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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024-064941

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE 19 MAY 2026

SIGNATURE OF JUDGE:

In the matter between:

PRESMOOI (PTY) LTD
REG NO: 1983/010594/07 Plaintiff

and

JEPPE EDUCATION CENTRE MPC t/a
JEPPE EDUCATION CENTRE
REG NO: 2007/013226/08 1st Defendant

HLATWAYO, HARRY **ID NO: 6[...]**	2nd Defendant
TUNYWA, ABDUL **ID NO: 6[...]**	3rd Defendant
TSELE, MOTSHENG JOSEPHINE **ID NO: 6[...]**	4th Defendant

JUDGMENT

Klopper, AJ

INTRODUCTION:

[1] This is an application for summary judgment in terms of rule 32 of the Uniform Rules of Court. The Plaintiff seeks payment of R2,464,905.40, jointly and severally, arising from unpaid rental and ancillary charges and interest on the amount, including cost on an attorney and client scale as per the terms of the agreement.

BACKGROUND FACTS:

[2] The Plaintiff is the lawful owner of the immovable property situated at Erf 4[...], Johannesburg and known as Jeppe House, 1[...] E[...] Street, Johannesburg.

[3] The Plaintiff and the First Defendant entered into a written lease agreement on 25 February 2019 in terms whereof the First Defendant would lease the premises for the purpose of conducting education activities in the form of a school against the payment of a monthly sum, including basic rental and ancillary costs.

[4] The first lease agreement was entered into for a period of two years, commencing on 1 January 2019 and expiring on 31 December 2021, subject to an automatic renewal on a month-to-month basis. The material terms are set out in paragraph 10 of the particulars of claim.

[5] During June 2022, the parties entered into a second written lease agreement with the commencement date set out as 1 January 2022 and expiring on 31 December 2022, subject to an automatic renewal on a month-to-month basis. The material terms of the second lease agreement are set out in paragraph 15 of the particulars of claim.

[6] The Second, Third and Fourth Defendants each executed a deed of suretyship in favour of the Plaintiff, binding themselves as surety and co-principal debtor for the due performance of the First Defendant's obligations to the Plaintiff under the lease.

[7] The terms and conditions of the second lease agreement is not in dispute.

[8] It is also not in dispute that the Plaintiff provided the First Defendant with occupation of the leased premises commencing on 1 January 2022.

[9] The First Defendant failed to comply with its obligations under the lease and following several default notices issued by the Plaintiff against the First Defendant during the period 6 September 2022 to 27 July 2023, the Defendant issued a final notice of termination of the lease dated 27 July 2023, effective 30 September 2023.

[10] Again, on 19 September 2023, the Plaintiff addressed a letter of demand to the First Defendant for all amounts due and owing flowing from the First Defendant's breach of the agreement.

[11] On 26 September 2023, the First Defendant responded to the letter of demand and denied its indebtedness to the Plaintiff.

[12] The First Defendant vacated the premises on 30 September 2023.

[13] In June 2024, the Plaintiff issued summons against the First, Second, Third and Fourth Defendants claiming outstanding accumulating rental of R2 465 905.40 for the relevant period up and until 30 September 2023 and damages in the amount of R702 870.44.

[14] On or about 8 July 2024, the First to Third Defendants delivered a notice of intention to defend and the Fourth Defendant followed suit on 11 July 2024. Each plea is identical in nature and raised the exact same defences.

[15] The Plaintiff issued an application for summary judgment against the First to Fourth Defendants on 20 December 2024 in terms of rule 32(2) of the Uniform Rules of Court.

[16] On or about 10 March 2025, the First to Third Defendants collectively delivered an affidavit resisting summary judgment, while the Fourth Defendant delivered an affidavit resisting summary judgment on or about 12 March 2025, together with an application for condonation of the late filing of her opposing affidavit.

THE DEFENDANTS' SPECIAL PLEA: POINTS *IN LIMINE:*

[17] The Defendants raised the following preliminary points *in limine* in respect of the Plaintiff's affidavit in support of summary judgment:

17.1. The affidavit is irregular in that the certification by the Commissioner of Oaths is irregular;

17.2. The deponent verifies only one cause of action when there are several causes of action and does not properly identify the cause of action being verified;

17.3. The amount verified by the deponent is clearly incorrect;

17.4. The deponent to the affidavit in support of summary judgment is not in a position to verify the cause of action.

DISCUSSION OF PRELIMINARY POINTS *IN LIMINE:*

Purported failure to properly depose to affidavit in support of summary judgment:

[18] The Defendants raised objection in heads of argument on the basis of non-compliance with the regulations promulgated in terms of the Justices of Peace

and Commissioners of Oaths Act, 16 of 1963 insofar as it relates to the Plaintiff's affidavit in support of summary judgment.

[19] The verifying affidavit represents the cornerstone of summary judgment procedure under rule 32(2), which permits the grant of a final judgment or order in a defendant action without full pleadings on a trial.[1] The verifying affidavit must satisfy the general requirements for affidavits as contained in the regulations[2] ("the Regulations") promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (as amended).

[20] In terms of regulation 3(1) the deponent is required to sign the statement in the presence of the Commissioner of Oaths, and if unable to write, he or she must affix his mark in the presence of the Commissioner of Oaths at the foot of the statement. In terms of regulation 4(1) the Commissioner of Oaths is required to certify that the deponent has acknowledged that he or she knows and understands the contents of the declaration. Regulation 4(1) reads as follows: '

"*Below the deponent's signature or mark the Commissioner of Oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he is required to state the manner, place and date of taking the declaration.*"

[21] In **Absa Bank Ltd v Botha N.O. and Others**[3] the following is stated in this regard:

"*[8]* *Although Rule 32(2) expressly requires that an affidavit accompany an application for summary judgement, a statement which was merely affirmed in accordance with the Regulations also complies with the requirements of Rule 32(2). Subject to whether there has been substantial compliance with the Regulations, the court has a discretion to refuse an affidavit which does not comply with the Regulations. Should a commissioner of oaths not certify that the*

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[1] **Arend v Astra Furnishers (Pty) Ltd** 1974 (1) SA 298 (C)

[2] Promulgated in Government Gazette 3619, Government Notice, R1258 of 21 July 1972 as amended by Government Notice R1648 of 19 August 1977, Government Notice R1428 of 11 July 1980 and Government Notice of R774 of 23 April 1983.

[3] (39228/12)[2013] ZAGPPHC 163; 2013 (5) SA 563 (GNP) (7 June 2013)

verifying affidavit in a summary judgment application had been sworn to or affirmed, the court will be reluctant to apply the maxim omnia praesumuntur rite esse acta donec probetur in contrarium[4]*, also known as the "presumption of regularity", for purposes of making the assumption that the document had, in fact, been sworn to (or affirmed) and signed in the presence of the commissioner of oaths."*

[22] The affidavit in support of summary judgment is deposed to by Angelique Smit. She stated under oath that:

"*I am a major female South African citizen employed by City Property (Pty) Ltd ("City Property") …."*

[23] Below the deponent's signature the commissioner of oaths certified the following:

"*I certify that the deponent has acknowledged that* ***she*** *knows and understands the contents of this affidavit which was signed and sworn to before me on this the 19th day of December 2024 at Fourways. The regulations contained in Government Notice No. R1258 dated 21 July 1972 (as amended) and Government Notice No. R1640 dated 19 August 1977 (as amended) having been complied with. With the relevant provisions of annexure "A" of the rules governing the administration of an oath or affirmation no. R1258 of 21 July 1972 (as amended) having been duly complied with, the deponent herein has acknowledged that* ***he*** *understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on* ***her*** *conscious and that* ***she*** *has uttered the words "so help me – God"*."

[24] Within the context of the above certification by the Commissioner of Oaths, the reference to the deponent's gender appears four times. Only once is there a reference to "**he**" as opposed to "**she**". Within the context of the Commissioner of Oaths' certification the one reference to **he** appears to be no more than a typing error. Accordingly, I am of the view that the *maxum omnia praesumuntur*

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4 Acts are presumed to have been lawfully done until proof to the contrary is produced

rite esse acta donec probetur in contrarium finds application. The fact that the Commissioner of Oaths clearly certified that the deponent "***she***" *knows and understands the contents of this affidavit …, considers the prescribed oath to be binding on* ***her****, conscious and that* ***she*** *has uttered the words "so help me God".*

[25] Having considered the affidavit in support of summary judgment within the context of the certification by the Commissioner of Oaths, I am satisfied that there has been substantial compliance with the regulations.

Purported non-compliance with rule 32(2)(b):

[26] Rule 32(2)(b) of the Uniform Rules of court prescribes that the plaintiff shall in an affidavit verify the cause of action and the amount, if any, claimed and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explained briefly why the defence as pleaded does not raise any issue for trial.

[27] In **Airports Company South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC**[5], the following was stated:

"*The ancillary charges such as the operating costs and disbursements, form part of the Defendant's monthly rental obligation, the fixed rental forming one component and the variable components forming the other part of the rental obligation. The agreement is clear as regards to both components of the monthly rental obligation. The Plaintiff correctly contended that its cause of action remains the same as that which was pleaded at the outset, namely payment of the arrear rentals owed in terms of the lease agreement. The ancillary charges are exactly that - ancillary – to the rental. Rather than introducing a new cause of action, the effect of the proposed amendment will be an expansion of the base of the existing cause of action."*[6]

[28] It is clear from the content of the affidavit in support of summary judgment that the Plaintiff's claim is based on the First Defendant's breach of the lease

[5] Unreported (13733/2017) [2022] ZAGPJHC 263 (26 April 2022) per Acting Justice Meyer
[6] Par 11 thereof

agreement, which manifest in the fact that the First Defendant failed to effect due payment in respect of arrear rent, municipal charges, water, sewerage, interest and other related charges up to and including the date of termination and vacating of the subject premises on 30 September 2023.

[29] The Plaintiff's cause of action is verified in detail with reference to the particulars of claim and specific reference to arrear rent, municipal charges, water, sewerage, interest and other related charges up to and including the date of termination.

[30] The deponent to the affidavit in support of summary judgment further verified the liability of the Second, Third and Fourth Defendants by virtue of the suretyship agreements.

[31] The verification of the cause of action as required by rule 32 is done by referring to the facts alleged in the summons, and it is unnecessary to repeat the particulars.[7]

[32] The terms and conditions of the lease agreement are clear and have been admitted by the Defendants. The Plaintiff's right to claim all charges set out in clause 5.3 of the agreement includes "*any other costs incurred by the tenant as a result of the use of the leased premises and/or enjoyment of the common areas and/or vacant areas (if and to the extent applicable)*".

[33] Clause 5.9 of the agreement provides for all amounts payable in terms of the agreement to be payable by the tenant free of deduction, exchange and/or set off. In terms of clause 5.13 of the agreement, the First Defendant shall be liable for interest on any amounts due in terms of the lease agreement and any unpaid amount, calculated at the prime rate plus 4% per annum. Clause 5.5 of the agreement provides for the calculation of charges, irrespective of whether estimated amounts have been provided by the Plaintiff under the agreement, or otherwise. Clause 5.14 further provides that:

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[7] **Van den Berg v Weiner** 1976 (2) SA 297 (T) at 299 G

"*The landlord shall be entitled to appropriate any amounts received from the tenant towards the payment of any debt or amount owing by the tenant to the landlord irrespective of when the debt arose."*

[34] In terms of clause 6 of the agreement, the First Defendant was obliged to maintain the leased premises at his own cost, including damage or breakage to the interior of the property (including all doors); to replace any fire extinguishing equipment; and to maintain the drainage and plumbing installations. As per clause 6.1.5, without prejudice to any rights and/or remedies available to the landlord in terms of the agreement, any failure by the tenant to attend to any obligation as set out in clause 6 shall entitle the landlord to attend to the necessary and to recover the reasonable cost therefrom from the tenant.

[35] The transactions as set out in annexure "FA1" to the Plaintiff's summary judgment affidavit,[8] also clearly reflects the First Defendant's indebtedness in the amount of R2 465 905.40 as at 4 September 2023. It further appears from annexure "FA1" that interest is reversed on the statement as of 1 August 2023.

Purported defective verification and apparent lack of personal knowledge:

[36] The Defendants challenge the quantum of the Plaintiff's claim in summary judgment without having raised this defence and/or objection in its plea. However, under the disguise of the above point *in limine*, the Defendants seek to impugn the amount claimed by the Plaintiff by arguing that the amount is manifestly incorrect and that the Plaintiff seeks to duplicate the recovery of certain amounts. The Defendants argue that the rental and related charges are not liquidated and cannot be claimed in summary judgment.

[37] In **NPGS Protection and Security Services CC and Another v First Rand Bank Ltd**[9], Makgoka JA stated the following:

"*[11] Rule 32(3) of the uniform rules requires an opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor. To stave off summary judgment, a defendant cannot*

[8] CaseLines: 02 – 16 to 02 - 54

[9] (314/2018)[2019] ZASCA 94; [2019] 3 All SA 391 (SCA); 2020 (1) SA 494 (SCA) (6 June 2019)

content him or herself with bald denials, for example, that it is not clear how the amount claimed was made up. Something more is required. If a defendant disputes the amount claimed, he or she should say so and set out a factual basis for such denial. This could be done by giving examples of payments made by them which have not been credited to their account."

[38] As already stated, the terms of the lease agreement are clear, which terms and conditions have been admitted by the Defendants. If the Defendants were adamant to place the amount claimed in dispute, it was incumbent on the Defendants to provide a factual basis of such denial in its plea and not as a "point *in limine"* in its affidavit resisting summary judgment.

[39] As to the objections raised by the Defendants against the deponent's personal knowledge, it is trite that any person who can swear positively to the facts may make an affidavit in support of a summary judgment application. The essential requirement is that the person should state, at least, that the facts are within his or her personal knowledge.[10]

[40] It has been held that the affidavit by a legal advisor of a plaintiff bank, in which it is stated that the facts deposed to fall within the knowledge of the deponent and that the deponent can swear positively to these facts and confirms them, is sufficient.[11]

[41] In this respect, the deponent clearly identifies herself as a legal advisor in the employ of City Property, the managing agent in relation to the immovable properties and the lease agreements which forms the subject matter of the application; confirms that due to her position she possesses over the necessary firsthand knowledge and has under her direct supervision and control the relevant documents forming the subject matter of the Plaintiff's claim and further confirms that the facts fall within her personal knowledge.

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[10] See: **Forhat Stud Farms (Edms.) Bpk. v Barclays Nasionale Bank Bpk.** 1978 (3) SA 118 (T) at 120 - 1

[11] **Nedcor Bank Ltd v Behardine** 2000 (1) SA 307 at 310 F – 311 C

[42] The deponent's possession and control over the relevant documents forming the subject matter, is corroborated by the relevant documents attached to the affidavit.

[43] Insofar as the Defendants allege that the deponent has failed to certify the "data messages" as required under section 15(4) of the Electronic Communications and Transactions Act, 25 of 2002 ("ECTA"), section 15(1) provides that in any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message, in evidence:

"*(a) On the mere grounds that it is constituted by a data message; or*

(b) if it is the best evidence that the person adducing it, could reasonably be expected to obtain, on the grounds that it is not in its original form."

[44] Section 15(3) and (4) merely pertain to the evidential weight of the data message and its admissibility upon its mere production if certified as correct.

[45] In the premise, I am not persuaded that the deponent lacks the ability to verify the cause of action.

Purported non-compliance with rule 32(4):

[46] It is trite that were evidence in an affidavit is included same does not necessarily invalidate the application. The court may simply ignore such evidence.[12]

[47] Following the amendments to rule 32, it has, however, been held on various occasions that documents annexed to the affidavit in support of summary judgment may be considered.

[48] In **Absa Bank Ltd v Mashinini N.O and Another[13]** the following was stated:

"*[t]he Rule as amended clearly did not envisage a mini-trial by the production of extensive facta probantia, but were, as in the present instance that which would have been a bare or bold denial can be refuted or, in the imprecise words of the*

[12] **AE Motors (Pty) Ltd v Levitt** 1972 (2) SA 658 (T)
[13] (32016/2019; 32014/2019)[2019] ZAGPPHC 976 (22 November 2019) at par 3.11

amended rule, "briefly" be explained by way of annexed document or documents that 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."

[49] I am in agreement with the above dictum.

THE TEST: SUMMARY JUDGMENT:

[50] In the appeal of **South African Land Arrangements CC v Nedbank**[14] the Supreme Court of Appeal succinctly summarised the principles applicable to summary judgment:

> "*[13] The legal principles governing summary judgment proceedings are well-established. In Maharaj v Barclays National Bank Ltd, Corbett JA outlined the principles and what is required from a defendant in order to successfully oppose a claim for summary judgment as follows:*
>
> *'…[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 enquiries into is: (a) whether the defendant had '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 that 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. The word 'fully', as used in the context of the rule (and its predecessors), has been the cause of some judicial*

[14] 2015 JDR 2364 (SCA)

controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bone fide defence."

[51] With reference to the remedy provided by summary judgment proceedings, Navsa JA said the following in **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture[15]:**

"*[31] The summary judgment procedure was not intended to 'shut a defendant out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.*

[32] 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 applications in our courts, summary judgment proceedings can hardly continue to be described as extra ordinary."

[52] In **Raumix Aggregates (Pty) Ltd v Richter Sand CC[16]** the full court explains what is required of a respondent in summary judgment:

"[15] Under the amended Rule the applicant is required, 15 days after the date of delivery of a plea or an exception, to deliver a notice of application for summary judgment, together with an affidavit identifying any point of law relied upon and the facts underpinning the claim, briefly explaining why the defence, as pleaded, does not raise any triable issue. Under the old Rule, the plaintiff was required to file a brief affidavit 'verifying a cause of action' and opining that the

[15] 2009 (5) SA 1 (SCA)
[16] 2020 (1) SA 532 (GJ)

defendant has no bona fide defence. These requirements are no longer applicable under the new procedure. The question is whether this change in procedure would, if applied retrospectively, adversely affect substantive rights.

[16] The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under s 34 of the Constitution."

[53] Rule 32(2)(b) of the Uniform Rules of Court prescribes that the plaintiff shall in an affidavit verify the cause of action and the amount if any, claimed and identify any point of law relied upon and facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial.

[54] In terms of rule 32(3)(b) of the Uniform Rules of Court, the defendants resisting summary judgment application must set out in their affidavit's facts, which if proved at trial, shall fully disclose the nature and grounds of the defence and the material facts relied upon.

[55] In **Breitenbach v Fiat SA (Edms) Bpk**[17] the court held:

"*I respectfully agree… that the word "fully" should not be given its literal meaning in rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all circumstances to be needlessly bald, vague or*

[17] 1976 (2) SA 226 (T) at 228 C and 228 E

sketchy, that will constitute material for the court to consider in relation to requirement of bona fide."

[56] In **Jily v First Rand Bank Ltd**[18] Willis JA held:

"It is indeed trite that a court has a discretion as to whether to grant or refuse an application for summary judgment…. It is a different matter where the liability of the defendant is undisputed: the discretion should not be exercised against a plaintiff so as to deprive it of the relief to which it is entitled. Where it is clear from the defendant's affidavit resisting summary judgment that the defence which has been advanced carries no reasonable possibility of succeeding in the trial action, a discretion should not be exercised against granting summary judgment. The discretion should also not be exercised against a plaintiff on the basis of mere conjecture or speculation."

DEFENCES RAISED:

[57] The First, Second, Third and Fourth Defendants raised the following defences:

57.1. A special plea based on an alleged non-compliance with the dispute resolution clause set out in the written lease agreement;

57.2 The existence of an alleged oral agreement constituting a p*actum de non petendo*, concluded between the Plaintiff and the First Defendant in terms whereof the Plaintiff's debt has purportedly been extinguished;

57.3 As to the conclusion of suretyship agreements by the Second, Third and Fourth Defendants, same were met with bare denial by the Defendants.

ISSUES FOR DETERMINATION:

[58] The issues for determination are the following:

58.1. Whether the Fourth Defendant's late filing of the affidavit resisting summary judgment ought to be condoned;

[18] [2014] ZASCA 183 (26 November 2014 (763/13))

58.4 Whether the defences raised by the Defendants are *bona fide* and whether the defences raised any triable issues;

58.5 Whether the Plaintiff is entitled to summary judgment for the arrear rental and ancillary charges against the Defendants.

DISCUSSION:

Condonation:

[59] The Fourth Defendant's opposing affidavit resisting summary judgment was filed two days late. The application for condonation is unopposed. Having considered the application, I am satisfied that good cause is shown for the non-compliance with the rules and that the Plaintiff suffered no prejudice as a result.

DEFENCES RAISED IN DEFENDANTS' PLEA:

Non-compliance with dispute resolution clause:

[60] The lease agreement between the parties contains an alternate dispute resolution clause, which states the following:

> "*13.3.1 Where a dispute arises regarding indebtedness under this agreement, such dispute shall first be referred to a senior manager of the intermediary and failing resolution within 15 (fifteen) days shall thereafter be referred to an independent practicing-chartered accountant of not less than 5 (five) years standing for determination, whose decision shall be final and binding on both parties."*

[61] On the basis of the above clause 13.3.1, read in isolation, the Defendants argued that there is clearly a dispute between the Plaintiff and the First Defendant regarding the indebtedness under the lease agreement, that the Plaintiff was aware of this dispute prior to institution of the action and that the resolution clause was triggered as soon as a dispute as to indebtedness arose, making the referral to the resolution pre-emptory.

[62] However, clause 3.13 of the lease agreement is preceded by clause 13.2 which reads as follows:

"*13.2.1 Without excluding any rights of the tenant prescribed by the Consumer Protection Act, 2008 or any other legislation applicable, from time to time, <u>either party may elect whether a dispute in terms of this agreement is to be brought in a court with competent jurisdiction or by way of dispute resolution as set out in clause 13.3 below</u>.*"

[own emphasis]

[63] Upon due consideration of the content of clauses 13.2 and 13.3 of the lease agreement, it is evident that the agreement presupposes an election to follow either the process under clause 13.2 or clause 13.3.

[64] In the absence of the existence of any declared dispute between the parties at the time, I find that the Plaintiff was entitled to make an election of process as provided for in clause 13.2.1.

[65] Accordingly, the Defendants' denial of this court's jurisdiction based on the "*resolution dispute clause"* is without merit.

<u>Pactum de non petendo</u>**<u>:</u>**

[66] The apex of the Defendants' defence against the Plaintiff's claim appears to be based on the allegation that the parties concluded an oral *pactum de non petendo* (an agreement not to sue) during or about June or July 2023.

[67] The pleaded version of this alleged agreement provides that the parties agreed as follows:

67.1. The First Defendant's indebtedness to the Plaintiff as at the end of June 2023, would be reduced to a total sum of R250,383.51;

67.2 The First Defendant would make payment of the total reduced indebtedness to the Plaintiff, in four equal monthly instalments of R62,595.75 from August 2023 to November 2023, both months inclusive; and

67.3 The Plaintiff would not enforce clause 13.6 of the lease agreement, in orally agreeing to varying the terms of the lease agreement until

December 2023, in the event of the First Defendant failing to make payment of the total reduced indebtedness to the Plaintiff by November 2023.

[68] However, the pleaded version of this oral agreement is inherently implausible and logically inconsistent. What the Defendants seems to suggest is that the First Defendant's indebtedness towards the Plaintiff as of June 2023, was reduced from R2,112,881.77 to a fraction of R250,383.51, conditional only upon the First Defendant making payment of the reduced debt and only the reduced debt by November 2023, whilst remaining in occupation of the leased premises (against no further charge and purportedly indefinitely) and whilst the written terms of the agreement became completely absolute in relation to its further occupation of the premises until December 2023 (conditional upon the First Defendant making payment by November 2023).

[69] Insofar as the Defendants argue that they complied with the agreement as pleaded, three proofs of payment are relied upon in the plea, being:

69.1. An amount of R250,000.00 paid on 14 February 2023;

69.2. An amount of R250,000.00 paid on 17 March 2023; and

69.3. An amount of R100,000.00 paid on 19 June 2023.

[70] The Defendants alleged *pactum de non petendo* stand in stark contrast to the fact that all these payments were made prior to June 2023, whereas the indebtedness as at end of June 2023, was to be reduced.

[71] Inconsistent with the allegations in the plea, the Defendants state in their affidavit resisting summary judgment that the agreement was concluded in July 2023 and argue that payments are evident from the Plaintiff's statement and were made on or about:

71.1. 1 August 2023;

71.2. 4 September 2023;

71.3. 3 October 2023;

71.4. 1 December 2023.

[72] Consequently, on Defendants’ own version, they failed to comply with what they alleged was a *pactum de non petendo*.

[73] In their affidavit resisting summary judgment, the Defendants aver that their attorneys of record made a *bona fide* error of annexing three incorrect payment proofs to the plea for the period preceding the conclusion of the alleged oral agreement and further that the Defendants intend to amend their plea in due course to rectify the *bona fide* error in respect of the payments and dates of payment.

[74] The affidavits resisting summary judgment were deposed to on 10 and 12 March 2025, respectively. However, after a lapse of a considerable period of approximately 8 months up until the hearing of this application on 5 November 2025, the Defendants appear to have taken no steps to amend their plea in accordance.

[75] The pleaded terms of the *pactum* are also inconsistent with the amounts reflected in the Plaintiff’s evidence (statement), which exceed the purported “reduced debt” and were not payments of four equal monthly instalments of R62,595.75, as alleged. On their own version, it appears that the Defendants failed to comply with what they alleged was a *pactum de non petendo*.

[76] In addition to the inconsistencies referred to above, the First to Third Defendants further attempted to add a further defence in paragraph 58 of their opposing affidavit by stating the following:

> “*58 The First, Third and Fourth Defendants and I, are advised that this constitutes a pactum de non petendo* ***and/or a waiver****.” (own emphasis).*

[77] No reference of a waiver is made in the Defendants’ plea.

[78] In **SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere**[19] the "Shifren" principle was set out that once parties to a written agreement agree that an agreement cannot be altered unless certain conditions are met, no amendment are valid unless the prescribed conditions have been met.

[79] In **Muller and Another NNO v Dennecker**[20] special weight was given to the judgment of Hiemstra in **Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd**[21] where it was held that a *pactum de non petendo* did not amount to a variation or a waiver which is required to be in writing by the contract, but co-existed with a contract in the sense that it merely suspended the enforceability of a contract for a specified period or the occurrence of some contingency.

[80] In **Brisley v Drosky**[22] the importance of the Shifren principle was reiterated and the court rejected an argument, with reference to the Muller case, that a court may refuse to enforce a non-variation clause if it would amount to a breach of the principle of good faith.[23]

[81] Counsel for the Plaintiff argued that an oral *pactum non petendo* in itself cannot justify the violation of the *Shifren* principle as suggested by the Defendants in *casu* and that the non-variation clause is conclusive with the lack of a *bona fide* defence.

[82] It is clear from the numerous notices of default to the First Defendant throughout the period of June 2023 to September 2023, that there was no agreement in line with what the Defendants suggest, particularly that the Plaintiff did not conduct itself in accordance with the purported pactum or waiver of its right to rely on the written lease agreement and evidently relied on the First Defendant's breach and communicated such breach and its intention to cancel the agreement to the First Defendant.

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[19] 1964 (4) All SA 520 (A) at 675
[20] 2002 (1) SA 928 (C)
[21] 1975 (3) SA 273 (T)
[22] 2002 (4) SA 1 (SCA)
[23] See par 13 thereof

[83] The lack of *bona fides* in the Defendants' defence is further evidenced by the fact that on the Defendants own version, the *pactum* was solely based on its indebtedness, which accrued prior to June 2023. The remaining three months of its occupation of the rental premises being unaffected.

[84] With regards to the issue of *bona fide* defence Binns-Ward J stated the following in **<u>Tumileng Trading v National Security and Fire[24]:</u>**

"*[40] However, does the fact that the bones of a triable defence have been made out in the plea mean that summary judgment must be refused? The answer is clearly 'no'! The reason for the negative answer is that the enquiry is not whether the plea discloses 'an issue for trial' in the literal sense of those words, it is whether the ostensible defence that has been pleaded is bona fide or not. As discussed earlier, that that is the relevant enquiry in a summary application follows from the rule maker's decision to leave subrule 32(3) substantively unamended. If one were to apply the amended rule differently, it would be impossible to marry the requirement of a plaintiff apparently posited by subrule 32(2)(b) (viz. showing that 'the defence as pleaded does not raise any issue for trial') with what is demanded of a defendant in terms of subrule 32(3)(b) (viz. showing that its defence to the action is bona fide; i.e. that its ostensible defence is not a sham). The respective supporting and opposing affidavits would pass each other like ships in the night if one were to understand the notion of 'issue for trial' in subrule 32(2)(b) as denoting something different from a 'bona fide defence' within the meaning of subrule 32(3)(b).*"

[85] Accordingly, I find that the averments in the Defendants' opposing affidavit fall far short of what is required in terms of rule 32(3)(b) of the Uniform Rules of Court.

<u>Suretyship agreements:</u>

[24] 2020 (6) SA 624 at 640, par 40

[86] The Second to Fourth Defendants each signed a deed of surety in favour of the Plaintiff as co-principal debtor and surety for the performance of the First Defendant in terms of the lease agreement. The Second, Third and Fourth Defendants raised no *bona fide* defence insofar as it relates to the sureties and has met the allegations relating to the existence of suretyship agreements with a bare denial. However, the denial of liability on the part of the suretyships only applies insofar as the principal debt has been extinguished.

[87] I am satisfied that the suretyship agreements comply with the necessary requirements and in the absence of any evidence on which the court can find that a valid oral *"pactum"* agreement was concluded, or that the First Defendant discharged its debt towards the Plaintiff, the liability of the Second, Third and Fourth Defendants as co-principal debtors and sureties for the performance of the First Defendant in terms of the lease agreement, remains.

[88] In the result, I am satisfied that the Plaintiff is entitled to summary judgment as prayed for and accordingly I make the following order:

ORDER:

Having heard counsel and having considered the written heads of argument and having read the documents filed of record, the following order is made:

1. Condonation is granted to the Fourth Defendant for the late filing of her opposing affidavit.

2. Summary judgment is granted against the First, Second, Third and Fourth Defendants in the following terms:

    2.1 That the summary judgment be granted against the First, Second, Third and Fourth Defendants, jointly and severally, the one paying the other to be absolved, as follows:

        2.1.1 Payment in the amount of R2 465 905.40;

        2.1.2. Interest on the amount of R2 465 904,40 calculated at 4% above the prime bank overdraft interest charge rate by

Nedbank Ltd per annum *a tempora morae* to date of payment or the maximum amount or rates set by law from time to time, whichever is the higher amount (prime interest rate 11.75% + 4% = 15.75%);

2.2 Payment of cost, such cost to be taxed on the attorney and client scale.

JA KLOPPER

ACTING JUDGE

HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

This Judgment was handed down electronically by circulation to the Plaintiff's legal representatives and the Defendants by email and by being uploaded to Case Lines. The date and time for the hand down is deemed to be on 3 February 2026

Appearances

Counsel for the Plaintiff: Adv J Strubel

Instructed by: Attorneys Raath Law Inc

	Ref.:
Appearance for Defendants:	Adv A Campbell
Defendants' attorneys:	Abdul Bacus Attorneys
Date of Hearing:	5 November 2025
Date of Judgment:	19 May 2026