

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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 28 July 2026

SIGNATURE OF JUDGE:

In the matter between:

**JEPPE EDUCATION CENTRE MPC t/a
JEPPE EDUCATION CENTRE
REG NO: 2007/013226/08**

1st Applicant

**HLATWAYO, HARRY
ID NO: 6[...]**

2nd Applicant

TUNYWA, ABDUL
ID NO: 6[...]

3rd Applicant

TSELE, MOTSHENG JOSEPHINE
Applicant
ID NO: 6[...]

4th

and

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

Respondent

In re:

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] The Applicants apply for leave to appeal against the whole of my judgment, save for the order on condonation, delivered on 19 May 2026 (“the judgment”), in which summary judgment was granted in favour of the Plaintiff (“the Respondent herein”) against the First to Fourth Defendants (“Applicants herein”), for payment of R2,464,905.40, together with interest thereon and cost on an attorney and client scale.
- [2] The application is opposed by the Respondent. Both parties filed written heads of argument. I have considered the written heads as well as the oral argument presented. For the reasons that follow, the application for leave to appeal falls to be refused.
- [3] The Respondent raises as a threshold objection that the notice of application for leave to appeal is fatally defective in that it fails to comply with rule 49(1)(b) of the Uniform Rules of Court. The Applicants advance ten grounds of appeal, which I address individually below. I shall deal first with the applicable legal framework, then with the threshold objection, and thereafter with each ground *seriatim*.

APPLICABLE LEGAL FRAMEWORK:

- [4] Applications for leave to appeal are governed by section 17 of the Superior Courts Act 10 of 2013 (“the Act”) and rule 49 of the Uniform Rules of Court. Section 17(1) of the Act provides that leave to appeal may only be given where the judge is of the opinion that:

- “(a)(i) *the appeal would have a reasonable prospect of success; or*
- (ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
- (b) *the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
- (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.”*

- [5] The phrase “*would have a reasonable prospect of success*” marks a deliberate legislative elevation from the former test of “*could reasonably succeed*”. in ***The Mont Chavaux Trust v Tina Goosen and 18 Others***¹ Bertelsmann J explained:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, The use of the word “would” in the new statute indicates a measure of certainty that another will differ from the court whose judgement is sought to be appealed against”.

- [6] This elevated threshold was affirmed by the Supreme Court of Appeal in ***Ramakatsa and Others v African National Congress and Another***². The word “*would*” requires a reasonable measure of certainty, not a mere possibility.

- [7] In ***Swart v Heine and Others***³, the Supreme Court of Appeal stated:

“[13] There is a further disconcerting aspect to this appeal. The issues in this appeal are simple and straightforward and do not involve complicated or complex issues of law. This is a case where leave to appeal should not have been granted at all. ... Leave to appeal should not be granted where there is no reasonable prospect of success on appeal, or no compelling reason why an appeal should be heard (s 17(1)(a) of the Superior Courts Act 10 of 2013).”

- [8] It is axiomatic that an application for leave to appeal is not an opportunity to re-argue the case. The question is not whether the court was wrong, but whether there is reasonable prospect that another court would reach a different conclusion.

- [9] Furthermore, it is settled law that an appeal lies against the substantive order of a court, not against the reasons for judgment.⁴

¹ 2014 JDR 2325 (LCC) par 6

² [2021] ZASCA 31

³ 192/2015 [2016] ZASCA (14 March 2016) par 13

- [10] An applicant must therefore demonstrate not merely that the court erred in its reasoning, but that the substantive order would have been different, had the correct law or facts been applied. An appeal on a question of law means an appeal in which the question for argument and determination is what the correct legal principle, or correct interpretation of a legal principle is.⁵
- [11] Where the court exercises a true judicial discretion, the standard of appellate interference is more demanding still. As the Constitutional Court held in ***Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another***,⁶ an appellate court will not interfere with the exercise of a discretion unless it is satisfied that the discretion was not exercised judicially, or that it was influenced by wrong principles of a misdirection on the facts, or that it reached a decision which could not reasonably have been made by a court properly directing itself. An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

ADEQUACY OF THE NOTICE OF APPLICATION FOR LEAVE TO APPEAL:

- [12] Rule 49(1)(b) of the Uniform Rules of Court, requires that the notice of application for leave to appeal “*concisely and succinctly*” set out the grounds upon which leave to appeal is sought. The grounds must identify with clarity whether the complaint concerns an incorrect finding of fact, an incorrect finding of law, or a failure to act judicially.⁷
- [13] An applicant who relies on an incorrect finding of law must clearly and succinctly identify the incorrect legal principle applied by court, and the correct legal principle that should have been applied. An applicant who relies on an incorrect finding of fact must show, from the text of the decision itself (*ipsissima verba*), that an accepted fact differs from a common cause or undisputed fact in

⁴ ***Cape Empowerment Trust Ltd v Fischer Hoffman Sithole*** 2013 (5) SA 183 (SCA) at 198 I – J, ***Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg*** [2015] JOL 33081 (SCA) at para 10 - 11

⁵ ***Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd*** [1992] 2 All SA 453 (A) at 457 - 459

⁶ 2015 (5) SA 245 (CC) at para 88 - 89

⁷ ***Media Workers Association*** (*supra*) at 457 – 459; ***Rex v Dhlumanyo and Another*** [1948] 2 All SA 566 (A) at 594 par 10

the record, or that the judicial officer overlooked certain facts and/or probabilities.⁸ An appeal court will not, save for in exceptional circumstances, permit disputes of fact or expert opinion to be raised for the first time on appeal.⁹

[14] Since an appeal lies only against the substantive order, the notice must also specify what order should be granted on appeal.¹⁰ It is not sufficient to list purported errors in the court's reasoning if no attempt is made to demonstrate how the substantive order would differ as a result.

[15] In **Songono v Minister of Law and Order**¹¹, Leach J stated:

"...Accordingly, insofar as rule 49(3) is concerned, it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what the case the respondent must be prepared to meet....the grounds of appeal required under rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully and properly informed of the case which the applicant seeks to make out... Just as rule 49(3) is pre-emptory in that regard, rule 49(1)(b) must also be regarded as pre-emptory. In my view, the lengthy and rambling notice of appeal filed in casu falls woefully short of what was required."

[16] The notice of application in the present matter consists of ten grounds. The majority are directed at the court's reasoning as opposed to the substantive order. The notice does not specify what alternative order should be sought on appeal, nor does it demonstrate how the substantive order would differ if any of

⁸ **Rex v Dhlumanyo and Another** (*supra*) at para 10

⁹ **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others** 2005 (2) SA 359 (CC) at 388 F – 389 A

¹⁰ **Cape Empowerment Trust** (*supra*) at 198 I – J; **Atholl Developments** (*supra*) at para 10 - 11

¹¹ 1996 (4) SA 384 (E) at 385 G – 386 A

the contentions were upheld. Several grounds fail to distinguish whether they are directed at findings of law, findings of fact, or the exercise of a discretion. These are material deficiencies.

- [17] Notwithstanding these deficiencies, which in my view render the notice non-compliant with rule 49(1)(b), I am prepared to consider each ground on the merits in the interest of finality and justice. I do so mindful that even if an applicant were to satisfy the court, that it erred in fact or in law, it must also show that the substantive order would have been different.

THE GROUNDS OF APPEAL CONSIDERED:

First ground: personal knowledge of the deponent:

- [18] The first ground is that the court erred in finding that the deponent to the summary judgment affidavit had the requisite personal knowledge and could swear positively to the facts and that the mere assertion of personal knowledge is insufficient.

- [19] The governing legal principles are well-settled. In ***Forhkat Stud Farms (Edms) Bpk v Barclays Nasionale Bank Bpk***,¹² it was held that any person who can swear positively to the facts may make an affidavit in support of a summary judgment application, and the essential requirement is that the person states, at least, that the facts are within his or her personal knowledge, unless such knowledge appears from the facts stated. In ***Nedcor Bank Ltd v Behardien***¹³, the court confirmed that an affidavit by a legal advisor of a plaintiff, 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 those facts, is sufficient.

- [20] The deponent, Ms Angelique Smit, identified herself as a legal advisor employed by City Property (Pty) Ltd, the managing agent in relation to the immovable properties and lease agreements forming the subject matter of the claim. She confirmed that by reason of her position, she possessed firsthand knowledge and had under her direct supervision and control all the relevant

¹² 1978 (3) SA 118 (T) at 120 H to 121 A
¹³ 2000 (1) SA 307 (C) at 310 F – 311 C

documents constituting the subject matter of the Plaintiff's claim. Her possession and control over those documents were corroborated by the documents attached to the affidavit.

[21] The Applicant's contention that the deponent's knowledge was "*purely derivative*" misrepresents the applicable legal principle. The law does not require that the deponent have been personally present, at the lease negotiations or party to alleged oral discussions. It requires no more than that the deponent state that the facts are within her personal knowledge. That requirement was met in this case.

[22] Critically, the Applicant's offer contains no alternative legal principle and do not challenge the foundational authorities of ***Forhkat Stud Farms*** and ***Nedcor Bank v Behardien***. The court correctly applied unchallenged legal principles to the facts. This ground has no reasonable prospect of success on appeal.

The second and third grounds: the *pactum de non petendo* and the *Shifren* principle:

[23] The second ground is that the court erred by deciding on the plausibility of the *pactum de non petendo* defence rather than its triability, thereby conducting a "*mini trial*". The third ground is that the court erred in relying on the *Shifren* principle, as a *pactum de non petendo* is not a "*variation*" of a contract. These grounds are related and are considered together.

[24] The test in summary judgment proceedings is not whether the defence is plausible but whether it is *bona fide* and good in law. In ***Maharaj v Barclays National Bank Ltd***¹⁴, Corbett JA summarised the enquiry and stated that the court must determine:

- (a) Whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded; and
- (b) whether on the facts so disclosed, the defendant appears to have a defence which is both *bona fide* and good in law.

[25] In ***Tumileng Trading v National Security and Fire***¹⁵, Binns-Ward J further explained:

“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 has been pleaded in bona fide or not.”

[26] The Applicants contend that the judgment conducted a “mini trial” on the papers and rely, for this proposition on ***Absa Bank Ltd v Mashini N.O and Another***¹⁶ quoting the dictum that:

“The Rule as amended clearly did not envisaged a mini trial.”

[27] This reliance is fundamentally misconceived and reveals a selective and inaccurate reading of the authority cited. The judgment itself relied on the very same case and the very same dictum and expressly agreed with it at par [49] of the judgment. The Applicants have extracted a single phrase from the dictum while ignoring the critical sentence that follows it. The full dictum in ***Absa Bank v Mashini*** reads:

“[T]he Rule as amended clearly did not envisaged 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 amended rule, ‘briefly’ be explained by way of annexed document or documents that should in my view be allowed. Do not do so would be to revert to the unsatisfactory position which was in existence prior to the amendment of the rule.”

[28] Read in full, ***Absa Bank v Mashini*** does not prohibit the refutation of a bald denial by way of documentary annexures, it expressly permits it. That is the precise course adopted by the Respondent in the summary judgment proceedings below. A litigant who cites an authority for a proposition that the authority itself refutes, cannot be said to have identified an error of law. The “mini trial” ground accordingly has no foundation either in the judgment or in the

¹⁵ 2020 (6) SA 624 at 640, par 40

¹⁶ (32016/2019; 32014/2019) [2019] ZAGPPHC 976 at par 3.11

case law invoked. The court did no more than what ***Absa Bank v Mashini*** sanctions. It allows the Plaintiff's documentary annexures to refute what was otherwise a bare and self-contradictory denial.

[29] Applying the correct test, whether the defence was *bona fide* and good in law, the court found correctly that the Defendants had failed to discharge the onus of establishing such a defence. The *pactum* pleaded was self-contradictory in the following material respects:

- (a) The three payments relied upon the plea (February, March and June 2023) all preceded the alleged conclusion of *pactum*, which the Defendants placed in June or July 2023;
- (b) The version in the plea was materially contradicted by the version in the opposing affidavit, which placed the agreement in July 2023 and relied on different payment dates and amounts;
- (c) The Defendants failed, on their own version, to pay the four equal monthly instalments of R62,595.75 as alleged;
- (d) No steps were taken in the approximately eight months between the filing of the opposing affidavit and the hearing of the application to amend the plea to reflect the alleged *pactum*. These contradictions were not peripheral but went to the heart of the alleged defence, and it was permissible and correct for the court to identify them on the papers before it.

[30] Regarding the *Shifren* principle: In ***SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere***¹⁷ and ***Brisley v Droskey***¹⁸ the courts established and affirmed that a non-variation clause requiring amendments to be in writing and signed will be enforced. The Applicants contend, relying on ***Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd***¹⁹ and ***Muller and Another NNO v Dennecker***,²⁰ that a *pactum de non patendo* (an

¹⁷ 1964 (4) All SA 520 (A)

¹⁸ 2002 (4) SA 1 (SCA)

¹⁹ 1975 (3) SA 273 (T)

²⁰ 2000 (1) SA 928 (C)

agreement suspending the enforceability of a debt) is not a “*variation*” of a contract and is accordingly not caught by a non-variation clause.

[31] Whatever the theoretical distinction between a *pactum de no patendo* and a variation, the distinction is of no assistance to the Applicants on the facts of this case. The Defendants’ own pleaded version disclosed that the alleged oral agreement purported to reduce the debt from R2,112,881.77 to R250,383.51, to restructure payment obligations, and to extend occupation of the premises. This constitutes a fundamental variation of the written lease agreement’s substantive terms and not merely a temporary suspension of a remedy. The lease agreement contains a non-variation clause acquiring amendments to be in writing. The oral agreement could not be relied upon on any characterisation.

[32] Furthermore, the Respondent correctly points out that the defence as pleaded did not constitute a *bona fide* defence good in law, nor did the “*amended*” or “*new*” version as impermissibly raised in the opposing affidavit.²¹ A defendant cannot at the summary judgment stage advance defences not raised in the plea. The court correctly applied this principle.

[33] An appeal court applying ***Thumaleng Trading*** would not reach a different conclusion on these grounds.

Fourth ground: the dispute resolution clause:

[34] The fourth ground is that the court erred in finding that there was no declared dispute between the parties and in relying on clause 13.2 rather than clause 13.3.1 of the lease agreement. The Applicants contend that once a dispute has been declared, clause 13.3.1 becomes mandatory and the election in clause 13.2 falls away.

[35] Clause 13.2 of the lease agreement expressly provides that:

“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.”

²¹ ***Nedbank Ltd v Uphuhliso Investments and Projects (Pty) Ltd and Others*** [2022] 4 All SA 827 (GJ)

[36] Clause 13.3.1 provides that where a dispute arises regarding indebtedness, *“such dispute shall first be referred to a senior manager of the intermediary and failing resolution within 15 days shall thereafter be referred to an independent practicing-chartered accountant... whose decision shall be final and binding.”*

[37] The Applicants’ interpretation, that clause 13.3.1 becomes pre-emptory upon the declaration of a dispute, is irreconcilable with the structure and plain wording of the agreement. Clause 13.2 precedes clause 13.3 in the agreement and confers an election on either party as to the dispute resolution mechanism. The lease agreement contains no clause which stipulates that once a dispute is *“declared”*, the election in clause 13.2 falls away and clause 13.3 becomes pre-emptory. Quite the contrary: the lease agreement presupposes an election to follow either the process under clause 13.2 or clause 13.3. This is consistent with the well-established principle of interpretation that a court must read the contract as a whole and give effect to all its provisions.²²

[38] The Respondent correctly submits that clause 13.3 can never be pre-emptory having regard to the provisions of clause 13.2. Equally, it is irrelevant whether there was a formerly declared dispute prior to institution of action. The election in clause 13.2 remains applicable, irrespective of whether a dispute has been declared or not. Even if the court’s finding that no formal dispute was declared prior to the institution of action were correct, the substantive order would remain unaffected on appeal because clause 13.2 independently entitles the Respondent to elect litigation.

[39] This ground has no reasonable prospects of success on appeal.

Fifth ground: adequacy of the opposing affidavit under rule 32(3)(b):

[40] The fifth ground is that the court erred in finding that the Applicants’ opposing affidavit fell short of what is required by rule 32(3)(b) of the Uniform Rules of Court, and in its application of *Thumuleng Trading v National Security and Fire*.

²² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at par 18

[41] Rule 32(3)(b) requires that the Defendant's affidavit resisting summary judgment sets out "*The facts upon which the Defendant relies as constituting a defence, which facts, if proved at trial, shall fully disclose the nature and grounds of the defence.*"

[42] In ***Breytenbach v Fiat SA (Edms) Bpk***,²³ the court held that the word "fully" should not be taken literally and that the statement of material facts need only be sufficiently full to persuade the court that the defence, if proved, would constitute a valid defence. However, a "*needlessly bald, vague and sketchy*" affirmation of a defence is relevant to *bona fides*. In ***NPGS Protection and Security Services CC and Another v First Rand Bank Ltd***,²⁴ Makgoka JA held:

"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 therefore. To stave off summary judgment, a defendant cannot content him or herself with bald denials.....If a defendant disputes the amount claimed, he or she should say so and set out a factual basis for such denial."

[43] The Applicants' opposing affidavit was materially inconsistent with the plea. The affidavit introduced a different version of the alleged *pactum*, placing it in July 2023 with the different payment dates and the amounts that was irreconcilable with what had been pleaded. As confirmed in ***Nedbank v Uphuhliso***²⁵, a defendant cannot at summary judgment stage advance defences not raised in the plea.

[44] Furthermore, the Respondent correctly submits that even if the court had not found the opposing affidavit to fall short of the requirements of rule 32(3)(b), the fact that the Applicants lacked a *bona fide* defence good in law would cause the substantive order to remain the same regardless. This ground therefore cannot, on appeal, result in a different substantive order.

Sixth ground: failure to account for the intention to amend:

²³ 1976 (2) SA 226 (T) at 228 C and 228 E

²⁴ (314/2018) [2019] ZASCA 94 at par 11

²⁵ [2022] 4 All SA 827 (GJ)

[45] The sixth ground is that the court erred by failing to account for the Applicants stated intention to amend their plea, and that summary judgment ought to have been refused because the defect in the plea was remediable.

[46] The proposition that summary judgment must be refused where a defendant states an intention to amend a defective plea finds no support in our law. The opposite is true. As noted above, a defendant cannot at summary judgment stage, advance defences that were not raised in the plea, and an intention to amend, without a formal application for amendment, cannot convert an otherwise ineffective defence in a triable issue.²⁶

[47] An issue raised in an affidavit resisting summary judgment can never constitute a “*triable issue*” warranting leave to defend if that issue was not pleaded, because evidence on such an issue could never be led at trial. It would be irrelevant to the pleadings and therefore inadmissible. The Respondent is correct in this regard.

[48] It must be noted that the court did take the Applicants stated intention to amend into account and, notwithstanding the intention to amend, correctly found that no *bona fide* defence good in law had been disclosed.

[49] Accordingly, this ground cannot succeed on appeal.

Seventh ground: compliance with the Justices of Peace and Commissioners of Oaths Act:

[50] The seventh ground is that the court erred in finding that the affidavit was compliant with the Justices of Peace and Commissioners of Oaths Act 16 of 1963 (“the Oaths Act”) in that the incorrect gender was referred to by the Commissioner of Oaths.

[51] The Respondent correctly points out that the court did not make a finding that the affidavit was “*compliant*” with the Oaths Act in the sense of being without affect. The court found that there was substantial compliance with the Act and regulations, having regard to the fact that the Commissioner referred to the

correct gender three times and only once referred to the incorrect gender. The court accordingly applied the maxim *omnia praesumuntur rite esse acta donec contrarium probitur* (presumption of regularity), for the purposes of presuming that the document had in fact been sworn to and signed in the presence of a commissioner. The court then exercised its discretion to accept the affidavit.

[52] In ***Absa Bank Ltd v Botha N.O. and Others***²⁷ it was held that, 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.

[53] The court exercised this discretion judicially. The Applicants do not contend that the court failed to act judicially in exercising the discretion, but contend that the court erred in finding substantial compliance. However, the finding of substantial compliance is well-founded on the facts. Three references to the correct gender against one reference to the incorrect gender is, on any fair reading, substantial compliance.

[54] As this court held in ***Trencon Construction*** at para 88 – 89, an Appellate Court ought to be slow to interfere with a discretion that was exercised judicially and within a range of permissible decisions. It is not sufficient that another court might have favoured a different option. That is not the test. The notice of application for leave to appeal does not specify any particular fact or legal provision that ousted this court's discretion to accept the affidavit.

[55] This ground has no reasonable prospect of appeal.

Eighth ground: alleged duplication of interest in the amount claimed:

[56] The eighth ground is that the court erred in failing to take into account that the amount verified by the Respondent in the affidavit for summary judgment was incorrect and that the amount claimed already included interest, thereby

²⁷

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

creating a duplication of interest in the claim and rendering the amount incapable of verification by the deponent.

[57] This ground is raised for the first time in the application for leave to appeal. The Applicants sought to challenge the amount claimed by the Respondent in summary judgment without having raised this defence and/or objection in their plea. As confirmed in **Nedbank v Uphuhliso**, a Defendant cannot at summary judgment states advanced defences that were not raised in their plea.

[58] It was accordingly incumbent on the Applicants, if they were adamant to place the amount in dispute, to provide a factual basis for such denial in their plea.²⁸ Raising such a contention for the first time by way of a point *in limine* in the opposing affidavit was impermissible.

[59] The court correctly held that the challenge to the amount was impermissible in the absence of a corresponding plea. There is no reasonable prospect that an Appeal Court will approach this issue differently.²⁹

[60] Accordingly, this ground fails.

Ninth ground: verification of the cause of action in terms of rule 32(2)(b):

[61] The ninth ground is that the court erred in finding that the Respondent had complied with rule 32(2)(b) of the Uniform Rules of Court by verifying the cause of action, where there was a multiplicity of causes of action, each of which needed to be independently verified.

[62] Rule 32(2)(b) requires that the affidavit in support of a summary judgment application verify the cause of action and the amount, if any, claimed. The Applicants contend that each breach of the lease agreement constitutes a separate cause of action and that each required separate verification.

[63] The court's finding on this point was correctly founded on **Van den Berg v Weiner**,³⁰ where it was held that verification of the cause of action as required

²⁸ **JNO G Teale & Sons (Pty) Ltd v Vrystaatse Plantediens (Pty) Ltd** 1968 (4) SA 371 (O)

²⁹ **NPGS Protection Security Services CC v First Rand Bank** [2019] ZASCA 94

³⁰ 1976 (2) SA 297 (T) at 299 G

by rule 32 is done by referring to the facts alleged in the summons, and it is unnecessary to repeat the particulars. The court also correctly applied ***Airports Company South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC***.³¹

[64] The Plaintiff's claim is based on the First Applicant's breach of the lease agreement and the Respondent verified this in detail with reference to the particulars of claim, with specific reference to arrear rent and ancillary charges. There is nothing lacking in particularity in the statements made by the deponent in relation to the Respondent's cause of action. To the contrary, the affidavit sets out more than what is required under rule 32(2)(b).

[65] Neither the court's reliance on ***Van den Berg v Weiner*** nor on ***Airports Company South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC*** is specifically challenged by the Applicants.

[66] Accordingly, this ground of appeal will not succeed on appeal.

Tenth ground: the cost order on the attorney and client scale:

[67] The tenth ground is that the court erred in ordering cost on the attorney and client scale against the Applicants, on the basis that the application for summary judgment should have been refused and cost should have been awarded to the Applicants.

[68] This ground is, in effect, entirely consequential upon the other grounds. Since summary judgment was correctly granted, the cost order flows from that. The premise of this ground therefore falls away.

[69] In any event, the award of cost on the attorney and client scale falls within the discretion of the court. As a general rule, a court will award costs on the attorney and client scale only where there are special grounds present, such as that the litigant has been guilty of dishonesty or fraud, that its motives have been vexatious, reckless and malicious or frivolous, that it has acted

³¹ (unreported, 13733/2017) [2022] ZAGPJHC 263 (26 April 2022)

unreasonably in its conduct of the litigation, or that its conduct is in some way reprehensible.³²

[70] The present matter, the award of cost on the attorney and client scale was additionally supported by clause 13.7 of the lease agreement, annexure “D”, which makes express provision for attorney and client scale cost. The court therefore not only exercised its discretion judicially, but did so in accordance with the express contractual terms to which the Applicants had agreed.

[71] Having regard to the standards set in ***Trencon Construction*** at para 88 and 89, there is no reasonable prospect that an Appellate Court would interfere with the court’s exercise of its discretion in awarding cost on the attorney and client scale.

[72] Accordingly, this ground must also fail.

ABSENCE OF COMPELLING REASONS:

[73] In terms of section 17(1)(a)(ii), leave to appeal may also be granted where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter and consideration.

[74] The Applicants have identified no conflicting judgments on any of the ten grounds raised. The legal principles applicable to summary judgment proceedings, the personal knowledge requirement, the *Shifren* principle the scope of a *pactum de non patendo*, the requirements for an opposing affidavit, the verification of a cause of action, the exercise of the discretion regarding compliance with the Oaths Act, and the award of cost on the attorney and client scale, are all well-settled and consistent across the authorities.

[75] This is not a case raising novel questions of law. It is, as the Supreme Court of Appeal described in ***Swart v Heine***, “*simple and straightforward*” in its application of well-established principles to undisputed facts. No compelling reasons exist why a Court of Appeal should hear this matter.

³²

Wraypex (Pty) Ltd v Barns 2001 (3) SA 205 (GNP) at 205 I – 207 G; Erasmus Superior Court Practice at RS72019 D5-21 to D5-22

CONCLUSION:

[76] I have considered each of the ten grounds of appeal individually and collectively. In respect of each ground, I am satisfied that there is no reasonable prospect that another court would arrive at a different substantive order. The court correctly applied established legal principles to the facts before it.

[77] Several of the grounds, notably the eight and a number of the points *in limine*, were raised for the first time in the opposing affidavit or in the application for leave to appeal, without having been pleaded. These grounds are, on the authority of ***Nedbank v Uphuhliso***, impermissible.

[78] The grounds dealing with the adequacy of the notice of application are well-founded. The notice fails to comply with rule 49(1)(b) in that it directs criticism at the court's reasoning rather than at the substantive order, fails to specify what alternative order should be granted on appeal, and fails to demonstrate that the substantive order would have been different had any alleged error been corrected. These deficiencies are material.

[79] Regarding cost, the initiation of this application for leave to appeal, raising ten grounds, most of which lack any foundation in law, constitutes the deployment of proceedings to further delay the enforcement of an order that correctly and properly granted summary judgment. The lease agreement provides expressly for cost on the attorney and client scale. The conduct of the Applicants in these proceedings has been unreasonable. Cost on the attorney and client scale are appropriate.

[80] In ***Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture***³³ Navsa JA emphasised that summary judgment proceedings were designed to prevent sham defences not defeating the rights of parties entitled to judgment. The application for leave to appeal is the continuation of that strategy of delay and must be brought to an end.

[81] Accordingly, I make the following order:

³³ 2009 (5) SA 1 (SCA) at para 31 - 32

1. The application for leave to appeal is refused.
2. The Applicants are ordered to pay the cost of this application for leave to appeal jointly and severally, the one paying, the other to be absolved, 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

Appearances

Counsel for the Plaintiff: Adv J Strubel

Instructed by: Attorneys Raath Law Inc

Appearance for Defendants: Adv A Campbell

Defendants' attorneys: Abdul Bacus Attorneys

Date of Hearing: 02 July 2026

Date of Judgment: 28 July 2026

