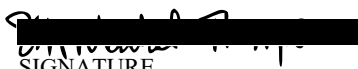


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 080588/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
1/9/2026	
DATE	SIGNATURE

In the matter between:

ANTONIO PEDRO

Applicant/Plaintiff

and

JOSE CRISOTOMO PACHRCO

First Respondent/Defendant

OLGA PACHECO

Second Respondent/Defendant

JUDGMENT

WENTZEL -THOMPSON J

Introduction

- [1] The plaintiff applies for summary judgment arising from an arrangement under which the defendants received rental paid by tenants occupying the plaintiff's immovable property in Pretoria on the plaintiff's behalf. The defendants initially denied substantially every material allegation concerning that arrangement.

Shortly before the application was ultimately to be heard, they sought to replace their plea with one in which they admitted the existence of an agreement but characterised it as a loan governed by the National Credit Act 34 of 2005 (“the NCA”).

- [2] The central question is whether the rentals received by the defendants constituted monies entrusted to them by the plaintiff for collection, administration and investment on his behalf, or whether those monies were lent by the plaintiff, with the consequence, so it is argued, that the transaction was an unlawful credit agreement because the plaintiff was not registered as a credit provider, and thus precluded the plaintiff from recovering the monies so lent.

The factual background

- [3] The plaintiff is the owner of residential property situated at 1242 Ruimsig Crescent, Woodhill Golf Estate. On 30 August 2021, he concluded a written lease with third-party tenants. Amongst its terms was that the rental would be paid into a bank account belonging to the first defendant. The tenants paid a deposit of R50 000 and thereafter monthly rental into the first defendant’s bank account as arranged.
- [4] The arrangement, so the plaintiff says, came about because he was living outside South Africa in Mozambique and in order to transmit the funds to himself in Mozambique would require compliance with strict South African Reserve Bank (SARB) and South African Revenue Service (SARS) regulatory requirements. The plaintiff had known the defendants for many years and they were close friends. The plaintiff explains that the arrangement arose because he required the assistance of someone in South Africa to receive and administer the rentals generated by his South African property on his behalf.
- [5] The agreement pleaded by the plaintiff was that the defendants would receive the deposit and rentals from the plaintiff’s tenant on his behalf by way of payment into the first defendant’s bank account, the first defendant would render accounts to the plaintiff, and they would receive R750 per month as “*commission*” for performing this administrative function. In addition, the plaintiff pleads that it was

further agreed that the funds collected would be repayable to the plaintiff on demand.

- [6] At the time that the agreement was concluded, the commission constituted 1.5% of the rental in the amount of R50 000 per month. The pleaded agreement describes the amount of R750 per month as a monthly administration fee, not as commission. But in the correspondence between the parties, the plaintiff refers to this payment as “*commission*.”
- [7] The plaintiff maintains that the arrangement was subsequently altered in October 2022. Instead of leaving the accumulated funds in an ordinary account, the defendants were to place the monies received and thereafter received into an interest-bearing account earning not less than 8.5% per annum. The monies and the return earned upon were re payable to the plaintiff on 30 days’ notice.
- [8] The contemporaneous evidence accords closely with that version. On 14 August 2022, the plaintiff asked the defendants to prepare a complete statement reflecting all rentals received during the preceding 12 months, including the R50 000 tenant’s deposit, and separately to calculate their commission.
- [9] The defendants thereafter produced what is headed a “*STATEMENT OF ACCOUNT - ANTONIO PEDRO*”. It records the successive rental receipts, a R50 000 deposit and, by October 2022, an amount of R750 000 transferred into what is described as an “*A PRAZO*” or term deposit. As at 31 May 2023 the document recorded that R1.15 million had been received by the first defendant.
- [10] This document strongly refutes the suggestion that the rental amounts paid into the first defendant’s account constituted a loan; a borrower ordinarily does not render the lender with an account of money loaned to him, which on the first defendant’s version, he was free to employ for his own purposes. On the contrary, the document emanating from the first defendant himself is entirely consistent with an administrator or agent accounting for monies received for another.
- [11] The same understanding emerges from the plaintiff’s communication of 16 February 2024. By then a South African FNB account had become available into

which the rentals could be paid directly. The plaintiff instructed that future rentals be redirected to that account, asked the defendants to invoice him for outstanding commission, and requested a statement documenting all rental monies deposited into the first defendant's personal account, including the interest earned, followed by transfer of those monies to the designated FNB account.

- [12] Nothing in that correspondence suggests that the plaintiff regarded the first defendant as a debtor, enjoying the use of money that he had loaned to them. He treated the first defendant as a friend who had accommodated him by receiving and administering his rentals. He acknowledged that he owed the first defendant commission for performing that service, while at the same time making it clear that they were required to account to him for his rental income and its investment return.

The pleas filed by the defendants

- [13] The defendants' original plea did not allege a loan. Apart from admitting those allegations which appeared from the written lease itself, their plea consisted substantially of denials and demands that the plaintiff prove his allegations.
- [14] In June 2025, the defendants materially changed their stance. They filed an amendment to their plea in which they admitted that an agreement was concluded on 30 August 2021, but alleged that the plaintiff agreed to "*loan*" the defendants the amounts paid by the lessee, that the defendants would receive R750 per month for administering the lease payments; and that the supposed loan carried interest at 0%.
- [15] Upon that foundation, the defendants placed reliance on the NCA and contended the alleged loan constituted a credit agreement; that the plaintiff was required to register as a credit provider; and that because he was not registered, the agreement was unlawful under s 89 and unenforceable. On this basis, the defendants contended that they were not obliged to repay the so-called "*loan*" amounts
- [16] The plaintiff denied that any money was ever lent to the defendants. He insisted that the rental amounts were received by them on his behalf and were to be

invested on his behalf. He also relied upon the long friendship between the parties and the fact that he was not engaged in the business of advancing credit.

- [17] In February 2025 another event occurred that has considerable bearing upon the *bona fides* of the defence subsequently advanced. Shortly before the summary judgment application was due to be heard, the defendants paid R1.1 million into the plaintiff's attorney's trust account. The matter was removed to permit settlement discussions. After crediting that payment, the plaintiff says that the capital balance presently outstanding is R425 500.

Summary judgment

- [18] Rule 32 is not intended to prevent a defendant with a genuine triable defence from having the dispute determined in a trial after the hearing of oral evidence that is subject to cross-examination. But neither is it intended to permit a defendant who has no sustainable defence to postpone the inevitable by formulating an artificial dispute with no credibility attached to it.
- [19] The test remains that articulated in *Maharaj v Barclays National Bank Ltd*.¹ The defendant must fully disclose the nature and grounds of the defence and the material facts upon which it rests, and those facts must disclose a defence which is both *bona fide* and good in law. The court does not at the summary judgment stage ordinarily resolve disputed factual issues on a balance of probabilities.
- [20] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*,² the Supreme Court of Appeal emphasised the other side of this principle: Summary judgment is not properly characterised as an extraordinary remedy which courts should approach with an inherent reluctance. Its purpose is to ensure that a defendant with a genuine defence is not shut out, while at the same time preventing a recalcitrant debtor with no defence from delaying enforcement of an established obligation.

¹ 1976 (1) SA 418 (A)

² 2009 (5) SA 1 (SCA)

- [21] These basic principles have not been altered by the amendment to Rule 32. *Tumileng Trading CC v National Security and Fire (Pty) Ltd*³ confirms that the question remains whether the defence has been genuinely advanced and whether the material facts necessary to sustain it have been sufficiently disclosed.
- [22] It is therefore not sufficient for the defendants to have characterised their arrangement with the plaintiff as a “loan” and to then argue that the provisions of the NCP flow from it. A legal conclusion unsupported by the facts from which it is said to follow does not become a *bona fide* defence merely because it has been pleaded. Facts must be shown from which the court should be able to conclude, or at the very least infer, that the arrangement between the parties in truth and in fact constituted a loan.
- [23] Was the arrangement a loan? In my view, it plainly was not. The funds did not originate in an advance by the plaintiff to the defendants; they originated from a rental stream from property owned by the plaintiff made by third-party tenants in discharge of the rental obligations to the plaintiff. The defendants received those payments because their bank account had been designated by the plaintiff, after concluding the arrangement with the first defendant, as the account into which the plaintiff’s rental income was to be paid.
- [24] The defendants were paid R750 per month for administering those receipts; this was the agreed remuneration for their service. It is difficult to reconcile that feature with the proposition that the plaintiff was at the same time conferring upon the defendants the beneficial use of increasingly large sums of money as an interest-free loan.
- [25] More fundamentally, the agreed obligations attached to the funds were inconsistent with the ordinary incidents of a loan. The defendants were obliged to account for what they had received, to invest the monies, to account for the interest generated by those investments, and ultimately to transfer the accumulated funds to the plaintiff when called upon to do so. Their own statement of account performs precisely that function; it identifies the plaintiff by name,

³ 2020 (6) SA 624 (WCC)

records the individual rentals received, records the deposit, distinguishes between the term investment and other money on hand and totals the amount held.

[26] The defendants' current characterisation of the arrangement is so improbable and commercially senseless that it falls to be rejected; it would mean that the plaintiff, unable conveniently to receive his South African rentals in Mozambique, asked close friends to assist him, agreed to pay them a monthly fee for doing so, permitted them nevertheless to appropriate his accumulated rental income for their own commercial purposes and only to repay it if demanded by the plaintiff. And for undertaking the risk that the funds may be used for failed commercial ventures pursued by the defendants, the plaintiff had no security and charged them no interest.

[27] This must be viewed against the backdrop that it is the plaintiff's case that he wished the funds to be placed in a restricted interest bearing account precisely because he wished to earn interest from the rental amounts saved by him. Why on earth would he forfeit his own rental income to fund interest free the defendant's business ventures, which it is not even alleged, he was required to sanction?

[28] The defendants' counsel's response to this was that the plaintiff agreed to this because the parties were close friends; but not so close that the defendant's agreed to utilise their South African account as a repository for the plaintiff's rental on a no fee basis. Quite the opposite; they admit that the plaintiff agreed to pay them an amount of R750 per month for this service. It makes no sense at all that the plaintiff would agree to let the defendants use the funds so deposited for their own purposes, provided only that they returned it when requested.

[29] Indeed, the facts speak for themselves. When return of the funds were demanded, the defendants were not in a position to repay it and could only transfer an amount of R1.1 million into the plaintiff's attorney's trust account. Why would the plaintiff assume this risk for no interests, without security and not even a share in the commercial venture/s pursued by the defendants with the money he was plainly intent upon saving and earning interest. The facts above need but

to be stated out loud to know that the version proffered by the defendant is quite preposterous.

- [30] That proposition becomes still less plausible once regard is had to the October 2022 arrangement. Why would a borrower, who was supposedly entitled to use the money in its own business, be obliged instead to place R750 000 of it into an interest-bearing investment and account to the plaintiff for the resulting return? The answer is apparent from the contemporaneous documents: The defendants were not borrowers; they were agents entrusted with the plaintiff's rental monies for which they earned commission. Their investment obligation was an incident of that mandate. As such, they owed the plaintiff a fiduciary duty, an obligation that the defendants plainly breached.

The fiduciary obligations of an agent entrusted with the funds of another

- [31] Where a person undertakes, as agent, to receive and administer funds belonging to another, the relationship carries fiduciary obligations in relation to those funds. The agent must act within the mandate, may not place himself in conflict with the principal's interests, may not appropriate or employ the funds for his own benefit without the principal's informed authority, and must render a proper account of their receipt, administration and disposition. The fiduciary obligation is particularly clear where the agent's mandate is to collect money, retain an agreed administration fee and preserve or invest the balance for the principal.
- [32] Moreover, the agent is ordinarily obliged keep the principal's money separate or at least identifiable where the arrangement requires it, not appropriate or use the money for the agent's own purposes without authority, not make a secret profit, and render a proper account to the principal. An agent entrusted with money cannot ordinarily treat it as his own merely because it has been paid into an account in his name.
- [33] This flows from the general fiduciary nature of agency. Since *Robinson v Randfontein Estates Gold Mining Co Ltd*⁴ South African law has long recognised that an agent must avoid a conflict between personal interests and the duty owed

⁴ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177-180

to the principal, and must account for benefits or profits derived through the agency. The fiduciary principle is not confined to trustees in the technical sense. It arises because the agent has undertaken to exercise powers or control over another person's affairs or property for that person's benefit.

[34] In *Phillips v Fieldstone Africa (Pty) Ltd and Another*,⁵ the Supreme Court of Appeal reaffirmed *Robinson* and emphasised that the paradigm example of a contractual relationship giving rise to fiduciary obligations is agency. Whether the relationship is fiduciary, and the precise content of the duties arising from it, depend upon the substance of the relationship and the circumstances in which the agent was entrusted to act. Once the duty is established, however, the no-conflict and no-profit rules are strict. A fiduciary may not appropriate for himself a benefit acquired through or by means of the agency, and a transaction involving such a conflict can ordinarily be validated only by the principal's free and informed consent following full disclosure.

[35] *Phillips* is particularly instructive because the Court expressly approved the principle, drawn from *Transvaal Cold Storage Co Ltd v Palmer*,⁶ that whenever an agent, in the course or by means of the agency, acquires a profit or benefit without the principal's consent, that benefit is regarded as having been received for the principal and must be accounted for and paid over. The agent is not entitled to retain any profit from the agency other than the remuneration agreed with the principal.

[36] The strictness of the rule was again emphasised in *Volvo (Southern Africa) (Pty) Ltd v Yssel*.⁷ Nugent JA reaffirmed *Robinson* and *Phillips* and held that money secretly earned in breach of a fiduciary duty must be disgorged. The obligation is not avoided because the fiduciary acted honestly, because the principal suffered no demonstrable loss, or because the fiduciary contends that the opportunity or benefit would not otherwise have accrued to the principal. What matters is that the fiduciary used a position of trust to advance his own interests in conflict with those which he was obliged to protect.

⁵ 2004 (3) SA 465 (SCA) paras 27 and 30-32

⁶ 1904 TS 4 at 20

⁷ 2009 (6) SA 531 (SCA) at paras 13-20

- [37] The fiduciary obligation is accompanied by a substantive duty to account. In *Watson v Sachs and Another*,⁸ the Appellate Division dealt directly with an agent's obligation to account to the principal. The Court recognised that an agent may incur a fiduciary duty to account to the principal and held, on the facts, that the agent could retain only the agreed commission. The balance received in the course of the agency was subject to the obligation of accounting to the principal.
- [38] The modern appellate authorities have placed the duty to account on an equally firm footing. In *Scholtz and Another v De Kock NO and Others*,⁹ the Supreme Court of Appeal reiterated that the existence, nature and scope of a fiduciary duty depend upon the facts and, importantly, upon the terms of the mandate. The Court distinguished the mere receipt of money from receipt pursuant to a mandate. Where the mandate entrusts one party with another's affairs or property, the mandate may itself give rise to the obligation to account.
- [39] Most recently, in *Walker and Another v Schabert Potgieter Attorneys Inc and Others*,¹⁰ the Supreme Court of Appeal affirmed that an agent must account for all that he knows and has done in execution of the mandate and in relation to the principal's property; it endorsed the principle that the agent must keep the principal's property separate from his own, deliver to the principal that which belongs to the principal, and provide a proper accounting of receipts, disbursements and the ultimate balance.
- [40] These principles are clearly relevant to the present dispute. If, as the plaintiff alleges, the defendant's mandate was to receive rentals belonging to the plaintiff, deduct an agreed administration fee of R750 per month, and thereafter preserve or invest the balance for the plaintiff's benefit, the defendant occupied the position of an agent entrusted with his principal's money. The funds did not thereby become available for the defendant's unrestricted personal use. Subject to the precise terms of the mandate, he was obliged to administer them in the plaintiff's interests, not to place himself in conflict with those interests, not to

⁸ 1994 (3) SA 655 (A)

⁹ [2024] ZASCA 132 paras 16-17

¹⁰ [2025] ZASCA 154, 2026 (2) SA 113 (SCA)

derive an unauthorised personal benefit from them, and to account fully for their receipt and disposition.

- [41] On that footing, the defendant's alleged use of the accumulated rentals to finance his own business ventures would amount, *prima facie*, to conduct inconsistent with the fiduciary obligations attaching to the mandate unless he establishes that the plaintiff freely and knowingly authorised that use after proper disclosure. *Phillips* makes clear that informed consent is the recognised answer to an otherwise impermissible conflict; a bare assertion of permission must therefore be assessed against the terms of the mandate, the contemporaneous communications and the inherent probabilities.
- [42] There is also an important distinction between an agent entrusted to administer another's funds and a borrower. Had the parties agreed that the plaintiff was advancing the rentals to the defendant as a loan, ownership of the money and the defendant's entitlement to use it would ordinarily follow the incidents of that debtor-creditor relationship. But if the true mandate was instead to collect, administer and invest the plaintiff's money, the defendant's obligation was fiduciary and accounting in character.
- [43] Where A asks B to collect rentals on A's behalf, deduct an agreed administration fee and invest the balance for A, as was the case in the matter before me, B is not ordinarily being advanced money for B's own use. B is administering A's money pursuant to a mandate. This is precisely why duties of good faith, proper administration and accounting arise.
- [44] The law is clear: The agent must be able to explain what money was received, what deductions were authorised, where the balance was placed, what income or interest was earned, and what ultimately happened to it. If the agent deliberately appropriated the funds to finance his own business activities, without the principal's informed consent, that would ordinarily amount to a breach of mandate and of fiduciary duty.
- [45] There is also an important consequence of misappropriation of funds entrusted by a principal to an agent. Where it is common cause that money belonging to the principal was received by the agent for a defined purpose, and the agent

admits that the money was thereafter used for some other purpose, the agent cannot normally answer the claim merely by asserting that the principal verbally authorised that use. An alleged permission to use large amounts of the principal's money for the agent's own ventures, particularly without interest or meaningful commercial return, would need to be assessed against the objectively proved relationship, contemporaneous communications and the inherent probabilities of such an arrangement being genuine.

[46] Thus, if the true agreement was that the defendant would collect South African rentals, retain R750 per month as an administration fee and place the balance in an interest-bearing investment for the plaintiff, the first defendant's appropriation of those funds to finance his own ventures would be difficult to reconcile with the obligations of an agent or fiduciary. A claim that the plaintiff instead permitted him to use the accumulated rentals as interest-free working capital would need to be evaluated against the first defendant's clear fiduciary relationship with the plaintiff and the commercial probabilities of such a relationship.

[47] What appears ultimately to have happened is that the defendants failed to preserve the distinction between money received on behalf of their friend and their own funds, and appropriated monies entrusted to them. That subsequent appropriation cannot retrospectively transform the clear mandate pursuant to an obvious contract of agency into a loan; a person cannot convert another's money into borrowed money merely by using it as his own.

The National Credit Act

[48] The allegation that the arrangement between the parties constituted a loan and not that of a principal and agent, and the reliance on the National Credit Act was clearly an afterthought. In their initial plea, the word "loan" was not mentioned. But as if it were not enough for the defendants to contend that the amount owing was a loan and acknowledging that they had an obligation to repay it, instead they placed reliance on the National Credit Act to allege that the loan itself was unlawful because the plaintiff was not registered as a credit provider, and thus that the plaintiff was not entitled to restitution.

- [49] The defence raised by the defendants is thus that, not only was the money loaned to them interest free, but they had no obligation to repay it. This, in the circumstances of the matter before me constitutes an unconscionable defence, particularly as it is raised against a once good friend.
- [50] It is for this reason that, although the defendants made a payment into the plaintiff's attorneys trust account, this payment was made without prejudice and was not intended for onward payment to the plaintiff, demonstrating a bona fide intent to repay what had allegedly been loaned to them.
- [51] In any event, the reliance on the NCA is entirely misconceived as I will demonstrate below.
- [52] First and foremost, the Act regulates credit agreements; it does not convert every obligation to repay or account for money into a credit agreement.
- [53] Section 4(1) provides, subject to specified exclusions, that the NCA applies to every credit agreement between parties dealing at arm's length and made within, or having effect within, the Republic.
- [54] Section 8 then identifies the agreements which constitute credit agreements. Of relevance to the defence raised is section 8(4)(f), which encompasses an agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred and a charge, fee or interest is payable to the credit provider in respect of the agreement or the amount deferred.
- [55] In *Asmal v Essa*,¹¹ the Supreme Court of Appeal explained that the charge, fee or interest contemplated by s 8 is consideration payable by the borrower to the provider for the use of credit. The existence of such consideration is an important feature distinguishing the transaction contemplated by s 8(4)(f).
- [56] On the defendants' own pleaded version, the supposed loan carried 0% interest. No charge or fee was payable by them to the plaintiff for the alleged extension of credit. The only fee pleaded is the R750 per month, but that travelled in precisely

¹¹ 2016 (1) SA 95 (SCA)

the opposite direction: it was payable by the plaintiff to the defendants for administering the rental payments. It therefore cannot constitute a charge or fee payable to a credit provider within s 8(4)(f).

[57] The defendant's argument thus must fail. First, the transaction was in truth not a loan at all. Secondly, even the defendants' pleaded "loan" is an unsecured interest-free arrangement which they have not shown to satisfy the requirements of s 8(4)(f).

[58] The defendants relied upon the fact that the plaintiff was not registered as a credit provider. Had this genuinely been a credit agreement to which the NCA applied, that would have been a serious matter. Since May 2016 the prescribed threshold under s 42(1) has been R0, with the result that registration under s 40 is no longer confined to persons who habitually conduct a credit business. Government Notice 513 of 11 May 2016 fixed the registration threshold accordingly.

[59] The Supreme Court of Appeal made the position clear in *Du Bruyn NO and Others v Karsten*.¹² Where the NCA applies and the statutory registration requirement is triggered, it does not matter that the transaction is once-off or that the lender does not ordinarily participate in the credit industry. *Du Bruyn* accordingly prevents the plaintiff from succeeding merely by saying that he was not a moneylender. But it does not assist the defendants unless they first establish that the transaction was a credit agreement to which the NCA applies. They have not been able to establish this as the loan on their version did not carry interest.

[60] There is however, a further difficulty with the defendants' argument.

[61] Section 4(2)(b)(iv)(aa) provides that parties are not dealing at arm's length where they are not independent of one another and consequently do not necessarily strive to obtain the utmost possible advantage from the transaction.

[62] The statutory language substantially reflects the description of arm's-length dealing in *Hicklin v Secretary for Inland Revenue*,¹³ namely that independent

¹² 2019 (1) SA 403 (SCA)

¹³ 1980 (1) SA 481 (A)

parties ordinarily strive to secure the utmost possible advantage for themselves. The enquiry is factual and contextual.

[63] In *Du Bruyn* the SCA rejected reliance upon an allegedly familial relationship because the objective circumstances showed that the parties were nevertheless independently pursuing their respective commercial interests. Conversely, in *Allied Steelrode (Pty) Ltd v Dreyer*¹⁴ the SCA held that an interest-free loan made as a gesture of friendship, in circumstances in which the lender was not seeking the maximum commercial advantage, was not an arm's-length transaction for purposes of the NCA.

[64] The plaintiff and defendants were longstanding friends. The arrangement was born of that friendship and of the plaintiff's practical difficulty in dealing with South African rental income while living abroad. The plaintiff was not bargaining commercially with the defendants as a lender seeking a return from borrowers.

[65] Indeed, the defendants' own case that the supposed loan bore no interest at all reinforces, rather than undermines, that conclusion. If their characterisation of the transaction as a loan were correct, its interest-free character and the close pre-existing friendship would provide substantial support for the conclusion that it was not an arm's-length credit transaction in the statutory sense.

[66] It is, however, unnecessary to finally to rest the decision upon s 4. The more fundamental conclusion is that there was no extension of credit at all

[67] The defendants' reliance upon ss 40 and 89 therefore cannot assist them. Those provisions operate only once there is a credit agreement governed by the Act.

[68] Section 40 requires registration where the statutory criteria are satisfied. Section 89(2)(d) renders unlawful a credit agreement entered into by a credit provider who was required to be registered but was not registered, while s 89(5) prescribes the consequences of an unlawful agreement

¹⁴ [2023] ZASCA 181

[69] *National Credit Regulator v Opperman*¹⁵ concerned those consequences. The Constitutional Court confirmed the invalidity of the former s 89(5)(c), which had effectively deprived an unregistered lender of restitution without judicial discretion. The case proceeded, however, upon an actual loan constituting a credit agreement and an obligation to register. It does not apply where the underlying transaction is a credit agreement at all.

Bona fides of the defence

[70] I remain mindful that summary judgment is not determined on credibility and the probabilities. Improbability alone ordinarily does not justify rejecting a properly disclosed factual defence.

[71] But this case goes further than improbability. The defendants have not disclosed the material factual incidents of the loan which they allege. They do not explain when the plaintiff became obliged to advance the money to them, what entitlement they acquired to use it, why they were nevertheless obliged to account for it, why they were paid R750 to administer it, why R750 000 was placed on investment for the plaintiff, or why the interest earned upon that investment belonged to the plaintiff.

[72] The defendant's conduct after the institution of the action is also relevant, not as an independent basis for liability, but in evaluating whether the subsequently formulated defence was and is genuinely advanced. In February 2025, the defendant's paid R1.1 million after the matter had been enrolled for summary judgment. The payment led the plaintiff to remove the matter to explore the possibility of settlement.

[73] Thereafter, and immediately before a later hearing, the case was reformulated as an interest-free loan rendered unlawful by the NCA. The chronology does not create liability where none exists, but it is legitimately considered together with the absence of the factual allegations required to substantiate the argument that the arrangement between the parties was one of loan and not agency.

¹⁵ 2013 (2) SA 1 (CC)

[74] None of the terms of the supposed loan are pleaded: When was it concluded, where was it concluded and what were the terms of repayment. The contemporary evidence, including their own statement, describes an altogether different relationship.

[75] I am therefore not persuaded that the defendants have disclosed a bona fide defence within the meaning of Rule 32(3)(b). More importantly, the facts which they themselves advance do not disclose a defence good in law under the NCA.

Disputes of fact, the rejection of an untenable version on affidavit and bona fides

[76] It is well established that motion proceedings are ordinarily ill-suited to the resolution of genuine disputes of fact. Where final relief is sought and a material factual dispute arises, the court generally proceeds on the facts stated by the respondent together with those facts in the applicant's affidavits which the respondent admits. That principle emerges from the oft quoted passage in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹⁶ but is subject to an important qualification, and that is that a court is not bound to accept allegations or denials which are so far-fetched or clearly untenable that they may properly be rejected on the papers alone.

[77] This qualification is not a licence to decide ordinary credibility disputes on affidavit. In *National Director of Public Prosecutions v Zuma*,¹⁷ the Supreme Court of Appeal cautioned that a court may not simply decide a factual dispute according to which version it considers more probable. However, departure from the respondent's version is justified where it consists of bald or uncreditworthy denials, raises a fictitious dispute, or is palpably implausible, far-fetched or so clearly untenable that rejection on the papers is warranted.

[78] Where one draws the line was explained by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd*.¹⁸ Conflicting affidavits are ordinarily an unsuitable means of resolving genuine factual disputes, but courts must equally guard against a respondent defeating otherwise competent relief by raising a fictitious dispute or

¹⁶ 1984 (3) SA 623 (A)

¹⁷ 2009 (2) SA 277 (SCA) at para 26

¹⁸ 2006 (4) SA 326 (SCA) at paras 55-56

putting forward a palpably implausible version. An uncreditworthy denial or palpably implausible version may accordingly be rejected without recourse to oral evidence. The threshold nevertheless remains a high one- the version must be such that it can confidently be characterised on the papers as demonstrably and clearly unworthy of credence.

[79] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*¹⁹ it was held that a dispute is not genuine merely because a respondent formally denies an allegation. The respondent must seriously and unambiguously engage with the fact said to be disputed. Where the matter lies peculiarly within the respondent's own knowledge and the respondent is able to provide a substantive answer, a bare or ambiguous denial may fail to raise a real, genuine and bona fide dispute. In determining that question, the court considers the denial against the broader factual matrix and the objective material before it.

[80] This principle is not confined to bare denials. In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another*,²⁰ the Supreme Court of Appeal endorsed the use of a robust, common-sense approach, even where the respondent had provided a detailed version, where that version was wholly fanciful and untenable. The Court itself rejected an alleged oral arrangement which it regarded, viewed against the objective circumstances and the contradictory versions advanced by the respondent, as inherently highly improbable.

[81] There is nevertheless a material distinction between saying that a version is improbable and saying that it is so inherently improbable that it does not genuinely raise a factual dispute at all. The former ordinarily requires oral evidence. The latter may, exceptionally, be rejected on affidavit. The judicial enquiry is therefore not whether the applicant's version appears more probable, but whether the respondent's version remains one which could reasonably be accepted after the objective facts, contemporaneous documents, internal

¹⁹ 2008 (3) SA 371 (SCA) at paras 12-13

²⁰ 2011 (1) SA 8 (SCA)

consistency of the version and the respondent's ability to explain matters within his own knowledge are considered.

[82] However, some caution is required in applying these principles in proceedings under Rule 32. Summary judgment is not a trial on affidavit; nor does it constitute motion proceedings. In *Maharaj*, Corbett JA held that where the defence depends upon disputed facts, the court does not determine those disputes or decide where the balance of probabilities lies; the question is whether the defendant has fully disclosed the nature and grounds of the defence and the material facts upon which it rests, and whether those facts, if established, would constitute a defence which is *bona fide* and good in law. That approach was reaffirmed by the Supreme Court of Appeal in *Joob*.

[83] The court should accordingly not reject a defence under Rule 32 merely because, upon a comparison of probabilities, the plaintiff's version seems considerably more likely. If the defendant has disclosed a coherent factual case which, if proved at trial, would constitute a defence, summary judgment must ordinarily be refused.

[84] But the requirement of *bona fides* in Rule 32 should not become illusory; a sham defence, an unexplained bare denial of matters peculiarly within the defendant's knowledge, or a version which is demonstrably fanciful when measured against undisputed objective facts may fail to satisfy Rule 32(3)(b) at all. *Joob* itself emphasises that the procedure exists to prevent sham defences from delaying enforcement of worthy claims, while safeguarding genuine triable issues.

[85] Thus, the jurisprudence established by *Plascon-Evans*, *Fakie* and *Wightman* remains useful in the present context, not because the Court is entitled to conduct a trial of probabilities in summary-judgment application, but because it assists in determining whether what is presented as a factual defence is genuinely and/or *bona fide* advanced. A version which is merely unlikely must be left for trial; a version which is so internally contradictory, inconsistent with incontrovertible contemporaneous documents, unsupported on matters peculiarly within the defendant's knowledge, or commercially fanciful that it cannot reasonably be

regarded as genuinely advanced, may properly be held not to constitute a *bona fide* defence.

[86] In my view, this approach is applicable to the defence presently advanced by the defendants in the matter before me.

[87] The plaintiff's case is that the first defendant, with the involvement of the second defendant, was entrusted to receive rental income in South Africa on the plaintiff's behalf, retain an agreed administration fee of R750 per month and, ultimately, invest the accumulated rentals in an interest-bearing account for the plaintiff's benefit. The defendants do not deny the existence of an oral agreement or their entitlement to the R750 monthly administration fee. Their amended case is instead that the plaintiff agreed to lend both defendants all of the rental monies received, at zero interest, while simultaneously paying them the administration fee for allowing his income to be deposited into the first defendant's bank account.

[88] The commercial improbability of this version, standing alone, would not justify its rejection. Courts do not rewrite unusual bargains simply because they appear improvident; nor may a court at summary-judgment stage prefer the plaintiff's version merely because it appears commercially more sensible.

[89] But commercial probability is not irrelevant when it forms part of a broader objective and undisputed factual matrix. The defendants' version must be considered together with the fact that the original lease directed the tenants to pay the rentals into the first defendant's account, that the first defendant was to account monthly, that the defendants were remunerated specifically for administering the rental receipts, that the pleaded later arrangement contemplated investment of the accumulated rentals; and that the plaintiff could call for payment of the monies upon notice. The documentary schedule further reflects the rental stream accumulating through the identified account over an extended period.

[90] Against that background, the defendants' assertion that the same funds were, from inception, an interest-free loan to them raises a significant question of *bona fides*. It is one thing to allege that the plaintiff subsequently agreed that the first

defendant might temporarily use some of the accumulated monies for a particular business venture; it is another to allege that the very arrangement under which the defendants were paid to administer the plaintiff's rental income was, from the outset, in substance an open-ended, interest-free loan of all rentals to both defendants.

[91] In deciding whether that version crosses the threshold from improbability into untenability, I consider it important that the relevant facts lie overwhelmingly within the defendants' own knowledge. If there was such an unusual loan agreement, the defendants were parties to it and were capable of explaining when and why it was concluded, how the amount of the loan was to be determined, when repayment would fall due, what purpose the monies were to serve, why the plaintiff agreed to forego any return on substantial sums, how the monthly administration fee fitted with the alleged loan, and why the contemporaneous dealings continued to treat the monies as rentals to be administered and accounted for. *Wightman* makes clear that where such matters are peculiarly within a respondent's knowledge, a court is entitled to expect serious and unambiguous engagement rather than assertion of a label that provides an alternative characterisation of the arrangement.

[92] The absence of those particulars is particularly material in summary judgment: The defendants were not required to prove the alleged loan; they were, however, required to disclose the material facts which made it a bona fide defence. Calling the arrangement a "loan agreement" does not itself establish bona fides if the factual content necessary to explain such an agreement are absent.

[93] What I need to ask is whether the facts disclosed by the defendants are sufficiently complete, coherent and objectively sustainable to constitute a *bona fide* defence. If they are, however improbable I may consider them, the matter must go to trial. If, however, the alleged interest-free loan is no more than a conclusion superimposed upon objective facts inconsistent with it, is inadequately particularised on matters peculiarly within the defendants' knowledge, and is contradicted by contemporaneous documentation to such an extent that it can confidently be characterised as fanciful or clearly untenable, then *Fakie*, *Wightman* and *Buffalo Freight* would support my view that the mere

assertion of a factual dispute should not be permitted to defeat summary judgment, unless it is shown to both *bona fide* and genuine.

[94] I therefore do not reject the defendants' version merely because an agreement under which the plaintiff lent substantial and progressively accumulating rental receipts to the defendants without interest may appear commercially improbable; an unusual or even improvident bargain is not for that reason alone incapable of proof, and summary judgment is not a mechanism for resolving ordinary disputes of probability.

[95] However, where the cumulative effect of the objective and undisputed factual evidence, when read together with the defendants' own version of events and its own documentation, renders the defendants version so unpalusible as to border on the ridiculous, such a defence should not be permitted to defeat an application for summary judgment.

[96] The undisputed facts are that the defendants were entrusted with the collection and administration of the plaintiff's rentals, the monies were initially paid into the first defendant's account, the defendants were remunerated at R750 per month for administering the funds so deposited and the arrangement contemplated that the accumulated funds would be placed in an interest-bearing investment (although this may have sublimely have been disputed.)

[97] But what the defendants themselves recognise is that they were required to account for rental income deposited into the first defendant's account. Against that background, where their assertion that those same monies were in truth lent to both of them at no interest is not accompanied by a satisfactory account of the ordinary incidents of the alleged loan, on ordinary summary judgment principles, it should be rejected and not be permitted to prevent the plaintiff obtaining summary judgment. This is particularly so as no detail is provided as to when and in what circumstances the loan was agreed, why the plaintiff would forego the investment return otherwise contemplated, what entitlement the defendants had to use the funds for their own purposes, how and when repayment was to occur, and how the continuing administration fee was reconcilable with their alleged status as borrowers. Those matters were peculiarly within the

defendants' knowledge and called for the full and particular disclosure required by Rule 32.

[98] When the defendants' failure to provide that explanation is considered together with the contemporaneous documents and the fiduciary character of the mandate under which the monies were received, I am satisfied that the alleged interest-free loan is not merely the less probable of two competing versions, but it is so lacking in a coherent factual foundation, and so inconsistent with the objective features of the parties' dealings, that it does not constitute a real, genuine and bona fide dispute requiring determination by oral evidence.

[99] Applying the caution required by *Maharaj* and *Joob*, but also the principles in *Fakie*, *Wightman* and *Buffalo Freight*, I am satisfied that I am not obliged to permit an otherwise established claim to proceed to trial merely because the defendants have attached the label "*loan*" to the very funds which they were entrusted and remunerated to administer for the plaintiff.

[100] In these exceptional circumstances, the version proffered by the defendants that the arrangement constituted a loan and that the NCA applied may properly be rejected as so palpably implausible and clearly untenable that it could not be genuinely advanced and is not *bona fide*. This is precisely the sort of defence that the case law makes clear is postulated solely for the purposes of delay and that should not be permitted to defeat summary judgment.

The second defendant's liability

[101] A discrete issue arises concerning the liability of the second defendant. The plaintiff seeks judgment against both defendants jointly and severally, but the documentary trail shows that the rental payments were not initially made into an account held jointly by them. The lease agreement itself stipulated that the rentals were to be paid into the account of the first defendant, and the particulars of claim expressly allege that the tenants performed by paying the rentals into the first defendant's bank account.

[102] The payment schedule is consistent with that allegation. The account into which the rentals were paid during the period from September 2021 until January 2024

was account number 1550949012. The earliest entries expressly identify that account with the first defendant, Jose Crisostomo Pacheco. There is no evidence before the Court establishing that this was a joint account held by both defendants. The fact that some later payment references contained the plaintiff's name does not alter the identity of the receiving account.

[103] The position changed during 2024. From February 2024 the payment schedule reflects rentals being paid into a different account, number 63081307217, identified with Ms Olga V S Chambal. The documentary material also records the plaintiff's instruction that future rentals were to be paid into an FNB account capable of receiving rand-denominated income.

[104] That later account is not the account of the second defendant, Olga Pacheco. It is identified in the schedule as belonging to Olga V S Chambal. The papers therefore do not establish that, in 2024, the rentals were redirected into an account held by the second defendant. What they establish is that the rentals ceased to be paid into the first defendant's account and were thereafter paid into an account associated with Olga Chambal.

[105] The plaintiff's case against the second defendant accordingly does not rest upon proof that the rentals were paid into her bank account. The particulars instead allege that, on about 30 August 2021, the plaintiff concluded the oral arrangement with both the first and second defendants. Although several of the pleaded terms refer specifically to the first defendant receiving the rentals into his account and rendering the monthly account, the plaintiff further pleads that he could call upon "*the defendants*" to pay over the money and that the agreed monthly administration fee was payable to "*the defendants*".

[106] The pleaded October 2022 amendment is expressed even more directly against both defendants. The plaintiff alleges that "*the defendants*" would take all rental monies received and invest them in an interest-bearing account, and that the plaintiff could call upon all money which "*the defendants received and then invested on his behalf*". The particulars then plead that "*the defendants received*" the deposit and rentals and were jointly indebted to the plaintiff.

[107] Importantly, the second defendant does not seek to distance herself from the underlying arrangement. On the contrary, in the amended plea, the defendants expressly allege that a loan agreement was concluded between the plaintiff and both defendants, under which the plaintiff would lend to “*the defendants*” the rental amounts received from the tenants. They further allege that “*the defendants*” would receive R750 per month for administering the lease payments and that the alleged loan carried interest at 0%.

[108] In argument the defendants’ case was that the oral agreement was a loan agreement under which the plaintiff would loan the rentals to both defendants, who would in turn receive the agreed administration fee. The second defendant’s affidavit resisting summary judgment likewise presents the defence as one shared by herself and the first defendant.

[109] The consequence is that the second defendant’s potential liability does not depend upon whether the rental monies physically passed through her personal account. The plaintiff pleads that she was a co-contracting party to the mandate, while she herself pleads an alternative joint loan agreement in which she was one of the borrowers. Her own pleaded case therefore places her squarely within the transaction.

[110] The fact that the rentals were initially paid into the first defendant’s account remains relevant. It may affect the evidential enquiry as to who physically received, controlled or appropriated the monies. But it does not, by itself, establish that the second defendant had no contractual liability where both the plaintiff’s case and the defendants’ own pleaded version identify her as a party to the oral agreement.

[111] Thus, it is clear that the second defendant’s liability arises from the pleaded allegation that she was jointly party to the mandate, reinforced by her own pleaded case that the plaintiff lent the rentals to both defendants.

The amount claimed

[112] The notice of motion initially sought payment of R1 525 500. It also sought contractual interest at 8.5%, together with further relief.

[113]The capital amount was reduced when the defendants paid R1.1 million in February 2025 into the plaintiff's attorney's trust account . The plaintiff expressly credits that payment against the R1 525 500 and identifies the remaining capital amount as R425 500.

[114]That amount is liquidated. Its ascertainment requires no investigation or accounting. It is obtained by simple subtraction from the capital amount claimed and verified in the summary judgment proceedings. It falls squarely within Rule 32(1)(b).

[115]The plaintiff is therefore entitled to summary judgment for R425 500.

The claim for a statement and debatement of account

[116]A distinction should be drawn between the liquidated capital claim and the plaintiff's claim for a statement and debatement of account. Rule 32(1) permits summary judgment only on a liquid document, for a liquidated amount in money, delivery of specified movable property or ejectment, together with interest and costs.

[117]A claim compelling a defendant to render and debate an account does not itself fall within those categories. Summary judgment should therefore not be granted for that form of relief merely because the capital claim is suitable for summary adjudication.

The claim for interest

[118]The plaintiff also claims contractual interest at the rate of 8.5% per annum. That claim requires separate consideration from the capital amount. In the affidavit supporting summary judgment the plaintiff says that, on 1 October 2022, the parties orally amended their agreement. The terms of that amendment were that the defendants would take the monies already received, together with future rentals received under the lease, and invest them in an interest-bearing account yielding not less than 8.5% per annum. He further says that he could call for repayment on 30 days' notice, whereupon the defendants were obliged to pay over all money received together with interest at 8.5%.

[119] The statement of account furnished by the defendants and relied upon by the plaintiff records that, as at 31 May 2023, R1.15 million had been received. More importantly, the statement reflects a transfer of R750 000 on 1 October 2022, and at its foot records R750 000 as a term deposit ("*deposito a prazo*"), with a further R350 000 held at call and the R50 000 tenant's deposit, producing the total of R1.15 million. This contemporaneous statement is consistent with the plaintiff's evidence that the arrangement changed on 1 October 2022 from the mere collection of rentals to the investment of the accumulated funds.

[120] The defendants' answer is not that the agreed investment rate was some figure other than 8.5%. Their amended case is fundamentally different; they allege that the rentals constituted an interest-free loan to both defendants, carrying interest at 0%. For the reasons already given, I have rejected that version as not constituting a bona fide defence. Once that version is rejected, there is no competing factual version directed specifically at the 8.5% rate alleged by the plaintiff.

[121] I am therefore satisfied that the plaintiff has adequately established, for purposes of Rule 32, the contractual obligation to account for the monies entrusted to the defendants together with interest at 8.5% per annum from 1 October 2022. That conclusion does not, however, mean that interest may simply be calculated on R1 525 500 from 1 October 2022. The capital sum did not exist in that amount on that date. It accumulated progressively as further rentals were received.

[122] The original notice of motion seeks interest on all money received by the defendants at 8.5% per annum from 1 October 2022 until payment. Properly understood, the contractual arrangement requires the rate to operate upon the money actually held by the defendants from time to time. On 1 October 2022 the accumulated amount placed into the term investment was R750 000. Thereafter additional rentals were received monthly. Those later amounts could only attract interest from the dates upon which they were received and became subject to the investment obligation.

[123] There is a further difficulty with the quantified interest figure of R186 497.09 contained in the original papers. The supporting affidavit reproduces that amount

as a component of the total indebtedness, but does not provide a calculation showing how it was derived. No schedule before me identifies the capital balance attracting interest during each period, the number of days for which the respective amounts attracted interest, or the calculation which produces R186 497.09.

[124] This does not, in my view, defeat the claim for interest. The contractual rate and the dates and amounts of the rental receipts are objectively ascertainable from the documents. What is inappropriate is to grant judgment for an unexplained lump sum said to represent accrued interest. The preferable course is to formulate the order so that interest is calculated mechanically upon the capital actually held from time to time.

The effect of the R1.1 million payment

[125] The position changed materially in February 2025. The supplementary affidavit records that, following approaches by the defendants' attorneys on about 7 February 2025, R1.1 million was paid as "part payment of the amount that was due and owing to the applicant". The plaintiff thereafter expressly appropriated the payment against capital, deducting R1.1 million from R1 525 500 and identifying the remaining capital as R425 500.

[126] That appropriation has a material bearing upon the plaintiff's claim for interest. Whatever contractual interest had accrued upon the R1.1 million before its payment remained accrued, but contractual interest could not thereafter continue to run on capital which had been paid. To permit interest at 8.5% to continue on the original R1 525 500 after payment of R1.1 million would compensate the plaintiff for being kept out of money which he had already received.

[127] The draft order proposed by the plaintiff therefore cannot be granted in its present form. It seeks payment of the reduced capital of R425 500, but simultaneously seeks contractual interest on the original R1 525 500 from 1 October 2022 until date of payment. Those two propositions are inconsistent. Once the R1.1 million was appropriated to capital, interest on that portion ceased to run upon payment.

[128] There is also no basis for awarding contractual interest at 8.5% and, for the same period and upon the same indebtedness, a second layer of mora interest. The object of interest is compensatory. Where the parties have agreed upon the rate applicable to an outstanding debt and that contractual rate continues until payment, a further award of mora interest over the same period would amount to double compensation. The plaintiff must therefore receive the contractual interest proved, not contractual interest supplemented by a second interest charge upon the same capital.

[129] I accordingly find that the plaintiff has established the contractual rate of 8.5% per annum but not the lump-sum interest calculation appearing in the summons. The appropriate order is one which applies that rate to the capital actually outstanding from time to time, taking account both of the progressive receipt of rentals after 1 October 2022 and the subsequent R1.1 million part payment.

Jurisdiction

[130] The original special plea challenged this Court's jurisdiction. That defence has no merit. The plaintiff states that the agreement was negotiated and concluded in Johannesburg and that its breach occurred there. The defendants' special plea identifies no contrary jurisdictional fact capable of displacing the Court's jurisdiction. A failure formally to plead the conclusion that the Court possesses jurisdiction does not deprive a superior court of jurisdiction where the underlying jurisdictional facts establish it.

Conclusion

[131] The essential premise of the defendants' defence is that money which they received as their friend's rental income somehow became money lent to them.

[132] That proposition is contradicted by the reason the arrangement was created, by the payment to the defendants of an administration fee, by their obligation to account, by their own statement of account, by their investment of R750 000, by their obligation to account for the investment return, by the plaintiff's instructions concerning transfer of the money, and ultimately by the substantial payment made after proceedings had been instituted.

[133] The later appropriation or use of the funds by the defendants could not change their juridical character. If A entrusts money to B to hold, administer and invest for A, B does not transform himself into A's borrower by taking the money and using it for his own purposes.

[134] Nor does the NCA provide a refuge for such conduct. The statute regulates credit; it does not convert an obligation to account for and restore another person's money into an unlawful loan.

[135] Even on the defendants' own pleading, their alleged loan was interest free. The R750 was not consideration payable by them for credit but remuneration payable to them for administering the plaintiff's rentals. The essential requirement identified in s 8(4)(f) and *Asmal v Essa* is therefore absent.

[136] I accordingly find that the defence raised by the defendants was and is neither *bona fide* in the sense required by Rule 32 nor good in law. The plaintiff has established his entitlement to summary judgment in respect of the liquidated balance of the capital amount.

[137] The plaintiff also claims mora interest from date of demand. That claim must be distinguished from his claim to the contractual investment return. Under the oral agreement the plaintiff was entitled to call for payment of the monies held by the defendants upon 30 days' notice. The October 2022 amendment did not alter that mechanism. It provided that, following such notice, the defendants were obliged upon expiration of the 30-day period to pay over the monies received together with the interest contemplated by the amended agreement.

[138] The agreement therefore did not stipulate a fixed calendar date upon which repayment would become due. The defendants' mora was consequently *mora ex persona*. Where no date for performance is fixed, the debtor is placed in mora by a proper demand and falls into mora upon failing to perform within the period stipulated by that demand or contract. *Mokala Beleggings (Pty) Ltd v Minister of*

*Rural Development and Land Reform and Crookes Brothers Ltd v Regional Land Claims Commission*²¹ confirm that distinction.

[139] The plaintiff relies upon demands made during February and May 2024. The founding papers specifically establish that on 10 May 2024 the plaintiff demanded payment of the deposit, rentals and accrued interest. Since the agreement afforded the defendants 30 days within which to comply with a call for payment, mora did not arise merely upon the making of that demand. It arose upon expiration of the contractual 30-day period without payment. In the absence of sufficiently clear evidence enabling me to determine an earlier date by reference to the February demand, I adopt the expiry of the 30-day period following receipt of the 10 May 2024 demand as the commencement of mora.

[140] From that point the juridical basis upon which interest is recoverable changes. Until repayment became due, the defendants' obligation was to preserve and invest the plaintiff's monies in accordance with the October 2022 arrangement. Once the plaintiff called up the funds and the contractual period for payment expired, the defendants were no longer entitled to retain the capital for investment. Their continued retention constituted default in payment of a monetary obligation. Mora interest thereafter compensates the plaintiff for being deprived of the use of his money. *Thoroughbred Breeders' Association and Steyn NO*²² establish that such interest constitutes damages flowing from delayed payment and does not require proof of the actual investment return which the creditor would have earned.

[141] The subsequent payment of R1.1 million in February 2025 did not place the defendants in mora; they were already in mora. Its effect was instead to reduce the capital upon which mora interest thereafter accrued. Mora interest accordingly runs on the capital then outstanding from expiry of the contractual 30-day demand period until receipt of the R1.1 million payment, and thereafter only upon the unpaid balance of R425,500 until final payment. This both compensates the plaintiff for delayed payment and avoids an impermissible

²¹ *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* [2001] ZASCA 82; 2001 (4) SA 551 (SCA); [2001] 4 All SA 161 (A). See also *Steyn NO v Ronald Bobroff & Partners* [2012] ZASCA 184; 2013 (2) SA 214 (SCA)

double recovery of contractual investment return and mora interest for the same capital and period.

Order

[142] In the result, I make the following order:

1. Summary judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for payment of R425,500.00.
2. The first and second defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay contractual interest at the rate of 8.5% per annum on the sum of R750,000.00, calculated from 1 October 2022 to 4 July 2024.
3. The payment of R1,100,000.00 received into the trust account of the plaintiff's attorneys in February 2025 is recorded as a part payment of the defendants' capital indebtedness and has been taken into account in determining the outstanding capital amount of R425,500.00 awarded in paragraph 1.
4. The first and second defendants are ordered, jointly and severally, the one complying the other to be absolved, within 30 days of this order, to render to the plaintiff a full account, supported by the relevant bank and investment statements, reflecting:
 - 4.1 all rental monies and other amounts received by them on behalf of the plaintiff from 1 October 2022 until the date upon which the tenants ceased making payments to them;
 - 4.2 the dates upon which those monies were received;
 - 4.3 the bank accounts or investments into which those monies were deposited or invested;
 - 4.4 all interest or other investment returns actually earned upon those monies; and

- 4.5 all amounts deducted from those monies and the basis for each such deduction.
- 5. The defendants shall debate the account referred to in paragraph 4 with the plaintiff within 30 days after delivery of the account.
- 6. Following the statement and debatement of account, the defendants shall pay to the plaintiff:
 - 6.1 any interest or investment return shown to have been earned upon rental monies received after 1 October 2022;
 - 6.2 provided that no amount shall be recoverable under paragraph 6.1 to the extent that it constitutes interest upon the R750,000.00 for the period in respect of which contractual interest has already been awarded under paragraph 2; and
 - 6.3 any other amount shown upon the debatement to be due to the plaintiff which has not already been included in the capital amount awarded under paragraph 1.
- 7. The first and second defendants are ordered, jointly and severally, the one paying the other to be absolved, to pay *mora interest* at the prescribed rate of interest applicable from time to time:
 - 7.1 on the capital amount then owing to the plaintiff, from **5 July 2024** until the date upon which the payment of **R1,100,000.00** was received into the trust account of the plaintiff's attorneys; and
 - 7.2 on the remaining capital amount of **R425,500.00**, from the date upon which the payment of R1,100,000.00 was received into the trust account of the plaintiff's attorneys to date of final payment.
- 8. For the avoidance of doubt:
 - 8.1 the award of contractual interest at 8.5% per annum under paragraph 2 is confined to the R750,000.00 identified in the

contemporaneous statement of account as having been placed in the term investment;

8.2 no fixed rate of 8.5% per annum is awarded in respect of rental monies subsequently received, save to the extent that the statement and debatement of account establishes that such interest or return was actually earned;

8.3 the plaintiff shall not recover both contractual interest and mora interest upon the same capital amount in respect of the same period; and

8.4 the plaintiff shall not recover, through the statement and debatement of account, any amount already included in the capital judgment or interest awarded under this order.

9. The defendants shall pay the costs of the summary judgment application on scale B


WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of the hearing: 28 July 2026
Date of the judgment: 1 September 2026

For the Plaintiff:

Adv. JRS Karuaihe instructed by
Mosima Attorneys

For the Defendants:

Weavind & Weavind
Attorneys