



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: No
- (2) OF INTEREST TO OTHERS JUDGES: No
- (3) REVISED: NO
- (4) DATE: 04 February 2026

(5) SIGNATURE: _____



Case Number: 001699/2024

In the matter between:

CORNELIUS JAKOBUS KRUGER N.O.

First Plaintiff

DANIEL ROUX VILJOEN N.O.

Second Plaintiff

LOUISE SNYMAN N.O.

Third Plaintiff

CHRISTIAN JACOBUS DE JAGER N.O.

Fourth Plaintiff

As nominee of FNB Fiduciary (Pty) Ltd

A division of FirstRand Bank Limited

In their capacities as Trustees of the

Potloodspruit Trust with registration

number: IT 816/96 (T)

and

THOMAS BUTLER ROODT N.O.

First Defendant

MARTIN RAUBENHEIMER N.O.

Second Defendant

In their capacities as Trustees of the
TBR Investment Trust with registration
number: IT 2030/2009

THOMAS BUTLER ROODT

Third Defendant

VILLA DA VIDA (PTY) LTD.

Fourth Defendant

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 04 February 2026.

JUDGMENT

COLLIS J:

1] This is an an opposed summary judgment application in terms whereof the Plaintiff Trust claims payment against the Defendant Trust (the First and Second Defendants) for payment of the amount of R5 million, together with

interest etc. Plaintiffs claim as against the Third Defendant is as surety for the obligations of the Defendant Trust.

BACKGROUND

2] The First to Fourth Plaintiffs are the trustees of the Potloodspruit Trust ("the Potloodspruit Trust").

3] The First and Second Defendants are the trustees of the TBR Investment Trust ("the TBR Trust").

4] In terms of a Sale of Shares Agreement entered into between the Potloodspruit Trust and the TBR Trust, the Potloodspruit Trust sold all of the shares that it held in the Fourth Defendant, Villa Da Vida (Pty) Ltd ("Villa Da Vida") to the TBR Trust.

5] The Third Defendant, Mr. Thomas Butler Roodt ("Mr Roodt"), bound himself as surety and co-principal debtor with the TBR Trust for the due and punctual performance of the trust's obligations under the Sale of Shares Agreement.

6] Subsequent to the sale agreement being concluded, the shares were transferred to the TBR Trust, but to date it has not paid the R5 million purchase price for the shares. This in essence is the cause of action which underpins this application for summary judgment.

7] The Defendants as mentioned, opposes the application and filed an answering affidavit to show the defences raised in the plea. The Defendants contend that these defences are bona fide and constitute triable issues.

THE LEGAL PRINCIPLES APPLICABLE

8] Summary judgment remains an extraordinary remedy that is not to be granted lightly, and it should not be granted where there is any indication of a genuine dispute of fact or law. All a defendant has to do is set out facts which is proven at trial will constitute a good defence to the claim.¹

¹ See: Cohen N.O. supra at par [31].

9] In Tumileng Trading CC v National Security and Fire (Pty) Ltd², it was stated that “A defendant is not required to show that its defence is likely to prevail.”³

10] “This is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success”. ⁴

11] In Cohen N.O. and Others v Deans⁵ the Supreme Court of Appeal held that defendants are required to disclose a defence that is “legally cognisable in the sense that it amounts to a valid defence if proven at trial”⁶, and the test is “whether the facts put up by the defendants raise a triable issue and sustainable defence in law, deserving of their day in court”.⁷

12] In the leading case being that of Maharaj v Barclays National Bank Ltd⁸ the Appellate Division held, that the grant of the remedy is based upon the

² 2020 (6) SA 624 (WCC) at par [13].

³ At par [13].

⁴ At par [23].

⁵ 2023 JDR 1216 (SCA).

⁶ Para [29].

⁷ Para [31].

⁸ 1976 (1) SA 418 (A) at p 423 A – H.

supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law.

13] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*⁹ the SCA held that:

"The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. ... 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".

14] The *onus* remains on a plaintiff to show that a defendant does not have a bona fide defence that is a triable issue.

15] In opposition, the Defendants have raised various defences:

15.1 By way of a special plea, the Defendants contend that the Sale of Shares Agreement is void for a failure by the Potloodspruit Trust to

⁹ 2009 (5) SA 1 (SCA) at para [32] and [33].

comply with the provisions of sections 40, 81(1) and (2), 92 and 93 of the National Credit Act 34 of 2000 ("the NCA").

15.2 In this regard the Defendants contend that the transaction in question was concluded at arm's length, whereas the Plaintiff's argues that it was not and that the NCA does not apply to the transaction.

15.3 In the second defence raised by the Defendants they contend that in authorising the First Plaintiff ("Mr Kruger") to sign the Sale of Shares Agreement, the trustees of the Potloodspruit Trust unlawfully abdicated their duties as trustees. In this regard counsel for the plaintiff submitted that the point is bad in law as it conflates the difference between taking fundamental decisions, and the implementation of a fundamental decision already taken.

15.4 Thirdly, the Defendants contend that it was the common continuing intention of the parties to the Sale of Shares Agreement that the Potloodspruit Trust would sell 100% (and not 50%) of its "Sale Claims" (the "Sale Claims") as defined in the Sale of Shares Agreement to the TBR Trust. On that foundational basis, the Defendants contend

that the Plaintiff Trust has failed to plead “prior” performance of the Sale of Shares Agreement as it stands to be rectified.

15.5 This defence is distinctly artificial. The Potloodspruit Trust only had one claim against Villa Da Vida, and de facto its personal rights in and to that claim was transferred to the TBR Trust.

15.6 Fourthly, the Defendants contend that Mr Roodt signed the Deed of Suretyship in a representative capacity for and on behalf of the TBR Trust and he is thus not bound in his personal capacity.

16] In addition to the various defences raised, the Defendants had also raised a *point in limine* which it required adjudication on, and this will be the first issue addressed in this judgment.

POINT IN LIMINE

17] In this regard, the defendants contend that the provisions of Rule 32(4) states that no evidence may be adduced by the Plaintiff otherwise than by affidavit referred to in sub-rule (2).

18] In terms of Rule 32(2)(b) a plaintiff is required to, “verify the cause of action”, “identify ... the facts upon which the Plaintiff’s claim is based, and explain briefly why the defences pleaded does not raise any issue for trial”.

19] Rule 32(4) therefore, expressly precludes the applicant in summary judgment proceedings from adducing any evidence otherwise than by affidavit referred to in sub-rule (2). No annexures to a plaintiff’s verifying affidavit are allowed except if the claim is founded on a liquid document.

20] On this basis, counsel for the Defendants submitted that the verifying affidavit deposed to by the First Plaintiff in this matter goes well beyond the permissible bounds. The Plaintiffs attempt to make out a case that the credit agreement (the sale of shares agreement, Annexure “POC1”) was not an arms’ length transaction and attaches further documents to the affidavit, which is not permissible.

21] Furthermore, on analysis of the verifying affidavit and annexures, counsel argued that the Plaintiff Trust cherry picks which evidence it puts before the Court to bolster its case and fails to disclose material evidence

that disproves its case, specifically relating to the question whether or not the transaction was concluded at arms' length.

22] In support of the *point in limine* so raised the Defendants placed reliance on the decision Nissan Finance, a product of Wesbank, of FirstRand Bank Ltd v Gusha Holdings and Enterprises (Pty) Ltd and Another ¹⁰ wherein the Court held that:

“Rule 32(4) expressly precludes the applicant in summary judgment proceedings from adducing any evidence otherwise than by the affidavit referred to in subrule 2. No annexures to a plaintiff’s 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. ...”.

23] In argument to the *point in limine* raised, the Plaintiffs submitted that Rule 32(2)(b) imposes a duty on a Plaintiff to explain briefly why the defences pleaded do not raise any issue for trial. A Plaintiff, so counsel

¹⁰ (2022/9914) [2023] ZAGPJHC 303 (5 April 2023) at para [29].

argued is thus required to engage with the content of the plea, in order to substantiate its averments that the defence is not bona fide.

24] Furthermore, it was submitted, that there will be certain cases where a Plaintiff will be entitled to set out facts, supported by the necessary documents, to briefly explain why the defences pleaded do not raise any issues for trial. In support of this proposition, counsel relied on the decision in Absa Bank Ltd v Mashinini N.O.¹¹ where the court held:

“The Rule as amended clearly did not envisage a mini-trial by the production of expensive *facta probantia*, but where, as in the present instance that which would have been a bare or bald denial can be refuted or, in the imprecise words of the amended Rule, “briefly” be explained by way of an annexed document or documents, that [sic] should in my view be allowed. To not do so would be to revert to the unsatisfactory position which was in existence prior to the amendment of the Rule.”

25] Placing reliance on the above decision counsel therefore submitted that in this application the quoted passage rings true. The annexing of annexures

¹¹ Absa Bank Ltd v Mashinini N.O Unreported GP case numbers: 32016/2019; 32014/2019 dated 20 November 2019 at apar 3.11.

“SJ3”¹² and “SJ4”¹³ to the verifying affidavit and making the allegations in relation thereto; was not intended to amplify the Potloodspruit Trust’s cause of action, but it was merely done to give a brief explanation why no triable issue is raised by the TBR Trust’s invocation of the NCA.

26] Without having embarked upon this step, counsel further argued that it would have been difficult to conceive of another way in which the Potloodspruit Trust could otherwise expose the defence put up by the TBR Trust as a sham.

27] Annexure “SJ3” and its terms are uncontentious and the Defendants themselves have attached an unredacted copy of the email encapsulated in annexure “SJ4” to their Answering Affidavit.¹⁴ There can hardly be any objection to the production of these documents and in the circumstances of this case, this court ought to have regard to annexures “SJ3” and “SJ4” and the allegations in relation to these documents.

¹² Annexure SJ3 is contained at Index: 12-31 to 12-64. It is the Share Sale Agreement entered into between the TBR Investment Trust and the Potloodspruit Trust in 2018.

¹³ Annexure SJ4 is contained at Index: 12-65. It is a copy of an email that MR Roodt sent to Mr Kruger on 30 July 2023.

¹⁴ Index: 12-113.

28] The annexing of Annexures "SJ3" and 'SJ4' is specifically prohibited by the provisions of Rule 32(4), unless the annexures is a liquid document. In the present instance, these annexures are not liquid documents and for these reasons they will not be considered by this Court.

29] The *point in limine* is as a result upheld with costs.

DEFENCES ON THE MERITS

30] The first defence raised by the Defendants is that the sale of shares agreement constitutes a credit agreement provided for in the National Credit Act, 34 of 2005 ("the NCA") and that the agreement so concluded is unlawful and void ab initio. This first defence was raised a special plea.¹⁵

31] The sale of shares agreement, is annexed to the Plaintiffs' Particulars of Claim as annexure "POC1."¹⁶ It contains the following salient terms:

¹⁵ Defendants' Plea: CaseLines ("CL"): 02-58 to 02-61.

¹⁶ CL: 02-25 to 02-54.

31.1. Ownership of the sale shares and sale claims vest in the TBR Trust on the effective date, i.e. the signature date being the 19th of November 2021.¹⁷

31.2. The purchase price for the sale shares and sale claims of R5 million is payable on the 31st of October 2023.¹⁸

31.3 Interest is payable on the said purchase price, calculated from the effective date until the date of payment thereof, at the rate of prime plus 2%.¹⁹

31.4. Should any party commit a breach of any of the provisions of the sale of shares agreement and fail to remedy that breach within 7 business days after receipt of written notice calling upon it to do so, the party aggrieved by the breach will be entitled, in addition to and without prejudice to any right it may have as a result of the breach, to enforce specific performance of the terms of the sale of shares agreement.²⁰

¹⁷ Clause 4.2, CL: 02-31.

¹⁸ Clause 4.3, CL: 02-31.

¹⁹ Clause 4.3.2, CL: 02-31.

²⁰ Clause 7, CL: 02-31 to 02-32.

31.5. If any legal proceedings relating to the enforcement by any party in terms of its rights in terms of the sale of shares agreement, a Court awards costs to any party, such costs shall be determined and recovered on the scale as between attorney and own client and shall include collection commission charges calculated at the rate of 10% of the outstanding and/or recoverable amount.²¹

32] The transaction recorded in “POC1” effectively meant that the Plaintiff Trust sold and transferred ownership of the sale shares and sale claims to the TBR Trust on signature date, with payment of the purchase price deferred and interest levied by the Plaintiff Trust on the deferred purchase price.

33] In the defendants’ plea it is averred that the transaction recorded in “POC1” constitutes a credit agreement and that it falls within the definition of such as set out in Sections 8(1) and 8(4) of the Credit Agreement Act, 34 of 2005 (‘NCA’).

²¹ Clause 17.2, CL: 02-37.

34] Section 8(4)(f) of the National Credit Act, 34 of 2005 ("the NCA") reads as follows:

"An agreement, irrespective of its form but not including an agreement contemplated in section (2) constitutes a credit transaction if it is-

(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-

(i) the agreement; or

(ii) the amount that has been deferred."

35] On the basis of the above definition of a credit agreement counsel for the defendants had argued that the transaction recorded in Annexure "POC1" therefore constitutes a credit transaction as defined in terms of the NCA.

36] In support for the argument advanced by counsel for the defendants, reliance was further placed on the decision of *Vesagie N.O. and Others v Erwee N.O. and Another*²² where the SCA considered a similar sale of shares

²² (734/2013) [2014] ZASCA 121 (19 September 2014).

agreement and held that the agreement falls within the ambit of Section 8(4)(f) of the NCA as a credit transaction.²³

37] In its plea the defendants allege that as at the effective date of "POC1", the TBR Trust had only two trustees, to wit the Second Defendant and the deponent to the Answering Affidavit (as per the relevant letter of authority annexed as Annexure "P1" to the Plea) and that the TBR Trust is therefore not a juristic person as defined in the NCA and is deemed a consumer in terms of and to which the NCA applies.

38] For the above reasons it was pleaded, that the sale of shares agreement (Annexure "POC1") is indeed a credit agreement that is subject to the NCA and that the Plaintiff Trust is a credit provider to the TBR Trust, which is a consumer as defined in terms of the NCA.

39] Between the parties, it is common cause that as at the effective date of Annexure "POC1" that the Plaintiff Trust was not a registered credit provider as provided for in terms of Section 40 of the NCA.

²³ At para [22].

40] In addition, Section 89(2)(d) and 89(5) of the NCA provides that:

89(2) Subject to subsections (3) and (4), a credit agreement is unlawful if-

(d) at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered.

89(5) If a credit agreement is unlawful in terms of section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order but not limited to an order that-

(a) the credit agreement is void as from the date the agreement was entered into.

41] The parties before Court holds divergent views as to whether they concluded a credit transaction as envisaged by Section 8(4)(f), and whether if found that they did, the plaintiffs ought to have been registered as a credit provider as required by section 40 of the NCA. Absent such registration a court can make a finding that the agreement is unlawful and void ab initio in terms of Section 89(2)(d)²⁴ as from the date that the agreement it was concluded.

42] This defence raised by the defendants in my view raises a triable issue and constitutes a sustainable defence in respect of which the defendants should be allowed to present its case in court.

THE SURETY DEFENCE

43] A second defence raised is in relation to the surety agreement in respect of which the defendants allege is invalid for non-compliance with Section 6 of the General Law Amendment Act, 50 of 1956.

44] Section 6 provides as follows:

²⁴ Vesagie supra at para [22].

'No contract of suretyship entered into after the commencement of this Act, shall be valid, unless the terms thereof are embodied in a written document signed by or on behalf of the surety.'

45] A surety's obligation is an accessory obligation and its validity depends on the existence of a valid principal obligation.²⁵ Therefore, if the principal obligation is found to be unlawful and void ab initio, the claim against the surety must as a result also fail.

46] Herein, Mr Roodt contends that he signed the Deed of Suretyship in his representative capacity as a trustee of TBR Trust and not in his personal capacity, nor did he have the intention to do so.

47] It is trite that the normal incidents of a contract of suretyship are that one person (the surety) binds him - or herself as debtor²⁶ to the creditor of another person (the principal debtor) to render the whole or part of the performance due to the creditor by the principal debtor. By its very nature,

²⁵ Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another 2011 (2) SA 266 SCA.

²⁶ The Law of South Africa: Volume 26 – Second Edition Replacement at 281.

a contract of suretyship thus requires a valid principal obligation with someone other than the surety as debtor.

48] The Deed of Suretyship, "POC2" annexed to the Particulars of Claim, clearly and unambiguously identifies Mr Roodt, in his personal capacity as the surety, the TBR Trust as the principal debtor and the Potloodspruit Trust as the creditor.

49] Mr Roodt clearly signed the Deed of Suretyship²⁷ in his personal capacity in terms of which he bound himself as surety and co-principal debtor with the TBR Trust for the due and punctual performance of the TBR Trust's obligations under the Sale of Shares Agreement.

50] Ex facie the Deed of Suretyship this much is clear and as such this defence raised is simply without merit.

WAS THE TRANSACTION CONCLUDED BETWEEN THE PARTIES AT AN ARMS' LENGTH?

²⁷ The Deed of Suretyship can be found at Index: 02-42 to 02-54.

51] In assessing the merits of this defence, it is apposite to briefly set out the history of the engagement of the parties.

52] Mr Kruger and Mr Roodt have been friends since the early 90's.²⁸ The latter was married to a cousin of Mr Kruger's late wife.²⁹ The Potloodspruit Trust is an inter-vivos trust. Mr Roodt was appointed as one of its trustees in 2016 because of the close friendship between him and Mr Kruger.³⁰

53] The fourth defendant, Villa Da Vida, owns an immovable property on the Bazaruto island and until 2 July 2018, the TBR Trust held all of the shares in Villa Da Vida.³¹

54] On 2 July 2018, through Mr Kruger's friendship with Mr Roodt, the Potloodspruit Trust purchased a 50% shareholding in Villa Da Vida from the TBR Trust. It paid R5 million for the shares.³²

²⁸ Index: 12-18; para 13.

²⁹ Index: 12-18; para 14.

³⁰ Index: 12-18; para 15.

³¹ Index: 12-19; paras 17 and 18.

³² Index: 12-19; para 19.

55] During September 2018, Mr. Kruger expressed the Potloodspruit Trust's intent to divest its shareholding in Villa Da Vida. Mr. Roodt signified the TBR Trust's willingness to repurchase the shares for R5 million contingent upon the TBR Trust's financial ability and liquidity.³³

56] In this regard, only about 27 July 2021, did Mr Kruger sent an email to Mr Roodt, insisting on a formal agreement as a means for the Potloodspruit Trust to divest its shareholding in Villa Da Vida.³⁴ Mr Roodt took exception to this because he felt that Mr Kruger was putting money before their friendship.³⁵

57] The ensuing fallout between Mr Kruger and Mr Roodt was the catalyst for the conclusion of the Sale of Shares Agreement on 7 October 2021.³⁶ The Sale of Shares Agreement in terms of clause 4.3 recorded the purchase price for the Potloodspruit Trust's shares and the Sale Claims was R5 million, payable by 31 October 2023.

³³ Index: 12-88; para 8.4

³⁴ Index: 12-19; para 22.

³⁵ Index: 12-19 to 12 - 20; para 23.

³⁶ The Agreement can be found at Index: 02-25 to 02-54. Index: 02-31; para 4.3.

58] In terms of clause 4.3 of the Sale of Shares Agreement, interest accrued on the deferred purchase price calculated from the effective date being 19 November 2021 at a rate of prime plus 2%.³⁷ After conclusion of the agreement the shares and Sale Claims were transferred to the TBR Trust.³⁸

59] To date the TBR Trust has not made payment of the R5 million purchase price.³⁹

60] On behalf of the plaintiffs it was advanced that a credit agreement which is not at arm's length is not affected by the provisions of the NCA and that the Sale of Share Agreement in question was not concluded as such.

61] The defendants, in turn contends that a factual dispute exists regarding the question whether the parties contracted at arms-length when they concluded the Share of Sale Agreement and that this indicates, that there is a triable issue to be determined. Evidence on the factual dispute would have

³⁷ Index: 02-31; para 15.4

³⁸ Index: 02-18; para15.

³⁹ Index: 02-18; para 16.

to be presented at trial for the trial court to make a determination in this regard.

62] The plaintiffs bear the *onus* to convince not only this Court but also a future Trial Court that the parties were not dealing at an arms' length.

63] It is for this reason that this Court concludes that on this question also a triable issue has been raised.

64] As this Court has already found that a triable issue has been raised it is deemed unnecessary to express an opinion on the remainder of the defences.

ORDER

65] Consequently, the following order is made:

65.1 The application for summary judgment is refused.

65.2 The *point in limine* is upheld with costs.

65.3 The Defendants are granted leave to defend.

65.4 The Plaintiffs are ordered to pay the costs of the summary judgment application on a party and party scale, as per Scale C.



COLLIS J

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for the Plaintiff: Adv. W.A. Van Aswegen

Instructing Attorney: Peyper Attorneys

Counsel for the Defendants: Adv. M.T Shepherd

Instructing Attorney: Strydom Britz Mohulatsi Inc

Date of Hearing: 06 February 2025

Date of Judgment: 04 February 2026