



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable / Reportable

Case no: 2914/2025

In the matter between

AIR LIQUIDE (PTY) LTD

Registration number 1948/029574/07

and

**D&N WELDING SUPPLIERS CC t/a
ENTERPRISE DISTRIBUTORS**

Registration number 2007/038742/23

SONJA MARIA STEENKAMP N. O

In her capacity as Executrix in the Estate
of the late Dalecia Myburgh

ANEEN DU PLESSIS

**THE MASTER OF THE HIGH COURT
BLOEMFONTEIN**

PLAINTIFF

FIRST DEFENDANT

SECEOND DEFENDANT

THIRD DEFENDANT

FOURTH DEFENDANT

Neutral citation: *Air Liquide (Pty) Ltd v D&N Welding Suppliers CC t/a Enterprise Distributors and Others* (2914/2025) [2026] ZAFSHC 3 (8 January 2026)

Coram: MAJOSI AJ

Heard: 9 October 2025

Delivered: 8 January 2026

Summary: Application for summary judgment – application refused. First and third defendants granted leave to defend the main action – costs of the summary judgment to

be costs in the cause.

ORDER

- 1 The application for summary judgment is refused.
 - 2 First and third defendants are granted leave to defend the main action.
 - 3 The costs of the summary judgment application shall be costs in the cause.
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JUDGMENT

MAJOSI AJ

[1] The applicant herein launched an application for summary judgment against the first and third respondents. The application is opposed. I will refer to the parties as they are cited in the main action to provide clarity in the eventual court order. The crisp issue for adjudication is whether the defendants (first and third defendants) have raised a defence which will give rise to an triable issue which must be ventilated at trial. The plaintiffs cause of action is based on three agreements namely, a distribution agreement and credit agreement concluded with the first defendant and a deed of suretyship where the third defendant is concerned.

[2] The salient terms of the distribution agreement concluded in the year 2010 were that the plaintiff would supply gas which the first defendant would purchase with cylinders from the plaintiff in order to be sold to its own customers who, in turn, would become distributor accounts in the Bloemfontein area with market conditions as determined by the plaintiff. The agreement would continue for a period of five years and would thereafter be automatically renewed for another period of five years. Either party would be entitled to terminate the agreement upon notice to the other. Upon cancellation, all gas cylinders would then have to be returned to the plaintiff as it remained their exclusive property.

[3] For the credit agreement, a credit facility was extended to the first defendant in which the plaintiff would supply gas with cylinders according to orders placed by the first defendant as per the plaintiff's terms and conditions of trade. Delivery of orders would take place to an address nominated and agreed upon to be accompanied by a delivery note which would be

prima facie proof that the gas and equipment were delivered.

[4] The amount reflected on the tax invoice would become due and payable after 30 days from the date of the statement. Cylinders would be returned to the plaintiff and failure to do so would result in the first defendant paying an amount of R2800.00 per cylinder. The third defendant bound herself as a co-surety and co-debtor with the first defendant in terms of both agreements.

[5] The plaintiff alleged in the particulars of claim that the first defendant breached the agreement by not effecting timeous payment in respect of both agreements after gas cylinders were supplied and delivered after credit was extended and that the first respondent failed to return the equipment (cylinders) as supplied. The total amount outstanding as invoiced being R1 942 270.16. Alternatively, payment of the cumulative amounts of R577 190.38, R1 331 614.78 and R33 465.00.

[6] The third defendant who bound herself as surety for the above-mentioned transactions, also failed to effect payment. Although the plaintiff in the particulars of claim prayed for the return of its cylinders, alternatively payment for them in the amount of R1 937.600.00, this second prayer and the alternative thereto is not pursued for the purpose of the summary judgment application. Summary judgment is being sought for the amount of R1 942 270.16 against the first and third defendants only. It is alleged that the said defendants have no bona fide defence to their claim even after they filed a plea in response to the particulars of claim in the main action which does not raise an issue for trial.

[7] The defendants, in their plea, admitted that the plaintiff supplied gas to them but allege that the claim is illiquid as their particulars of claim refer to fair and reasonable market prices for the gas and a schedule of gas prices had not been attached to the particulars of claim. After this plea with a counterclaim was filed, they caused a notice in terms of rule 35(12) of the Uniform Rules of Court to be delivered to the plaintiff to obtain the said schedule. However, same was never delivered as it was deemed irrelevant by the plaintiff for two reasons, namely that it referred to prices applicable in June 2010 and the defendants undertook to pay the current market prices to the plaintiff and the first defendant was given the right to use the equipment.

[8] They thus allege that they have a bona fide defence to the claim that the plaintiff charged them excessive prices as reflected in the tax invoices rendered as opposed to rates given to other customers in the same area. Consequently, the counterclaim was filed as the defendants allege that they overpaid for gas and that the plaintiff was subsequently enriched by an amount of R5 645 143.45.

[9] For the credit agreement, the defendants alleged that the plaintiff's founding affidavit was deposed to by a legal practitioner who bore no personal knowledge of the distributor or the credit agreement. They alleged that the plaintiff, in its particulars of claim, also failed to properly disclose a cause of action as the schedule of gas prices was never provided nor were any delivery notes attached to show that delivery of the gas cylinders took place and in fact delivered to the nominated address.

[10] In further amplification thereof, the defendants denied that the equipment was not returned but in fact alleged that on two different occasions the discrepancy of the actual equipment was brought to the attention of the plaintiff who ignored their pleas, as all equipment had been returned. Accordingly, it was stated that they have a bona fide defence and have raised several issues for trial.

[11] Rule 32 of the Uniform Rules of Court sets out the grounds upon which a court may grant summary judgment and directs that a defendant must either provide security to the satisfaction of the court or file an affidavit within the prescribed time frames wherein they fully disclose the nature and grounds and material facts relied upon for resisting summary judgment. In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*¹ Navsa JA stated the following:

'The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G–426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse

¹ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* [2009] ZASCA 23; 9 2009 (5) SA 1 (SCA).

summary judgment.²

[12] In *Firststrand Bank Ltd v De Santos and Another*,³ the court stated that:

‘In addition to identifying any point of law relied upon and the facts upon which the plaintiff’s claim is based, and to explain briefly why the defence as pleaded does not raise any issue for trial. A plaintiff is required to engage with the content of the defendant’s plea in order to substantiate its averments that the defence is not bona fide and has been raised merely as a delaying tactic.’⁴

[13] In *Maharaj v Barclays National Bank Ltd*,⁵ the court set out the principles relating to summary judgment as follows:

‘Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be.’

[14] Counsel for the plaintiff argued that the defendant in their plea simply noted the allegation of a breach to the agreement and did not deny it. This was based on an electronic mail sent by the third defendant on 24 October 2024 wherein they admitted the breach by indicating that they did not make regular payments. In their subsequent affidavit resisting summary judgment, they raised a new averment that was not contained in their plea – they specifically denied that they were in breach of the agreement.

[15] Furthermore, although the defendants raise the defence that the plaintiff has not charged fair and reasonable prices, they have, for the past 14 years since the inception of the initial contract, being paying the prices determined by the plaintiff, regardless of whether the

² Ibid para 32.

³ *Firststrand Bank Ltd v De Santos and Another* [2025] ZAGPPHC 606.

⁴ Ibid para 23.

⁵ *Maharaj v Barclays National Bank Ltd* [1975] ZASCA 102; 1976 (1) SA 418 (A) at 426A-C.

market prices were fair and reasonable as per the specific terms of the distribution and credit agreements, and have made use of the plaintiff's gas and equipment. Despite this reference to excessive pricing, the defendants failed to show that it engaged in prohibited practice in terms of the Competition Act 89 of 1998 or referred the matter to a correct forum being that of the Competition Tribunal or Competition Appeal Court. Moreover, it was argued that the certificate of balance serves as prima facie evidence that the defendants are indebted to the plaintiff and it was incumbent on the defendants to discharge this evidential burden for the purpose of resisting the application for summary judgment. It thus cannot be said that their application does not disclose a cause of action.

[16] Lastly, it was argued that the plaintiff filed an exception to the defendants' counterclaim which does not disclose a cause of action based on unjustified enrichment nor has it been stated that this is an actual defence to the claim in the main action or to the summary judgment application. It was therefore stated that the application for summary judgment ought to be granted with costs on an attorney and client scale.

[17] Transversely thereto, counsel for the defendants' argued that that the legal counsel in the employ of the plaintiff cannot, by virtue of her position, swear positively to the facts contained in the founding affidavit as she is not the author of the certificate of balance annexed to the said affidavit, nor can she show that the cylinders were indeed delivered to the defendant. Furthermore, the plaintiff's claim is not for a liquidated amount of money capable of speedy ascertainment.

[18] They contended that although the plea indicated that the particulars of claim referenced the letter dated 24 October 2024, this cannot be seen as an admission that the amount is outstanding or that they are indebted to the plaintiff. As such, a counterclaim was filed in relation to the main action wherein they alleged that they overpaid the plaintiff's invoices with an amount of R5 645 143.45 and that the unjustified enrichment is based on the law of contract, which explains why the matter was never referred to the Competition Tribunal as a prohibited practice.

[19] Instead of resolving the issue raised by defendants, the plaintiff repudiated the agreement by refusing to supply them with gas. This was accepted and the defendants, in turn, cancelled the distributor agreement in November 2024 resulting in summons being issued against them.

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[20] There is a dispute between the parties on whether the defendants indeed owe money to the plaintiffs or whether the counterclaim for unjustified enrichment will succeed. In my view, the defendants have disclosed the nature, grounds and material facts relied upon and raised triable defences which ought to be ventilated at trial. The plaintiff on the other hand, will also have an opportunity to prove its case at trial.

[21] Having considered the submission by parties, relevant case law and the plaintiff's supplementary heads of argument, summary judgment will be refused and the defendants shall be given leave to defend the action. It is trite that costs follow the successful party. In light of the dispute, the trial court would be better placed to determine the issue of costs including that of the summary judgment application.

[22] Accordingly, I make the following order:

- 1 The application for summary judgment is refused.
- 2 The first and third defendants are granted leave to defend the action.
- 3 The costs of the summary judgment application shall be costs in the cause.


O R MAJOSI
ACTING JUDGE OF THE HIGH COURT

Appearances

For the applicant:

Instructed by:

Adv M Van Der Westhuizen

c/o Vermaas Rawson Inc.

Bloemfontein

For the first and third respondents:

Instructed by:

Adv WJ Groenewald

Symington De Kok Attorneys

Bloemfontein