 29-1 at E-23) in the amount of R 113,150.03.
- (iii) Default interest calculated on the 15% security fee of the misappropriated funds of R 113,150.03 to the date of cancellation of 15 August 2021 in the amount of R 17,177.95 (see annexure marked POC 79 at D-7).
- (iv) The recovery of the Security interest fee of 15% p.a. calculated on the use of the misappropriated capital fund balance of R 754,333.51 from 03 February 2016 to 15 August 2021 of the amount of R 159,171.19 (see annexure marked POC 80-1 at D-22).
- (v) Default interest at a rate of 7% in terms of the Prescribed Rate of Interest Act 55 of 1975 on the amounts in (i) to (iv) in the alternative of R 910,600.46 from 30 September 2020 to date of payment.
- (vi) That the amounts in prayers (A) and (B) above to be ordered as costs in the administration of the KNS estate in terms of section 89(1) of the Insolvency Act, Act 24 of 1936.
- D. In consequence to the misstatements made by the Defendants, the quantum and liability of abortive litigation costs and damages incurred by the Plaintiffs to be determined by the Commercial Court on the date to be determined in the deliberation of the reserved costs in this matter as held in the Judgment of 18 March 2025 in this matter.
- E. Costs of suit, the scale to be argued in the determination of reserved costs to be separately determined.
- F. That the Plaintiff be granted leave to pursue the further damages claimed in the action.
- G. Further and/or alternative relief.

PART A2 (In the alternative to Part A1 as against the First- to-Third Defendants)

- A. Confirmation that the First Plaintiffs cancellation of the Security as to Costs Agreement is lawful
- B. That the First-to-Third Defendants are ordered to pay jointly and severally, the one paying the other to be absolved, an amount of R 5,982,211.78 as at 15 August 2021 in damages to the First Plaintiff in consequence to the lawful cancellation, made up as follows:
 - (i) The return of the net actual amount of Security Capital funding provided, inclusive of the variations to this agreement retained by the Defendants in the amount of R 1,004,261.30 as at 15 August 2021 (see Annexure marked POC 73-1 at A-24).
 - (ii) Default interest calculated on the net Security Capital funding provided from 18 October 2019 to 15 August 2021 of the amount of R 188,157.86 (see annexure marked POC 76 at D-7).
 - (iii) The return of the bank trust interest earned on Capital held by the Fourth Defendants on behalf of the First Plaintiff as at 30 September 2020 being the difference between admitted capital and interest held as per Fourth Defendants admission in the amount of R 1,625,363.09 (see annexure marked POC 58), less actual net capital provided as at 30 September 2020 of R 1,004,261.30 (see annexure marked POC 73A at A-24) in the amount of R 621,101.29.
 - (iv) Default interest calculated on the trust interest earned as at 30 September 2020 of R 621,101.19 to 15 August 2021 in the amount of R 106 821,82 (see annexure marked POC 77 at D-5).
 - (v) The security fee of 15% on total capital provided of R 2,384,261.30 as at 15 August 2021, as per the security as to costs agreement and its variations (see annexure marked POC 73A at B1, B3, B4, B5, B7, B9, B11 and B12) in the amount of R 357,639.20.
 - (vi) The payment of the security interest fee of 15% per annum, calculated on progressive capital balances, from 04 February 2014 to 15 August 2021 of calculated at R 3,414,731.14, the amount not debt interest but agreed annual costs of providing capital (see annexure marked POC 73A at D-25).
 - (vii) The recovery of the security fee of 15% calculated on the misappropriated progressive use of the Plaintiffs trust capital and interest by the Defendants in the amount of R 754 333.51 as at 30 September 2020 (see annexure marked POC 29-1 at E-23) in the amount of R 113,150.03.
 - (viii) Default interest calculated on the 15% security fee of the misappropriated funds of R 113,150.03 to the date of cancellation of 15 August 2021 in the amount of R 17,177.95 (see annexure marked POC 79 at D-7).
 - (ix) The recovery of the Security interest fee of 15% p.a. calculated on the use of the misappropriated capital fund balance of R 754,333.51 from 03 February 2016 to 15 August 2021 of the amount of R 159,171.19 (see annexure marked POC 80-1 at D-22).
 - (x) (x) Default interest on the total amount of R 5,982,211.78, calculated from 15 August 2021 to date of payment at a rate of 7% in terms of the Prescribed Rate of Interest Act, Act 55 of 1975.
- C. In the alternative to prayers in (A) and (B), where this Honourable court may find the cancellation unlawful, that the Defendants be ordered to pay jointly and severally, the one paying the other to be

absolved, the following damages in the loss suffered in consequence to the First-to-Third Defendants breach of their duty of care:

- (i) The Second Plaintiffs bank trust interest earned of R 621,101.29 as at 30 September 2020, and
 - (ii) The recovery of the security fee of 15% calculated on the misappropriated progressive use of the Plaintiffs trust capital and interest by the Defendants in the amount of R 754 333.51 as at 30 September 2020 (see annexure marked POC 29-1 at E-23) in the amount of R 113,150.03.
 - (iii) Default interest calculated on the 15% security fee of the misappropriated funds of R 113,150.03 to the date of cancellation of 15 August 2021 in the amount of R 17,177.95 (see annexure marked POC 79 at D-7).
 - (iv) The recovery of the Security interest fee of 15% p.a. calculated on the use of the misappropriated capital fund balance of R 754,333.51 from 03 February 2016 to 15 August 2021 of the amount of R 159,171.19 (see annexure marked POC 80-1 at D-22).
 - (v) Default interest at a rate of 7% in terms of the Prescribed Rate of Interest Act 55 of 1975 on the amounts in (i) to (iv) in the alternative of R 910,600.46 from 30 September 2020 to date of payment.
 - (vi) That the amounts in prayers (A) and (B) above to be ordered as costs in the administration of the KNS estate in terms of section 89(1) of the Insolvency Act, Act 24 of 1936.
- D. In consequence to the misstatements made by the Defendants, the quantum and liability of abortive litigation costs and damages incurred by the Plaintiffs to be determined by the Commercial Court on the date to be determined in the deliberation of the reserved costs in this matter as held in the Judgment of 18 March 2025 in this matter.
- E. Costs of suit, the scale to be argued in the determination of reserved costs to be separately determined.
- F. That the Plaintiff be granted leave to pursue the further damages claimed in the action.
- G. Further and/or alternative relief

PART A3 (As against the Fourth-to-Seventh Defendants)

- A. That where the First-to-Third Defendants have been held to be liable for damages in the cancellation of the Security as to Costs Agreement that the Fourth-to-Seventh Defendants are ordered to pay jointly and severally, the one paying the other to be absolved, together with the First-to-third Defendants, an amount of R 5,982,211.78 as at 15 August 2021 in damages to the First Plaintiff in consequence to the lawful cancellation of the security as to costs agreement, made up as follows:
- (i) The return of the net actual amount of Security Capital funding provided, inclusive of the variations to this agreement retained by the Defendants in the amount of R 1,004,261.30 as at 15 August 2021 (see Annexure marked POC 73-1 at A-24).
 - (ii) Default interest calculated on the net Security Capital funding provided from 18 October 2019 to 15 August 2021 of the amount of R 188,157.86 (see annexure marked POC 76 at D-7).
 - (iii) The return of the bank trust interest earned on Capital held by the Fourth Defendants on behalf of the First Plaintiff as at 30 September 2020 being the difference between admitted capital and interest held as per Fourth Defendants admission in the amount of R 1,625,363.09 (see annexure marked POC 58), less actual net capital provided as at 30 September 2020 of R 1,004,261.30 (see annexure marked POC 73A at A-24) in the amount of R 621,101.29.
 - (iv) Default interest calculated on the trust interest earned as at 30 September 2020 of R 621, 101.19 to 15 August 2021 in the amount of R 106 821,82 (see annexure marked POC 77 at D-5).
 - (v) The security fee of 15% on total capital provided of R 2,384,261.30 as at 15 August 2021, as per the security as to costs agreement and its variations (see annexure marked POC 73A at B1, B3, B4, B5, B7, B9, B11 and B12) in the amount of R 357,639.20.
 - (vi) The payment of the security interest fee of 15% per annum, calculated on progressive capital balances, from 04 February 2014 to 15 August 2021 of calculated at R 3,414,731.14, the amount not debt interest but agreed annual costs of providing capital (see annexure marked POC 73A at D-25).
 - (vii) The recovery of the security fee of 15% calculated on the misappropriated progressive use of the Plaintiffs trust capital and interest by the Defendants in the amount of R 754 333.51 as at 30 September 2020 (see annexure marked POC 29-1 at E-23) in the amount of R 113,150.03.
 - (viii) Default interest calculated on the 15% security fee of the misappropriated funds of R 113,150.03 to the date of cancellation of 15 August 2021 in the amount of R 17,177.95 (see annexure marked POC 79 at D-7).
 - (ix) The recovery of the Security interest fee of 15% p.a. calculated on the use of the misappropriated capital fund balance of R 754,333.51 from 03 February 2016 to 15 August 2021 of the amount of R 159,171.19 (see annexure marked POC 80-1 at D-22).

- (x) Default interest on the total amount of R 5,982,211.78, calculated from 15 August 2021 to date of payment at a rate of 7% in terms of the Prescribed Rate of Interest Act, Act 55 of 1975.
- B. In the alternative to prayers in (A), that the Fourth-to-Seventh Defendant be ordered as follows:
 - (i) That the Fourth-to-Seventh Defendants are held to have misappropriated the Second Plaintiff's section 86(4) trust account, and
 - (ii) That the Fourth-to-Seventh Defendants are ordered to pay jointly and severally, the one paying the other to be absolved, the following damages in the loss suffered in consequence to the Fourth-to-Seventh Defendants breach of their duty of care:
 - (a) The Second Plaintiffs bank trust interest earned of R 621,101.29 as at 30 September 2020, and
 - (b) The recovery of the security fee of 15% calculated on the misappropriated progressive use of the Plaintiffs trust capital and interest by the Defendants in the amount of R 754 333.51 as at 30 September 2020 (see annexure marked POC 29-1 at E-23) in the amount of R 113,150.03.
 - (c) Default interest calculated on the 15% security fee of the misappropriated funds of R 113,150.03 to the date of cancellation of 15 August 2021 in the amount of R 17,177.95 (see annexure marked POC 79 at D- 7).
 - (d) The recovery of the Security interest fee of 15% p.a. calculated on the use of the misappropriated capital fund balance of R 754,333.51 from 03 February 2016 to 15 August 2021 of the amount of R 159,171.19 (see annexure marked POC 80-1 at D-22).
 - (e) Default interest at a rate of 7% in terms of the Prescribed Rate of Interest Act 55 of 1975 on the amounts in (i) to (iv) in the alternative of R 910,600.46 from 30 September 2020 to date of payment. (1) That the amounts in prayers (A) and (B) above to be ordered as costs in the administration of the KNS estate in terms of section 89(1) of the Insolvency Act, Act 24 of 1936.
- C. In consequence to the misstatements made by the Defendants, the quantum and liability of abortive litigation costs and damages incurred by the Plaintiffs to be determined by the Commercial Court on the date to be determined in the deliberation of the reserved costs in this matter as held in the Judgment of 18 March 2025 in this matter.
- D. Costs of suit, the scale to be argued in the determination of reserved costs to be separately determined.
- E. That the Plaintiff be granted leave to pursue the further damages claimed in the action.
- F. Further and/or alternative relief

Part B1 (as against the First-to-Third Defendants)

- A. That the first-to-third Defendants are ordered to pay the second Plaintiff the amount of R 1,914,678.12, jointly and severally, the one paying the other to be absolved made up as follows:
 - (i) The return of the bridging finance capital amount of R 600,000.00.
 - (ii) The payment of the 15% capital raising fees (security fee) of R 90,000.00.
 - (iii) The payment of the Security interest fee compounded at 15% calculated on the capital raising security fee and capital from 04 June 2014 to the 26 May 2021, being the earliest date the Second Plaintiffs became aware of the breach and misrepresentations, in the amount R 1,224,678.12, the amount not debt interest but agreed annual costs of providing capital (see annexures marked POC 55 and POC 101 at D5).
 - (iv) Default interest at 7 % in terms of the Prescribed Rate of Interest Act 55 of 1975 on the amount of R 1,914, 678.12 calculated from the 26 May 2021 to 29 July 2022.
 - (v) Default interest at 9 % in terms of the Prescribed Rate of Interest Act 55 of 1975 on the aforesaid amounts in (i) to (iv) calculated from the 29 July 2022 to date of payment.
- B. In consequence to the misstatements made by the Defendants, the quantum and liability of abortive litigation costs and damages incurred by the Plaintiffs to be determined by the Commercial Court on the date to be determined in the deliberation of the reserved costs in this matter as held in the Judgment of 18 March 2025 in this matter.
- C. Costs of suit, the scale to be argued in the determination of reserved costs to be separately determined.
- D. That the Plaintiff be granted leave to pursue the further damages claimed in the action.
- E. Further and/or alternative relief

Part B2 (in the alternative to B1 as against the First-to-Third Defendants).

- A. That the first-to-third Defendants are ordered to pay the second Plaintiff the amount of R 1,914,678.12, jointly and severally, the one paying the other to be absolved made up as follows;

- (i) The return of the bridging finance capital amount of R 600,000.00
- (ii) The payment of the 15% capital raising fees (security fee) of R 90,000.00.
- (iii) The payment of the Security interest fee compounded at 15% calculated on the capital raising security fee and capital from 04 June 2014 to the 26 May 2021, being the earliest date the Second Plaintiffs became aware of the breach and misrepresentations, in the amount R 1,224,678.12, the amount not debt interest but agreed annual costs of providing capital (see annexures marked POC 55 and POC 101 at D5).
- (iv) Default interest at 7 % in terms of the Prescribed Rate of Interest Act 55 of 1975 on the amount of R 1,914, 678.12 calculated from the 26 May 2021 to 29 July 2022.
- (v) Default interest at 9 % in terms of the Prescribed Rate of Interest Act 55 of 1975 on the aforesaid amounts in (i) to (iv) calculated from the 55 of 1975 on the aforesaid amounts in (i) to (iv) calculated from the 29 July 2022 to date of payment.
- B. In consequence to the misstatements made by the Defendants, the quantum and liability of abortive litigation costs and damages incurred by the Plaintiffs to be determined by the Commercial Court on the date to be determined in the deliberation of the reserved costs in this matter as held in the Judgment of 18 March 2025 in this matter.
- C. Costs of suit, the scale to be argued in the determination of reserved costs to be separately determined.
- D. That the Plaintiff be granted leave to pursue the further damages claimed in the action.
- E. Further and/or alternative relief PART B3 (As against the Fourth-to-Seventh Defendants).

PART B3 (As against the Fourth-to-Seventh Defendants)

- A. That the fourth-to-Seventh Defendants are ordered to pay the second Plaintiff the amount of R 1,914,678.12, jointly and severally, the one paying the other to be absolved made up as follows;
 - (i) The return of the bridging finance capital amount of R 600,000.00.
 - (ii) The payment of the 15% capital raising fees (security fee) of R 90,000.00.
 - (iii) The payment of the Security interest fee compounded at 15% calculated on the capital raising security fee and capital from 04 June 2014 to the 26 May 2021, being the earliest date the Second Plaintiffs became aware of the breach and misrepresentations, in the amount R 1,224,678.12, the amount not debt interest but agreed annual costs of providing capital (see annexures marked POC 55 and POC 101 at D5).
 - (iv) Default interest at 7 % in terms of the Prescribed Rate of Interest Act 55 of 1975 on the amount of R 1,914, 678.12 calculated from the 26 May 2021 to 29 July 2022.
 - (v) Default interest at 9 % in terms of the Prescribed Rate of Interest Act 55 of 1975 on the aforesaid amounts in (i) to (iv) calculated from the 29 July 2022 to date of payment.
- A. In consequence to the misstatements made by the Defendants, the quantum and liability of abortive litigation costs and damages incurred by the Plaintiffs to be determined by the Commercial Court on the date to be determined in the deliberation of the reserved costs in this matter as held in the Judgment of 18 March 2025 in this matter.
- B. Costs of suit, the scale to be argued in the determination of reserved costs to be separately determined.
- C. That the Plaintiff be granted leave to pursue the further damages claimed in the action.
- D. Further and/or alternative relief

Background

[2] The background apropos this application has been comprehensively chronicled in my previous judgment and would not be repeated in this judgment. In brief, the disputes between the parties emanate from the two agreements entered into *inter se*. The first agreement is titled ‘Security for Costs Agreement’ which was entered into on 8 November 2013. This agreement relates to the security provided by the applicants in respect of the Arbitration proceedings launched by the liquidators of KNS Construction (Pty) Ltd (“KNS”) regarding the dispute with Genesis on Fairmont Partnership (“Genesis”). The security provided by the first applicant was the amount of R 1 000 000.00 paid into the fourth respondent’s trust

account, to be invested in an interest-bearing account for the benefit of the first applicant.¹ The fourth respondent, in turn, issued a guarantee for the arbitration costs (to be taxed), payable at the end of the arbitration proceedings. The balance (if any) and interest would be refunded to the applicants.²

[3] The second agreement is the Bridging Finance Agreement concluded on 4 June 2014 in terms of which the second applicant agreed to pay the respondents an amount of R600 000.00, intended to cover the costs for the launching of debt collection proceedings against Wilgeheuwel and SANRAL (“debtors”). The applicants contend that the amount was paid on the understanding that it would be repaid from the amount collected from the debtors.

[4] The parties subsequently varied the repayment conditions, which were confirmed in the plaintiffs’ emails dated 12 and 13 January 2016, attached to the plaintiffs’ particulars of claim. The emails specifically stated that “...loan and costs will be returned either through the attainment of a successful litigation of the Mutual and Federal matter (aqua) and/or by the release of the guarantee of fees if successful in the Genesis matter, whichever is the soonest.”

[5] Genesis was placed under liquidation, and the arbitration proceedings were stayed. The liquidators launched civil proceedings against Vestacor Limited (“*Vestacor*”), which took over Genesis’ obligations. The judgment was obtained by default on 10 October 2019 in the amount of R27 000 000.00.³ The applicants were notified of the judgment and construed it as success in arbitration and proceeded to cancel the Security for Costs Agreement on 15 August 2021, then demanded a refund. The respondents did not heed the demand for payment, and the applicants sued out a summons (“*first action- 009661/2022*”) for the refund. The respondents served a notice to defend and a plea. The applicants launched an application for summary judgment and set it down for 13 March 2023.

[6] The respondents filed an opposing affidavit denying that success was achieved since the judgment obtained against Vestacor was rescinded by consent. Furthermore, that success would never be achieved since the civil claim which instituted against Vestacor, which

¹¹ The applicants are for convenience not differentiated in this judgment.

² There is a dispute as to how the funds must be disbursed.

³ The liquidators further launched proceedings against Mutual and Federal.

continued after the rescission of judgment, was also unsuccessful.⁴ The respondents further stated that they had previously conveyed to the respondents that the judgment against Vestacor was rescinded erroneously on 28 July 2021 instead of 14 January 2022.

[7] The respondents' opposing affidavit was not aligned with what was stated in the plea, and then served a notice to amend the plea, which was opposed by the applicants. The respondents then launched an application for leave to amend.

[8] The parties then agreed to postpone the summary judgment application on condition that the applicants would be allowed to supplement the application for summary judgment, if so advised, upon receipt of the amended plea. The agreement to postpone was made an order of court on 3 March 2023.

[9] The application for leave to amend the plea served before me on 27 January 2025. I handed down judgment on 18 March 2025, where I granted the respondents leave to amend.

[10] The discovery that the judgment against Vestacor had been rescinded compelled the applicants to initiate new proceedings ("*second action–132503/2023*"). The respondents contended that the crafting of the pleadings in the second action created an impression that some causes of action in the first action were indirectly abandoned. The applicants disputed this assertion. I was invited to pronounce on the status of certain causes of action in the first action in view of the respondents' assertion that the two actions cannot co-exist.

[11] After hearing arguments, I returned a judgment and ruled that 8 of the 13 claims set out in the first action were abandoned and the applicants would proceed only with claims predicated on misappropriation of funds, delict, and inducement to enter into a contract.

[12] The respondents duly delivered their amended plea, followed by the applicants filing a notice of intention to amend the particulars of claim in view of the changes emanating from the amended plea.

[13] The applicants proceeded to supplement their papers as envisaged in the court order of 3 March 2023⁵ and set down the application for summary judgment. The respondents served a supplementary opposing affidavit bemoaning the applicants' failure to compliance

⁴ The appeal against the dismissal of the claim against Mutual and Federal was also dismissed.

⁵ See para 7 above.

with the provisions of Rule 32(1) of the Uniform Rules of Court and also introducing new issues.

Submissions by the parties

Respondents' points *in limine*

[14] The respondents raised the following preliminary points: first, that the applicants had submitted a fresh application for summary judgment and not supplemented the initial application in accordance with the order of 3 March 2023. Secondly, the orders now sought go beyond my order of 18 March 2025, which limited the applicants' case to claims based on misappropriation of funds, delict, and inducement to enter into a Bridging Finance Agreement⁶, and had added relief relating to costs for the aborted litigation under Part C, declaratory orders, repudiation, orders based on the abandoned contractual claims, and misstatements. The applicants' papers also refer to unjust enrichment.

[15] The respondents' contention that the order granted in 2023 has catch-all provisions in terms of which the applicants is entitled to supplement the application and add all that is *deemed necessary* pursuant to the amendment of the plea, is stretching the order of 3 March 2023 overzealously. Relief sought under Parts A1, A2, and C hinges on the order declaring the cancellation of the agreement lawful or unlawful. Such relief are incompetent under a summary judgment application regime.

[16] To the extent that certain orders now sought by the applicants are not captured in the order I made on 18 March 2025, the points raised by the respondents are sustained. This also applies to the relief which are not countenanced by Rule 32 of the Uniform Rules of Court, namely, declaratory orders and damages claims.

[17] The adjudication of the application for summary judgment will be limited to the relief sought in accordance with the causes of action as set out in the order of 18 March 2025.

⁶ The respondents contend that all these claims are illiquid and or claims for damages. The respondents seem to fail to appreciate that at centre of the summary judgment application is not the cause of action, but whether the order sought is, *inter alia*, for a liquidated amount in money.

Merits

Misappropriation of funds.

[18] The applicants contend that the liquidators wrongfully and unlawfully authorised the attorneys to make payments from the funds held as Security for Costs towards expenses associated with the arbitration process. This authorisation was inconsistent with the initial instructions in terms of which the funds availed as Security for Costs would only be paid upon finalisation of the arbitration. There were however specific instances, applicants submitted, where the applicants authorised payments from those funds, namely, R100 000.00 on 24 June 2016 (for an application in the high court) and R200 000.00 on 7 January 2017 (being 50% of the appeal tribunal costs in the arbitration), which were recorded in the finance schedules issued by the applicants. Secondly, the attorneys acting on authorisation from the liquidators also paid interest (which was payable only to the first applicant) to third parties without prior authorisation from the applicants.

[19] The applicants contend further that the attorneys stood in a fiduciary relationship to the applicants⁷ as providers of funds and are therefore considered to be co-wrongdoers with the liquidators in the misappropriation of the funds. They should therefore, the argument continued, be held liable *in solidum* with the liquidators based on collusion *inter se*.

[20] In their defence, the respondents contend that all payments effected were preceded by consultation with the applicants who gave authorisation, and to this end, the applicants' averments are disputed.

[21] The applicants argued further that the conduct of the respondents amounted to repudiation, which took two forms: first, refusal to pay the amount after the respondents had stated that there was success in arbitration pursuant to the order granted against Vestacor on 10 October 2019. In retort, the respondents contend that this claim is linked to the contractual claims, which have now been abandoned. Secondly, reneging to repay the amount of R600 000,00, which was payable in terms of the bridging finance agreement.

⁷ The applicants referred to *Flionis v Bartlett and Another* (506/04) [2006] ZASCA 23 and *Legal Practitioner Fidelity Fund v Guilherme* (702/2022) [2023] ZASCA 96, where the court held that the attorneys owe a duty of care to depositors who may not be their clients.

[22] The claims relating to repudiation or a delictual claim are mainly based on the failure to obtain authorisation from the applicants, which claim is disputed by the respondent, having stated that the payments were made after consultation with the applicants. According to the respondents, the funds were for expenses associated with the arbitration and were clearly accounted for. The said payments were never challenged by the applicants before. This appears to be a genuine dispute and cannot be construed as fanciful, implausible, or untenable, and should therefore be referred to oral evidence.

Delictual claims

[23] The applicants contend that the liquidators and the attorneys have a fiduciary duty as appointed liquidators and legal practitioners, respectively, in relation to the applicants in their capacities as funders to the estate and proven creditors in the estate. The liquidators and the attorneys are considered by the applicants as joint wrongdoers for the misappropriation of the trust funds.

Inducement to enter into a contract.

[24] In this regard, the applicants submit that they seek damages arising from the cancellation of the bridging finance agreement (“finance agreement”). The applicants contend that the respondents induced them to enter into the finance agreement by undertaking to refund the amount of R600,000.00 knowing well that they would not fulfil this undertaking. The misrepresentation was material and justified the cancellation of the finance agreement. If the court finds that the misrepresentation did not warrant cancellation, then the respondents should be ordered to refund the applicants based on unjust enrichment, as the estate has no funds and there are no longer remaining debtors.

[25] The respondents, on the other hand, dispute that any inducement was made and that the monies received from the collection of debts were also applied to other expenses pursuant to the discussion with the applicants. Further, that to this end, the defence raised is bona fide and summary judgment should be granted, the respondents argued.

Legal principles

[26] It is trite that the summary judgment applications provide remedies for the applicants where it is ineluctable that the respondents do not have a bona fide defence to the claims against them. The said rule is, however, circumscribed to claims which are based on a liquid document, liquidated amount in money, delivery of specified movable property or ejectment, together with any claim for interest and costs.

[27] The respondents have correctly stated that some of the orders sought by the applicants are not countenanced by Rule 32 of the Uniform Rules. This includes a declaratory order that the cancellation of the agreements by the applicants is lawful.

[28] Where there are disputes of fact in motion proceedings, the court should have regard to whether the dispute raised is genuine or bona fide; if so, the summary judgment application would not be granted. But where such disputes are far-fetched and clearly untenable, the court should readily reject same and grant the judgment.⁸

Analysis

[29] The claims predicated on misappropriation of funds (under Part A) by the respondents have been met with a defence that authorisation was obtained from the applicants. Though the funds were meant to be used only after the arbitration had been finalised and after taxation, the applicants authorised some payments before. I note that the respondents contend that the applicants authorised payments over time without demur. Despite the fact that the applicants aver that only two payments were authorised, I am inclined to allow the respondents to lead evidence before a trial court regarding the alleged authorisation in respect of other payments. I consider the defence to be raising a triable issue and summary application to be incompetent. This conclusion would *mutatis mutandis* apply to the claim predicated on delict.

[30] Concerning the claim under Part B, which is based on the assertion that the applicants were induced to enter into a finance agreement, it cannot be resolved without regard to oral evidence presented by the parties. The case advanced by the applicants in the summary

⁸ The applicants referred to *Wightman t/a Construction v Headfour Pty Ltd and Another* 2008 (3) SA 371 (SCA) (10 March 2008), at para [12] and *Absa Bank Ltd v van der Walt* (8817/2022) [2023] ZAGPJHC 680 (9 June 2023) at [25].

judgment application requires the court to draw an inference that the respondents never intended to keep their bargain and pay, is unsustainable, since the applicants have not presented sufficient facts (on the respondents' state of mind) from which such an inference should be drawn.

Conclusion

[31] As set out above, the defences raised by the respondents give rise to triable issues which militate against the granting of summary judgment. In the premises, the application is bound to fail.

Costs

[32] The respondents seek that the applicants' first and second applications for summary judgment be dismissed with costs on an attorney and client scale, including costs of counsel on Scale C against the applicants jointly and severally, the one paying the other to be absolved. The respondents contend that the applicants served a fresh application instead of only filing a supplementary affidavit relating to the amendment of the plea as contemplated in the order granted on 3 March 2023. Furthermore, the fresh application, which is voluminous, did not refer to the amended plea served by the respondents, which is also in defiance of the order that the applicants would file supplementary papers relating to issues raised in the respondents' amended plea.

[33] In addition, the applicants have included in their summary judgment application new causes of action which do not engage the claims identified in the judgment I granted on 18 March 2025.

[34] In retort, the applicants contend that the service of the voluminous and additional papers was due to the misrepresentation or misstatements of facts emanating primarily from the respondents having misrepresented the date of the rescission of the judgment against Vestacor. The declaratory order sought relating to aborted costs is also linked to the said misrepresentation.

[35] The Constitutional Court held in *Mkhatshwa*⁹ “... that the purposes of punitive costs, being an extraordinarily rare award, are to minimise the extent to which the successful litigant is out of pocket and to indicate the court’s extreme opprobrium and disapproval of a party’s conduct.” I had regard to the presentation of this application and the arguments advanced by both parties and the voluminous documentation filed by the applicants, which are characterised by rambling prolixity, and find that a punitive costs order is warranted.

[36] The respondents, in addition, seek that the order of costs should be accompanied by an order in terms of Rule 32(9)(a) in terms of which the court would direct that the proceedings be stayed pending the payment of costs where the court found that the applicants persisted with a summary judgment application where the defences raised were not unreasonable. An order prohibiting a party from proceeding unless the costs are settled may generally be considered an infringement of the party’s right to access courts, which is inconsistent with section 34 of the Constitution. As is well known, the rights enshrined in the Constitution can be limited under section 36. In this instance, Rule 32(9)(a) would qualify for the limitation, noting further that the constitution also provides for the right of the court to regulate own processes.

[37] It is trite that the question of costs is within the repository of the court’s discretion, which must be exercised having considered certain factors, including but not limited to, whether there is an abuse of the court process by a litigant.¹⁰ One would have to consider that the reasons why the matter is allocated to the commercial court are to, *inter alia*, attempt to adjudicate disputes speedily though with a measure flexibility and quicker turnarounds. The process of taxation may frustrate the attainment of a quicker justice. Having regard to a possible delay due to taxation and the fact that I have relayed my displeasure by ordering costs at a punitive scale, exercising my discretion to order a stay of the proceedings pending payment of costs as envisaged in Rule 32(9)(a) of the Uniform Rules of Court would lead to unnecessary delay and double jeopardy to the applicants.

⁹ *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15, at para 17, quoting with approval 2 *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) (SARB) at paras 224 and 227 and *Limpopo Legal Solutions v Eskom Holdings (SOC) Limited* [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) (*Eskom*) at para 20.

¹⁰ See *Argus Printing & Publishing Co Ltd v Rutland* 1953 (3) SA 466 (C), *Howff (PDT) Ltd v Prompts Engineering (BPK) Ltd* 1977 (2) SA 267 (A) and *Rheeder v Sperms* 1978 (1) 1041 (A).

Order

[38] In the premises, I make the following order.

1. The application for summary judgment is dismissed with costs on attorney and client, including costs for counsel on scale B,
2. The respondents are granted leave to defend the applicants' action.



M V NOKO
Judge of the High Court.

DISCLAIMER: This judgement is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 17 November 2025.

Dates

Hearing: 11 April 2025.

Judgment: 17 November 2025.

Appearances

For the Applicants:

STH Saunders, Trust Account Advocate in terms of section 34(2)(b) of the Legal Practice Act 28 of 2014.

For the Respondents:

MvR Potgieter SC

Instructed by:

Senekal Simmonds Inc.