



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 2025-217978

In the matter between:

**JT ROSS PROPERTIES (PTY) LTD
(Registration number 2000/005528/07)**

PLAINTIFF

and

**TRANS MODAL GROUP (PTY)
(Registration number 2021/471400/07)**

FIRST DEFENDANT

**BLAINE NEVILLE–LUND EVANS
(ID NO. 890509 xxxx xx1)**

SECOND DEFENDANT

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for the handing down of the judgment is deemed to be 16 September 2026 at 09h30.

ORDER

The following order is granted:

1. Provisional sentence in the sum of R2 414 473 (two million, four hundred and fourteen thousand, four hundred and seventy-three rand) is entered in favour of the plaintiff against the first and second defendants.
2. The defendants are directed to pay interest thereon at the prime overdraft rate, compounded monthly, from 28 November 2025 to date of payment.

3. The defendants are directed to pay the costs of the action to date on the attorney and own client scale jointly and severally with the one paying the other to be absolved.

JUDGMENT

Nako AJ:

Introduction

[1] The first defendant leased commercial property from the plaintiff for the purposes of its warehousing and logistics business. The second defendant bound himself as a guarantor and co-principal debtor with the first defendant for all amounts due to the plaintiff in terms of the lease agreement. The lease agreement was for a period of two years from 1 March 2024 to 28 February 2026, but the lease agreement was cancelled before the expiry of its full term and the defendants agreed to vacate the premises on 31 May 2025. The plaintiff and the defendants subsequently entered into a settlement agreement (the settlement agreement) for payment of rental which remained due and payable when the lease agreement was cancelled, as well as reinstatement costs. It is the settlement agreement which is the subject matter of this provisional sentence.

[2] The plaintiff issued a provisional sentence summons against the first and second defendants for payment of the amount of R2 414 573 in terms of the settlement agreement that the parties concluded on 22 September 2025 and which document they agreed constituted a liquid document. In terms of the settlement agreement, the defendants acknowledged being indebted to the plaintiff in the amount of R1 903 203.79 and undertook to make payment of the said amount on or before 2 June 2025.

[3] The defendants failed to make payment on the agreed date. The parties then concluded an addendum to the settlement agreement in terms of which the defendants acknowledged that they were indebted to the plaintiff in the increased amount of

R2 514 573 and undertook to discharge their indebtedness by way of payment of 12 equal instalments of R209 547.75, with the first instalment being payable on 19 September 2025 and the last instalment being payable on 1 August 2026.

[4] The parties further agreed that, in the event that the defendants failed to observe, or committed any breach whatsoever of, any of the terms or conditions of the agreement, the full balance of the capital amount, or remaining balance thereof, would immediately and without notice become due and payable, notwithstanding that any portion thereof that may not yet be due and payable. The parties also agreed that a certificate of balance signed by or on behalf of the creditor confirming the amount of the debtor's liability would, together with the agreement, be prima facie proof of the amount owed and would be valid as a liquid document in any court with jurisdiction for purposes of obtaining provisional or summary judgment.

[5] The defendant failed to pay the plaintiff the amounts due and owing in breach of the agreement and the addendum.

[6] The defendants opposed the provisional sentence summons and raised two defences. Firstly, they argued that they had a counterclaim against the plaintiff, which, if successful, would extinguish their indebtedness to it. Secondly, the defendants raised a constitutional defence that they are unable to satisfy the provisional sentence and, as such, the granting of provisional sentence would deny them their constitutional right of access to courts. It is to be noted that none of these defences deny liability for the debt or the liquidity of the documents relied on by the plaintiff in seeking provisional sentence.

The counterclaim defence

[7] The first defendant asserted that it cancelled the lease agreement as a consequence of the premises becoming flooded due to the plaintiff failing to honour its obligations in terms of the agreement. The first defendant alleged that the plaintiff failed to maintain the roof, gutters and downpipes of the building rented by it. The ingress of the water into the premises was caused by the roof, the gutters and downpipes being in such a state of disrepair that they failed to prevent water from flooding into the premises.

[8] During the period of 22 and 25 April 2025, the defendants alleged that the floodwater damaged the interior of the leased premises, as well as the items of cargo¹ stored therein. The defendants argued that it was not the first time that they experienced such flood damage, with the damage previously having been caused on 17 December 2024, 23 January 2025, 20 February 2025, 26 February 2025, 13 March 2025 and 16 April 2025. After the April 2025 floods, the defendants indicated that damage to stock kept at the premises was in excess of R9 000 000 as a result of the floods.

[9] The defendants also alleged that there were further floods on 25 May 2025 and 4 June 2025 and alleged that they had suffered a direct loss of R1 999 000 arising from the transport and relocation costs incurred in moving their clients' goods away from the flooded premises.

[10] The defendants also argued that they were placed on notice of a claim being instituted against the first defendant by one of its clients in the amount of R2 900 000 arising from flood damage to certain items stored in the leased premises. Should such claim eventuate, the first defendant indicated that it would seek an indemnity from the plaintiff. The defendants argued further that had the plaintiff not served the provisional sentence summons but proceeded with an ordinary action, they would have been able to file a counterclaim against the plaintiff for the alleged damages claims and would be able to seek the stay of the plaintiff's proceedings pending the determination of their counterclaim.

[11] The plaintiff denied the existence of a proper counterclaim. Firstly, the settlement agreement was concluded after the alleged floods, with clause 12 thereof specifically stating that the terms of the agreement were in full and final settlement of all and/or any claims of whatsoever nature in connection with the lease agreement. The plaintiff also relied on other clauses in the lease agreement, in particular clauses 8 and 9, which provide for the maintenance obligations of the parties, as well as the

¹ While the word 'cargo' ordinarily refers to goods carried in a ship the defendants referred to the items held in the warehouse on behalf of their clients as cargo in the answering papers. I shall employ the same term.

exclusion of liability in identified circumstances, including the failure to maintain the building, vis major or casus fortuitous.

[12] Furthermore, the plaintiff denied that the flooding was caused by the state of disrepair of the roof, gutters and downpipes. The plaintiff also relied on the exclusion of liability contained in certain clauses of the lease agreement.

[13] In relation to the indemnity claim, the plaintiff denied that such an indemnity claim would be a bar to the granting of provisional sentence, as the plaintiff would potentially be liable to that third party claimant and not to the defendants, if there was such a claim.

The access to court defence

[14] In relation to this defence, the defendants argued that the requirements of the provisional sentence procedure obliges the defendants to pay the plaintiff's claim in full and only then would they be entitled to enter the principal case. In this regard, the defendants submitted that neither of them can afford to have the sum of R2 414 573 'tied up in limbo', pending them establishing their defence to the plaintiff's claim in the trial proceedings. The defendants surmise that if provisional sentence were to be granted against them, they would effectively be barred from entering the principal case.

[15] The defendants argued further that the manner in which the plaintiff instituted its claim in the current circumstances and proceeded by way of provisional sentence, effectively deprived them of their rights in terms of section 34 of the Constitution.

[16] The plaintiff denied that the defendant's claim that they cannot afford to have the sum claimed tied up in limbo is a valid defence for the purposes of section 34 of the Constitution.

The law and analysis

Counterclaim

[17] In *MHB Construction CC v Alvopoint CC*,² the court refused to consider a counterclaim, as a defence to provisional sentence, which was already serving before the court under a different case, on the premise that the other matter did not serve before the court considering the provisional sentence. The court went on to hold that '[i]t was incumbent on the defendant to pertinently make out a case for the counter-claim contended for in the instant matter so as to afford its adversary the opportunity to refute the allegations in reply'.³

[18] The court also held that:⁴

'much as it is permissible for a defendant to raise a liquid or illiquid counterclaim as a defence, it is only in exceptional circumstances, and where a defendant raising a counter-claim has established, on the affidavits filed in the provisional sentence proceedings, that the probabilities of success are substantially in its favour, will a court postpone provisional sentence proceedings pending the outcome of the defendant's counter-claim.' (Footnote omitted)

[19] In *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a the Land Bank, and Another*,⁵ the Constitutional Court held that:

'a defendant, who relies on a defence which goes beyond the liquid document, is required to produce sufficient proof of that defence to satisfy the court that the probability of success, in the principal case, is against the plaintiff.'

The Constitutional Court concluded that if the probabilities are balanced or they favour the plaintiff, provisional sentence should be granted.⁶

[20] Both parties relied heavily on the principles enunciated in *Twee Jonge Gezellen*. The defendants argued that 'properly construed', their answering affidavit

² *MHB Construction CC v Alvopoint CC* [2016] ZAECHC 15.

³ Ibid para 14.

⁴ Ibid para 8.

⁵ *Twee Jonge Gezellen (Pty) Ltd and Another v Land and Agricultural Development Bank of South Africa t/a the Land Bank, and Another* [2011] ZACC 2; 2011(3) SA 1 (CC) (*Twee Jonge Gezellen*).

⁶ Ibid para 21

disclosed the precise category of cases identified in *Twee Jonge Gezellen* and urged this court to refuse provisional sentence and allow the dispute to be ventilated at trial.

[21] The plaintiff argued that the court's discretion to refuse provisional judgment amounts to an indulgence and is accordingly a narrow discretion and that where the alleged defence (or counterclaim) goes beyond the liquid document (in this instance, the settlement agreement), the defendant must prove on the papers filed that the probabilities of success of the counterclaim are in their favour and that the plaintiff's claim is unlikely to succeed.

[22] The plaintiff framed the issues for determination as follows:

- '(a) whether the defendants are capable of satisfying the judgment debt.
- (b) whether, on the preponderance of probabilities they will succeed in the counterclaim.
- (c) whether the plaintiff is unlikely to succeed in its claim.'

[23] The defendants, on the other hand, framed the issue to be decided as follows in their heads of argument:

'the core dispute is not whether the settlement agreement or the addendum were concluded, but whether, in circumstances where the defendants advance a substantial counterclaim arising from an alleged breach of the plaintiff's maintenance obligations under the lease and consequent flood damage, the provisional sentence procedure would operate unfairly and unconstitutionally by barring the defendants from a trial.'

[24] For the defendants to succeed in establishing the existence of the counterclaim defence, they had to establish the existence of the counterclaim in the answering affidavit and they had to demonstrate that the counterclaim enjoyed prospects of success.

[25] However, the defendants, in asserting that they have a counterclaim, rely on events which occurred before the conclusion of the settlement agreement and the addendum thereto. The defendants have not addressed the exclusionary clauses, relied upon by the plaintiff in their answering affidavit.

[26] In their heads of argument, the defendants argued that the plaintiff's reliance on clause 12 of the settlement agreement and on estoppel are themselves triable issues. This argument is then followed by questions that would have to be answered in the interpretation of the 'full and final settlement clause' of the settlement agreement. This argument ignores the fundamental requirement that the defendants must demonstrate their defence in the answering affidavit.

[27] The defendants could have easily prepared the counterclaim and attached it to the answering affidavit for purposes of demonstrating that it meets the elements of whatever claim they are asserting, instead of expecting the court to interpret the exclusion contained in clause 12 in a vacuum. The defendants need to do more to avert provisional sentence than just demonstrate a triable issue. The second leg of the enquiry is to show that they have favourable prospects of success or that the prospects are evenly balanced and would be improved by the leading of oral evidence. The defendants failed to pertinently make a case against the plaintiff in this regard and were content with bald allegations in the answering affidavit.

[28] The defendants have not addressed the exclusion of liability contained in clauses 8.22 and 9.3 of the lease agreement, both in the answering affidavit and in their heads of argument. This failure to address those exclusions tips the balance of success in the counterclaim towards the plaintiff. The clauses specifically relied upon by the plaintiff in the replying affidavit provide as follows:

'The lessee shall not have any right, remedy or claim of any nature whatsoever against the lessor for any loss or damage (whether general, special or consequential), expenses or injury which may be suffered by the lessee directly or indirectly by reason of, or arising out of or as a result of:

8.22.1 the building or the property or any part thereof being in a defective condition or state of disrepair or any particular repair or maintenance not being effected by the lessor within a reasonable time of it coming to the lessor's attention; or

8.22.2 vis major or causus fortuitous or any other cause wholly or partly outside the lessor's control; or ...

8.22.4 the leased premises or on the property or the building being damaged or destroyed.

...

9.3 No Warranty

The lessor

9.3.1 does not warranty or represent that the leased premises are fit for the purpose for which they are let nor that the lessee will be granted licences in respect thereof for the conduct of its business or that such licences will be renewed...'

[29] Lastly on this topic, the facts contained within the affidavits before the court point to the cancellation of the lease having been mutually agreed to by the parties after the defendants had failed to pay their rental and not as a result of the floods. Furthermore, some of the alleged flooding occurred after the defendants were supposed to have vacated the premises and paid the agreed amount on 4 June 2025. It appears to me that the moving and relocation of cargo was going to occur for the purposes of vacating the premises and was not as a result of the floods.

[30] In relation to the prospective claims by its clients, the first defendant has already intimated that it would seek an indemnity from the plaintiff and as such, the first defendant's clients will utilise the third party procedure contemplated by the Uniform Rules of Court. In this regard, those claims, if they occur, do not form part of the counterclaim.

[31] The defendants have failed to demonstrate the existence of a counterclaim with prospects of success in their favour and as such, the court is unable to exercise the narrow discretion that it has in favour of the defendants. In the event that I am wrong, the defendants are not without a remedy. Rule 8(10) provides that the defendant may enter into the principal case when it has satisfied the judgment and taxed costs or if the plaintiff, on demand, fails to furnish security in terms of rule 8(9).

Inability to pay

[32] The Constitutional Court in *Twee Jonge Gezellen* concluded that the limitation of the right to access to court is narrow and ascribed a limited discretion to the court to refuse provisional sentence where the defendant can demonstrate the following circumstances:⁷

- '(a) an inability to satisfy the judgment debt;
- (b) an even balance of prospects of success in the main case on the papers; and

⁷ *Twee Jonge Gezellen* para 66.

(c) a reasonable prospect that oral evidence may tip the balance of prospective success in his or her favour.'

[33] The Constitutional Court explained the inability to pay as follows:⁸

'It goes without saying that "inability to satisfy the judgment debt" in the present context is not the same as inconvenience or even hardship to the defendant. A defendant who is unable to pay because he or she does not want to sell or encumber a particular asset or who would rather not disturb the cash flow of his or her business, is not entitled to seek what amounts to an indulgence from the court. As I see it, inability to pay in this context must require the defendant to show that the judgment debt is unlikely to be satisfied by the attachment and sale in execution of his or her property. For a defendant simply to state, as the applicants did in this case, that he or she is unable to pay the judgment debt will therefore be insufficient to trigger the court's discretion to refuse.'

[34] The defendants in this case stated on oath that they cannot afford to have the amount claimed 'tied up in limbo'. The predetermined conditions listed by the Constitutional Court in *Twee Jonge Gezellen* require more from the defendants than this stated reason and must be coupled with a solid defence to the claim, with an even balance of prospects of success, which would be tipped in favour of the defendants by oral evidence.

[35] The defendants had an obligation to demonstrate the existence of all three requirements listed by the Constitutional Court in *Twee Jonge Gezellen*. They have not done so and the factual history relied upon was not a precursor to pending litigation regarding the flooding. If it was, this is not evident from the answering affidavit, nor does it explain the signing of the agreement and the addendum with clauses excluding liability and/or confirming the agreements to be in full and final settlement of all disputes between the parties after the correspondence relied upon was already dispatched.

[36] The defendants have failed to make out a case for the exercise of the narrow discretion in their favour, especially in circumstances where the liquid document is not

⁸ Ibid para 67.

challenged and reliance is on a counterclaim which has its own stringent requirements, as canvassed above.

[37] On the facts of this case, the narrow discretion cannot be exercised in favour of the defendants in circumstances where they have failed to set out on oath their inability to satisfy the provisional sentence judgment, accompanied by even prospects of success which would be improved by oral evidence. The claim made by the defendants has been rebutted by the plaintiff in the replying affidavit, relying on the contracts signed by the defendants.

[38] Provisional sentence is an important remedy⁹ and its effectiveness should not be curtailed without sufficient evidence of a solid defence and/or inability to pay where there is a solid defence which requires the hearing of oral evidence.

[39] In this matter, the defendants have done no more than allude to the fact that the granting of provisional sentence would inconvenience them by tying up funds needed for the liquidity of the first defendant. This is not the inability referred to by the Constitutional Court. Furthermore, if the defendants follow the provisional sentence procedure set out in rule 8(11), the funds used to satisfy the judgment will not be held in 'limbo' for longer than is necessary.

[40] The defendants have failed to make out a case which meets the jurisdictional requirements set out in *Twee Jonge Gezellen* or to advance any other sufficient reasons to justify the refusal of provisional sentence based on the reasons of limiting their right of access to court. In the circumstances, I agree with the plaintiff that I do not have the discretion to refuse provisional sentence on the facts of this case.

Costs

[41] The general principle is that costs follow the result. While the court retains a discretion in relation to costs, that discretion must be exercised judicially. The defendants raised defences and failed to substantiate same or to provide justification

⁹ *Twee Jonge Gezellen* para 4.

for the refusal of provisional sentence in circumstances where they were not disputing the agreement or that they owe the money claimed.

[42] The parties agreed in the settlement agreement that costs of litigation would be payable on the attorney and own client scale. No reasons were advanced during the hearing for a deviation from this agreement. The defendants could not really have been in a position to persuade the court to deviate from the agreement in the circumstances of this case, as it appears from the agreements that they failed to honour their rental obligations and had to terminate the lease agreement more than a year before its original term.

[43] To the extent that the plaintiff was represented by two counsel, a senior and a junior counsel, there is no prayer in the papers for costs consequent upon the employment of two counsel. The matter is also not so complex nor is it voluminous to justify the employment of two counsel.

Order

[44] In the circumstances, I make the following order:

1. Provisional sentence in the sum of R2 414 473 (two million, four hundred and fourteen thousand, four hundred and seventy-three rand) is entered in favour of the plaintiff against the first and second defendants.
2. The defendants are directed to pay interest thereon at the prime overdraft rate, compounded monthly, from 28 November 2025 to date of payment.
3. The defendants are directed to pay the costs of the action to date on the attorney and own client scale jointly and severally with the one paying the other to be absolved.

NAKO AJ

APPEARANCES

Heard:	17 August 2026
Delivered:	16 September 2026
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