IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION MAHIKENG

CASE NO: 2315/2024

Not Reportable

In the matter between:

DONOVAN JOHANN JANSE VAN VUUREN **APPLICANT**

And

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

Coram: Reddy J

Heard: 30 April 2026

Delivered: Judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII. The date and time for handing down the judgment are deemed to be 16h00 on 13 May 2026.

Summary:

Application for leave to appeal against summary judgment – whether prescription had run and whether the running thereof was interrupted by a tacit acknowledgment of liability in terms of s 14 of the Prescription Act 68 of 1969 – whether the court impermissibly resolved a dispute of fact on the papers and whether annexure SJ3 was admissible in summary judgment proceedings –

whether compliance with ss 127(2) and 127(5) of the National Credit Act 34 of 2005 is a jurisdictional precondition to enforcement – whether the certificate of balance was contractually compliant – whether the vehicle was sold for a fair market value – both requirements of s 17(1)(a) of the Superior Courts Act 10 of 2013 considered – application dismissed.

ORDER

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1. The application for leave to appeal is dismissed.
2. There is no order as to costs.

JUDGMENT

REDDY J

Introduction

[1] Before this court is an application for leave to appeal. The applicant, Mr Donovan Johann Janse van Vuuren (van Vuuren) , seeks leave to appeal the summary judgment entered against him by this court on 20 January 2026. The respondent, BMW Financial Services South Africa (Pty) Ltd (BMW), has filed a notice to abide. It follows that the application proceeds unopposed.

The test for leave to appeal

[2] The test for the grant of leave to appeal is prescribed by section 17(1) of the Superior Courts Act.[1] It reads :

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –
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> (a) (i) the appeal would have a reasonable prospect of success; or
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> (b) (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
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> (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
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> (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[3] In *S v Smith*[2] this test was described in the following way:

> "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound rational basis for the conclusion that there are prospects of success on appeal."

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1. Superior Courts Act 10 of 2013.

2 *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para 7.

[4] The threshold is not whether the appeal will succeed, but whether it has a realistic chance of succeeding. The question is whether another court would reasonably reach a different conclusion.

The grounds of appeal

[5] The following grounds of appeal advanced by van Vuuren can be broadly summarised as follows:

(i) Whether prescription had run, it being common cause on BMW's own version and on the facts accepted by the court that the cause of action arose on 12 May 2021 and that summons was served on 13 May 2024, being a period of three years and one day.

(ii) Whether the running of prescription was interrupted in terms of s 14 of the Prescription Act[3], (the PA) and in particular, whether the conduct relied upon by the BMW constituted an acknowledgment of liability.

(iii) Whether the alleged acknowledgment of liability was established on admissible evidence, regard being had to the evidentiary limits applicable to summary judgment proceedings.

(iv) Whether the court impermissibly resolved a material dispute of fact on the papers, van Vuuren having denied any acknowledgment of liability in his affidavit resisting summary judgment.

(v) Whether BMW impermissibly supplemented its case by raising the interruption of prescription for the first time in the summary judgment affidavit, it not having been pleaded.

[3] The Prescription Act 68 of 1969.

The legal principles governing summary judgment

[6] The rationale and requirements for granting or denying summary judgment are trite. The test is whether the defendant has satisfied the court that they have a *bona fide* defence to the action[4].This entails assessing whether the facts pleaded by the defendant raise a triable issue and a sustainable defence in law. The pleaded defence must not be bald, vague or sketchy.

[7] The question that engages this court is whether any of the five grounds of appeal advanced by van Vuuren affords a reasonable prospect that another court would come to a different conclusion on any of those grounds, or whether there is some other compelling reason why the appeal should be heard. I propose that each ground be dealt with in turn.

Background

[8] To place the grounds of appeal in proper perspective, the following salient facts warrant repetition. On 20 December 2018, BMW and van Vuuren entered into a written Instalment Sale Agreement for the purchase of a 2012 BMW K 1600 GTL for R247 521.52. On 24 February 2021, van Vuuren elected to surrender the motor vehicle voluntarily in terms of s 127(1)(a) and (b) of the National Credit Act[5].

[9] The vehicle was valued at R89 840.00 by TUV SUD South Africa on 12 March 2021 and sold at public auction on 12 May 2021 for R51 750.00. A notice in terms of s 127(5) was prepared on 11 April 2022, reflecting an

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[4] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)
[5] The National Credit Act 34 of 2005.

outstanding balance of R128 087.52. As of 24 April 2024, the amount due was R158 073.51. Summons was served on van Vuuren on 13 May 2024.

[10] It is common cause, on BMW's own version and as accepted by this court, that the cause of action arose on 12 May 2021 and that summons was served on 13 May 2024, a period of three years and one day. The prescriptive period under s 11(d) of the PA *prima facie* expired on 12 May 2024, the day before service.

Prescription: whether the running thereof was interrupted

[11] Advocate Riley submitted that the cause of action arose on 12 May 2021, being the date the vehicle was sold at auction, and that the three-year prescriptive period under s 11(d) of the PA accordingly expired on 12 May 2024. Summons was served on 13 May 2024, one day later.

[12] That contention was accepted in the judgment. In our law, breach of contract is remediable through two mutually exclusive options; a claim for specific performance, or cancellation of the contract and a claim for damages. As this court found, following van Vuuren's voluntary surrender of the vehicle on 24 February 2021, the agreement was cancelled. The cancellation put paid to the first option. The claim that then lay open to BMW was a claim for damages. Prescription of that claim ran from the date the debt became due, which was 12 May 2021, the date on which the shortfall was crystallised by the auction sale. BMW seems to concede that summons was served a day after the three-year prescriptive period. The question that then engages this court is whether the running of prescription had been interrupted. That is the question to which I now turn.

[13] Advocate Riley contended that this court's rejection of the prescription defence rested on a single finding, namely, that van Vuuren's request for a statement of account and a reduced settlement offer in April 2022 constituted a tacit acknowledgment of liability in terms of s 14 of the PA. That finding, he submitted, cannot be sustained. Advocate Riley advanced that an acknowledgment of liability, whether express or tacit, must be clear, unequivocal, and inconsistent with any explanation other than an admission of indebtedness. More fundamentally, Advocate Riley advanced that before that legal enquiry can even arise, the factual foundation must first be established. In this matter, that foundation is squarely disputed.

[14] Van Vuuren categorically denied in his opposing affidavit that any request for a settlement offer was made, and further denied that any conduct on his part constituted an acknowledgment of liability. Applying the *Plascon-Evans* [6]rule, Advocate Riley submitted, the court was required to approach the matter on van Vuuren's version and could not accept BMW's disputed version unless it was so far-fetched or untenable that it could be rejected on the papers.

[15] Advocate Riley further submitted that the only material placed before the court by BMW was annexure SJ3, an internal email exchanged between unidentified persons within BMW's own structures, in which it was noted that "the client requests a detailed statement with possible settlement reduced offer." Advocate Riley avers that this document was not authored by van Vuuren. It was not a written acknowledgment emanating from him. It was not a recording, transcript, signed note, or contemporaneous admission. For

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[6] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May

BMW, it was, at best, the weakest kind of hearsay. It did not establish who spoke to van Vuuren, whether any conversation took place, what words were used, whether they were accurately conveyed, or the context in which the alleged request arose.

[16] Advocate Riley reasons that there was accordingly no proper evidential basis for the court to find, as a fact, that van Vuuren had requested a settlement offer, let alone that he had thereby acknowledged liability. Moreover, Advocate Riley continues that the strict procedural limits governing summary judgment proceedings preclude a plaintiff from supplementing its case with evidentiary material annexed to the Uniform Rule 32(2) affidavit.

[17] To this end, Advocate Riley proposed that the interruption of prescription was not pleaded. The email was accordingly improperly introduced. Simply put, Advocate Riley concludes that even if the court were to accept that some engagement occurred, a request for a statement of account or a settlement figure remains ambiguous and, by itself, does not meet the threshold required by s 14 of the PA. At the very least, the dispute raised a triable issue that ought to have been referred to trial.

Deliberation

[18] What needs to be underscored is that an acknowledgment of liability for purposes of s 14 of the PA is a matter of fact, not of law. This was affirmed in *KLD Residential v Empire Earth Investments*[7] and *Madibeng Local*

[7] *KLD Residential CC v Empire Earth Investments 17 (Pty) Ltd* (1135/2016) [2017] ZASCA 98; [2017] 3 All SA 739 (SCA); 2017 (6) SA 55 (SCA) (6 July 2017)

Municipality v Public Investment Corporation Ltd[8]. Advocate Riley submitted that a request for a settlement figure is as consistent with a debtor who disputes the claim as with one who admits it. That submission is too broad. The conduct on 12 April 2022 was not a mere enquiry about a disputed amount. Van Vuuren, through his own external debt collector, sought a reduced settlement offer on the specific debt. The implicit concession that something is owed inheres in the very act of seeking a reduced figure on that debt. As I see it, that conduct constitutes a tacit acknowledgment of liability.

[19] I turn to the factual dispute. Van Vuuren contends that he categorically denied the April 2022 contact in his opposing affidavit and that the court was accordingly required to accept his version. The question that engages this court is whether that denial raised a genuine triable issue. In my view, it did not. The defence must not be bald, vague or sketchy. Van Vuuren's opposing affidavit did no more than deny, in the most general terms, that any acknowledgment of liability was made. Van Vuuren offered no account of what occurred or did not occur on 12 April 2022. He identified no inaccuracy in the evidence placed before the court. He provided no alternative explanation for the content of annexure SJ3. In these circumstances, there was nothing of substance to resolve. The denial was bare. A bare denial is not a bona fide defence.

[20] I am also unpersuaded that the *Plascon-Evans*[9] rule assists van Vuuren. That rule governs application proceedings where a court is required to evaluate two competing versions on affidavit. Summary judgment under Rule 32 is a

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[8] *Madibeng Local Municipality v Public Investment Corporation Ltd* (603/2017) [2018] ZASCA 93; 2018 (6) SA 55 (SCA) (1 June 2018)

[9] *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

different and more confined procedure. The court is not called upon to determine which version prevails. The enquiry is the narrower one of whether the defendant has placed sufficient facts before the court, with adequate particularity, to show that the defence is *bona fide* and good in law. Van Vuuren's bare denial did not meet that standard.

[21] I turn to the admissibility of annexure SJ3 and the supplementation argument. It is correct, as a general principle, that a plaintiff in summary judgment proceedings may not use the founding affidavit to place before the court evidence that goes beyond what is necessary to verify the pleaded cause of action. Advocate Riley contended that the interruption of prescription was not pleaded and that SJ3 was improperly introduced. He further submitted that SJ3 is an internal email between unidentified persons within BMW's own structures and that it constitutes the weakest form of hearsay.

[22] As I see it, the supplementation objection does not arise on the facts of this matter. Van Vuuren first raised prescription as a special defence in his affidavit resisting summary judgment. BMW placed the evidence of the April 2022 contact before the court in direct response to that defence. A plaintiff is entitled to answer a defence once it is raised. The introduction of SJ3 was not a supplementation of BMW's cause of action. It was a rebuttal of a defence.

[23] Insofar as the hearsay objection is concerned, it is significant that van Vuuren did not, in his opposing affidavit, challenge the authenticity of the document. He did not deny that it was generated within BMW's systems. He did not challenge the accuracy of its contents. He did not depose to the fact that no such request was ever conveyed. Van Vuuren's denial was directed at

the legal conclusion sought to be drawn from the document, not at the facts recorded in it.

[24] In those circumstances, the document remained before the court on its contents, unchallenged in substance. Given van Vuuren's litigating conduct, the inevitable conclusion was that there was a proper evidential basis for this court to find, as a fact, that the request had been made. Accordingly, this point must fail.

<u>Non-compliance with sections 127(2) and 127(5) of the National Credit Act 34 of 2005</u>

[25] Advocate Riley avows that these provisions are peremptory and that compliance with them is a jurisdictional precondition to enforcing the credit agreement. He contended that BMW has not presented sufficient documentary proof that the s 127(2) notice was sent by prepaid registered mail to van Vuuren's chosen domicilium, and that no track-and-trace slip, postal receipt, or affidavit from the person responsible for dispatch was furnished.

[26] Advocate Riley further claims that the reliance by BMW on *Edwards v FirstRand Bank Ltd t/a Wesbank*[10] is misplaced. In that matter, documentary proof was furnished that the notices were generated and sent. In this matter, he submitted, no such proof of dispatch exists for the s 127(2) notice, and the track-and-trace receipt relied upon for the s 127(5) notice does not, on its own, establish delivery to van Vuuren's *domicilium*.

[10] *Edwards v FirstRand Bank Ltd t/a Wesbank* [2016] ZASCA 144; 2017 (1) SA 316 .

Deliberation

[27] On 8 March 2021, a written notice in terms of s 127(2) was sent by prepaid registered mail to van Vuuren. The contents thereof informed van Vuuren that the vehicle had been valued in the amount of R89 840.00. On 12 May 2021, the vehicle was sold at auction for R51 750.00. A notice under s 127(5), dated 11 April 2022, was delivered via registered email on 25 March 2024.

[28] In the final analysis, this court must be satisfied that BMW has placed before it facts demonstrating that, on a balance of probabilities, the notices as set out in s 127(2) and (5) have been sent to van Vuuren. In my view, consistent with *Edwards*, the use of a track-and-trace receipt satisfies the requirements of delivery, particularly where van Vuuren has not rebutted it.

[29] On the s 127(2) notice, the uncontested averment in the founding affidavit that the notice was dispatched by prepaid registered mail to van Vuuren's chosen *domicilium*, in the absence of any denial of receipt or challenge to the averment in the opposing affidavit, is sufficient to establish dispatch on a balance of probabilities. Vân Vuuren's bare denial that the notices comply with the NCA does not constitute a bona fide defence. Resultantly, there is no merit in this point, and it falls to be dismissed.

The certificate of balance

[30] Advocate Riley maintains that the certificate of balance (COB) was signed by a supervisor, not a person designated as 'manager', as required by clause 17.1 of the agreement. It is common cause that the COB was signed by Leonie Du Plessis, Supervisor, Asset and Loss Recovery. Advocate Riley

submitted that the COB was accordingly not compliant with clause 17.1 and cannot constitute *prima facie* proof of indebtedness. BMW concedes the designation of the signatory but contends that on a proper construction of clause 17.1, and having regard to the resolution dated 25 May 2021 authorising the Supervisor Loss and Recovery to sign COBs on behalf of BMW, the COB is compliant.

<u>Deliberation</u>

[31] In *Senekal v Trust Bank of Africa Ltd* [11] the court considered the purpose of a certificate of balance clause and held that its primary purpose is to facilitate proof of the amount of the principal debtor's indebtedness at any given time, and that a certificate shall be sufficient or *prima facie* proof of the amount due. The certificate of balance fulfils its primary purpose of providing *prima facie* proof of van Vuuren's indebtedness and is compliant with the underlying agreement. Van Vuuren takes no issue with the amount of the debt or the applicable interest as reflected in the COB. The challenge is directed solely at the signatory's designation.

[32] On a proper construction of clause 17.1 of the agreement, a supervisor in the relevant division is sufficiently senior to satisfy the requirements of the certificate clause, particularly where the authority to sign is confirmed by a board resolution. It follows that this point falls to be dismissed.

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[11] *Senekal v Trust Bank of Africa Ltd* 1978(3) SA 375 (A)

The dispute regarding the sale price

[31] Advocate Riley argues that BMW's assertion that the vehicle was sold for the highest price reasonably obtainable as required by s 127(4)(b) of the NCA is questionable. He advances that the substantive facts underpinning the realised amount are undisclosed by BMW, and that pertinent facts *inter alia* the auction conditions, the advertising process, the number of bidders, the reserve price, and the market valuation of the vehicle at the time of sale have not been furnished.

Deliberation

[32] Van Vuuren misses the significance of the provisions of s 128 of the NCA and the potential remedy it subsumes. What is more, van Vuuren has not adduced any extrinsic evidence to bolster his contention that the vehicle was not sold for a fair market value. Consequently, this point suffers a similar fate as the previous grounds and is dismissed. It is accordingly dismissed.

Conclusion

[33] I have considered each of the five grounds of appeal advanced on behalf of van Vuuren and found that none provides a reasonable prospect that another court would reach a different conclusion. That disposes of the first part of s 17(1)(a) of the Superior Courts Act. As to the second part, no compelling reason has been advanced for the appeal to be heard in any event. The matter does not raise a novel point of law, does not affect a broad class of litigants, and does not otherwise warrant the attention of a higher court. In the premises, there is no basis for leave to appeal to be granted. The application must be dismissed.

Costs

[34] BMW has filed a notice to abide and has not participated in the application. In the circumstances, there is no order as to costs.

Order

[35] Resultantly, I make the following order:

1. The application for leave to appeal is dismissed.

2. There is no order as to costs.

[redacted]

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION

APPEARANCES

For the applicant:	Advocate B Riley
Instructed by: Attorneys	Willie Jordaan Attorneys C/O Van Rooyen Thlapi & Wessels
Respondent:	DRSM Attorneys (Notice to Abide)