



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 2025-131100

In the matter between:

TIREPOINT (PTY) LTD

Plaintiff

and

TIMELINK CARGO (PTY) LTD

Defendant

Reportable / Not reportable

Coram: Anderssen AJ

Heard: 19 May 2026

Delivered: Electronically on 21 May 2026

Summary: Summary judgment – claim admitted – damages claimed in reconvention – written agreement expressly excludes right of set-off – summary judgment granted

ORDER

1. Summary judgment is granted against the defendant in the following terms:

1.1 Payment of the sum of R4 823 649.09;

1.2 Interest on the aforesaid amount at the prime interest rate plus 3% from due date until date of payment;

1.3 Costs of suit on the attorney and client scale.

JUDGMENT

Anderssen AJ:

Introduction

- [1] The plaintiff (“*Tirepoint*”) applies for summary judgment for payment in the amount of R4 823 649.09 together with costs and interest. The claim arises from the alleged breach of a written credit facility agreement concluded in March 2018. Tirepoint had sold and delivered to the defendant (“*Timelink*”) certain goods between December 2024 and April 2025 for which it was not paid.
- [2] Timelink raised a point *in limine* claiming that the founding affidavit in support of the summary judgment application went beyond the prescripts of Rule 32(2)(b). This rule requires a plaintiff to verify the cause of action and the amounts claimed in the particulars of claim but Tirepoint verified a different claim – the capital amount originally claimed had reduced as payments had been received pursuant to the issue of the summons. Timelink did not persist with this point *in limine* at the hearing.
- [3] Timelink initially disputed the amounts claimed and sought a debatement of account. It later conceded that the amount claimed in the summary

judgment application is correct. The other defences raised arise from Tirepoint's alleged breach of the agreement:

[3.1] Firstly, Timelink complains that it deposited 107 tyre casings with Tirepoint for retreading but that it has retained the tyre casings purporting to exercise a lien over it. The counterclaim seeks damages in an amount of R320 000 for the unlawful retention of these casings.

[3.3] Secondly, Timelink claims that it is entitled to damages for breach of contract, quantified at R3 500 000, arising from Tirepoint's delivery of defective tyres. Tirepoint persists with its claim for summary judgment and relies on clause 2.3 of the agreement, which expressly excludes the right of set-off.

APPLICABLE LEGAL PRINCIPLES AND CASE LAW

[4] The summary judgment procedure is not intended to deprive defendants with a triable issue, or a sustainable defence, of their day in court.¹ What is required of a court hearing a summary judgment application is, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of the defence and the facts upon which it is founded. Second, whether the defence so disclosed is both *bona fide* and good in law. If these thresholds have been met, the court is bound to refuse summary judgment.²

[5] Rule 32(5) affords the court hearing an application for summary judgment

¹ *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA) at 11G-12D.

² See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G-426E.

a discretion as to whether to enter summary judgment or not. Thus, even if a defendant fails to comply with the provisions of rule 32(3)(b), which requires a full disclosure of the nature and the grounds of the defence (or counterclaim) as well as the material facts upon which it relies, it does not mean that summary judgment will follow.³

The meaning of 'fully' and 'bona fide' as set out in case law

[6] The requirement that the defendant's affidavit must disclose the nature and the grounds of his defence, and the material facts relied upon therefor, 'fully', was discussed in the *Breitenbach*-matter.⁴ It is not necessary to set out the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial.

[7] All that is required is that the defendant's defence be not set out so baldly, vaguely or laconically that the Court, with due regard to all the circumstances, receives the impression that the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have.⁵ After all, a dishonest deponent (if he is wise) will present as narrow a front as possible, and, if it is practicable, a blurred one.⁶

[8] In *Tumileng* the *Maharaj* judgment was considered by Binns-Ward J after Rule 32 was amended.⁷ He concluded that the summary judgment

³ See in this regard *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* (680/2002) [2004] ZASCA 31 (31 March 2004); [2004] 2 All SA 366 (SCA); 2004 (6) SA 29 (SCA) at para [10].

⁴ *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228B/C.

⁵ *Breitenbach* at 229A.

⁶ *Ibid* at 228H.

⁷ *Tumileng Trading CC v National Security and Fire (Pty) Ltd* (3670/2019) [2020] ZAWCHC 28 (30 April 2020); 2020 (6) SA 624 (WCC) at para [13].

procedure, even in its amended form, remains true to its origin. Rule 32(3), which regulates what is required from a defendant in its opposing affidavit, has been left substantively unamended in the overhauled procedure, which means that the test remains what it always was: has the defendant disclosed a *bona fide* (i.e. an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed.

[9] The court is not obliged to search for a defence among loosely made allegations.⁸ The defendant must set out facts with sufficient particularity and detail to enable the court to assess whether the defence is *bona fide*. The use of the word 'satisfy' in Subrule (3)(b) does not mean 'prove'. What is required is that the defendant set out in his affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. The sub-rule was not intended to demand the impossible.⁹

[10] *Bona fides* is not given its literal meaning in the Subrule. It is the defence that must be *bona fide*, and whether it is *bona fide* or not depends upon the merits of that defence as raised in the defendant's affidavit. It is sufficient if the defendant swears to a defence, valid in law, and the affidavit shows that there is a reasonable possibility that the defence he advances may succeed on trial. If the defendant, however, omits facts upon which a defence can be based, the defendant will fail.¹⁰ Similarly, if the defendant is not *bona fide*, the defendant must fail as the defence

⁸ *Breitenbach supra*.

⁹ *Breitenbach supra* at 228B.

¹⁰ *Border Concrete Engineering Co (Pty) Ltd v Knickelbein* 1982 (2 SA 648 (E) at 651.

would then also not be *bona fide*.¹¹

Raising a claim in reconvention as a bona fide defence

[11] ***Spilhaus & Co Ltd v Coreejees***¹² was one of two judgments by Watermeyer J in which he resolved the issue whether, as a matter of principle, the requirement of a *bona fide* defence in summary judgment proceedings can be satisfied by the defendant raising an unliquidated claim for damages which exceeds the sum of the plaintiff's claim. In this case, as in the earlier case of ***Weinkove v Botha***,¹³ Watermeyer J held that, if, as a matter of pleading a defendant is allowed to raise the existence of an unliquidated counterclaim, which exceeds the amount of the claim as a defence to the plaintiff's claim, it must also be permissible to raise that same defence in answer to an application for summary judgment.

[12] The Supreme Court of Appeal considered the issue of when and whether a claim in reconvention can constitute a *bona fide* defence in a summary judgment application in the ***Soil Fumigation*** case. With reference to an earlier judgment in this division,¹⁴ it held:

[8] ... If the counterclaim put up by the defendant is less than the plaintiff's claim, the defendant cannot be said, in this manner, to have put up a defence to the whole of the plaintiff's claim. If, however, the balance is covered by a payment into court, a defendant succeeds, in the words of Corbett J:

'[om] op dié wyse 'n bona fide verweer teen die hele hoofeis op te werp'.

[9] What Corbett J did not deal with explicitly, was the question in the present

¹¹ ***Van Eeden v Sasol Pensioenfonds*** 1975 (2) SA 167 (O) at 173H and 179F-180B.

¹² 1966 (1) SA 525 (C) at 529E-H.

¹³ 1952 (3) SA 178 (C) at 183A-D.

¹⁴ ***Stassen v Stoffberg*** 1973 (3) SA 725 (C).

case, namely whether as a matter of principle a counterclaim for a lesser amount could be regarded as constituting a 'bona fide defence' to that part of the plaintiff's claim which the counterclaim, if successful, would extinguish. The dictates of logic referred to by Watermeyer J in Weinkove and Spillhaus & Co. Ltd., in my view, indicate that it could. The reasoning adopted by Watermeyer J was that if it is permissible for a defendant, by way of a plea, to raise the existence of an unliquidated counterclaim as a defence to the plaintiff's claim, then, it should be equally permissible to raise that defence by way of affidavit in summary judgment proceedings. Rule 22(4), and particularly the second part thereof, specifically allows the defendant to put up a counterclaim for a lesser amount as a defence to the extent of that amount. In the light of these provisions I can, as a matter of principle, see no reason why a defendant should not be allowed to raise the same partial defence by means of a counterclaim for a lesser amount in summary judgment proceedings. A defendant who fails to pay the balance into court runs the risk that summary judgment may be granted for the balance together with the costs resulting from the summary judgment application. In order to avoid this risk a defendant may therefore be well advised to follow the example of Kroonklip Beleggings (Edms) Bpk by paying the balance into court.

- [13] The law is thus settled that an unliquidated counterclaim for an amount exceeding the claim in convention could, if *bona fide* in the sense contemplated by Rule 32(3)(b) amount to a defence in summary judgment proceedings. Even if the unliquidated counterclaim is for a lesser amount a defendant could still defeat the summary judgment application, but runs the risk that summary judgment may be granted for the balance together with the costs resulting from the summary judgment application. In order to avoid this risk a defendant may therefore be well advised to pay the balance into court thereby providing security in terms of Rule 32(3)(a).

THE DEFENCES RAISED BY THE DEFENDANT

- [14] In its plea, Timelink admitted the citation of the parties, the jurisdiction of the court, the existence and conclusion of a written agreement between the parties, the identity of the persons that represented the parties and the terms of the agreement. It also admitted that Tirepoint sold and delivered to it certain goods in terms of the agreement for which invoices were rendered. It, however, denied the outstanding balance due or that the

amount was owing, averring that additional payments had been made that had not been allocated to its account.

[15] Tirepoint subsequently allocated additional payments to the account and reduced the amount claimed in the summons from R5 837 042.28 to R4 823 649.09 in the summary judgment application. Updated account statements showing the allocation of additional payment receipts were annexed to the summary judgment founding affidavit.

[16] Although Timelink initially sought a debatement of account, it subsequently (at the hearing) abandoned the defence in light of the provision in the written agreement that the amount due and payable by it may be determined and proven by a certificate issued and signed by a director of Tirepoint. As recorded above, I was informed at the hearing that Timelink is no longer disputing the amount claimed from it. It persisted with its other two defences.

[17] Timelink pleads firstly that it delivered to Tirepoint tyre casings for retreading but that the latter has refused to return the 107 tyre casings to it. This despite admitting that the tyre casings remained the property of Timelink. No facts were averred by Tirepoint that would substantiate a lien-claim and therefore their unlawful retention of the tyre casings caused Timelink damages in the amount of R320 000 as each tyre casing is worth R3 000. Neither the plea nor the counterclaim, however, incorporates the averment that it was an express, tacit or implied term of the agreement that Tirepoint may not withhold Timelink's property. Mr MacKenzie conceded that this may mean that the defence has not been explained 'fully' but he countered to say that Tirepoint has not provided any justification for

withholding Timelink's property and that it has resorted to impermissible self-help. If that is so, Timelink has a remedy available to him, other than a claim in reconvention in which it seeks damages.

[18] It seems to me that Timelink seeks damages (instead of a return of its property) because, if the damages are proved and quantified it would be able to set-off its liquidated claim against the claim in convention. This is, however, not permissible in terms of the credit agreement as I discuss below.

[19] The second defence raised is that Tirepoint has caused Timelink damages by delivering defective tyres. The *quantum* of damages relates not only to the value of the defective tyres but also to the cost of replacement thereof and damages sustained to the wheels, the wheel arch structure and the undercarriage of Timelink's trucks. An implied term was specifically pleaded. When Timelink learned about the defective tyres it notified Tirepoint who refused to conduct a scrap analysis on the defective tyres and the relationship between the parties broke down. Timelink decided not to make payment of its account with Tirepoint as a result of the abovementioned breaches in contract and the resultant damages it suffered.

DISCUSSION

[20] Neither defence, however, is a *bona fide* defence within the meaning of Subrule (3)(b). Set-off can only take place if both debts are liquidated in the sense that they are capable of speedy and easy proof, and, as a result, suppliers often exclude the operation of set-off in credit agreements of this

sort. This was the case *in casu*. The credit agreement between Tirepoint and Timelink expressly excludes the operation of set-off.

[21] It is settled law that the operation of set-off may be excluded by agreement.¹⁵ I am not persuaded by the argument from Mr MacKenzie that the court is not faced with a claim for set-off but rather with a claim for damages. After all, the purpose of seeking a delay in judgment on the plaintiff's claim – because a defendant wants the court to determine its counterclaim first – is because that defendant wants to set-off its damages, once liquidated, against the plaintiff's claim.

[22] In this I take guidance from an earlier decision in this court where it was faced with a similar set of facts in ***Collotype Labels***.¹⁶ The plaintiff and the first defendant in that matter had entered into an agreement in September 2009 in terms of which the plaintiff undertook to sell certain products and deliver related services on an on-going basis to the first defendant, subject to the terms of an overarching agreement of trade. The first defendant made an application for credit facilities and for the opening of an account on the same day. The credit agreement expressly provided that the first defendant was not entitled to set off any amount due to the plaintiff.

[23] The following *dictum* is of application:

[67] The suggestion that the defendants would not be seeking to set-off the debt owed by the plaintiff against its claim does not make sense to me. The defendants are asking for a counter-claim to be determined so that they can set-off their debt, as determined at a later stage against the plaintiff's claim. The fact is, the contract does not allow them to do that. Arguments attempting to get

¹⁵ See ***Blakes Maphanga Inc v Outsurance Insurance Company Ltd*** (144/2009) [2010] ZASCA 19 (19 March 2010); 2010 (4) SA 232 (SCA); [2010] 3 All SA 383 (SCA) at para [15] and the authorities relied thereon in footnotes 4,5 and 6.

¹⁶ ***Collotype Labels RSA (Pty) Ltd v Prinspark CC and Others*** (6722/2016) [2016] ZAWCHC 159 (9 November 2016).

around clause 40 are, in my view, unconvincing. For reasons set out above the defendants are precluded from invoking the operation of set-off, which is effectively what the counterclaim would seek to do at the end of the day. It further appears from the correspondence between the parties, that the extent of the claim itself is yet to be quantified. The outstanding tooling is still to be checked and verified for quality. Some may need to be remade. Under those circumstances, it cannot be said that the actual counterclaim is liquidated and I have not understood the defendants to suggest that it is.

[68] Furthermore, in *Spilhaus & Co. Ltd v Coreejees*,¹⁷ the court held that, the fact that the defendant has a counterclaim for damages is not a 'defence' to plaintiff's action on its claim within the meaning of Rule 32(3)(b). The summary judgment was therefore granted in favour of the plaintiff with costs.

[69] In any event, nothing prevents the first defendant from instituting action against the plaintiff should it wish to do so. The door is not 'shut' to the defendants so to speak. Furthermore, both parties through their correspondences and in court have conveyed that the matter at hand is capable of settlement.

[24] The point was also made in ***Altech Data (Pty) Ltd v M B Technologies (Pty) Ltd***¹⁸, where the court stated the following:

(f) The right to set off the damages to be claimed in the counterclaim

*It seems to me that, on a proper construction of the structure and nature of this agreement, the remarks of Lichtenberg J in the case of Herrigel NO v Bon Roads Construction Co (Pty) Ltd and Another*¹⁹ are apposite. The learned Judge there stated at 676G-677A:

'... (I) f a party to an action wants to obtain the benefit of set-off, he must claim to be entitled to set-off; see Hardy NO and Mostert v Harsant 1913 TPD 433; Bain v Barclays Bank (DC & O) Ltd 1937 SR 191.'

Clause 4.2 of the agreement scrutinised in that case stated that '*the purchaser shall pay the seller the purchase price ... without deduction or set-off ...*' The court found that the express wording of the relevant clause precluded the respondent from relying on set-off to avoid payment of the portion of the purchase price which fell due on 5 December 1997. The court decided that if the applicant's claim for payment of the purchase price was undisputed and the counterclaim for damages was in dispute it could

¹⁷ Reference removed: 1966 (1) SA 525 (C) at 529G-H.

¹⁸ 1998 (3) SA 748 (W) at 761B-G.

¹⁹ Reference removed: 1980 (4) SA 669 (SWA) at 676.

not be set-off against the applicant's claim.

[25] In light of what I have set out above I am persuaded that Timelink's indebtedness to Tirepoint, in terms of the written agreement, has been admitted. I am of the view that, with due regard to the terms of the written agreement (particularly the bar to set-off), Timelink cannot avoid judgment being taken against them simply on the basis of their counterclaim as the latter cannot be used to set-off the debt against Tirepoint.

CONCLUSION

[26] My decision does not close the doors of the court to Timelink. It is still able to pursue its claim for damages against Tirepoint. My order does not prevent Timelink from pursuing its claim, should it wish to do so.

[27] Costs must follow the cause. The parties agreed, in clause 9.6 of the agreement that Tirepoint would be entitled to attorney and client costs should it have to incur legal costs to recover monies owing to it.

[28] The order is recorded above.

ANDERSSSEN J S
Acting Judge of the High Court

Appearances:

For the plaintiff: Adv U Mahilall
Instructed by: Harris Billings Attorneys

For the defendant: Adv P Mackenzie
Instructed by: Van der Spuy Attorneys