



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not Reportable

Case No:728/2025

In the matter between:

HIGH YIELD TRADERS (PTY) LTD

Applicant

And

**ANDRE SPORT AND MINING
SUPPLIERS (PTY) LTD**

First Respondent

WILLEM BOTHA

Second Respondent

Coram: MNYOVU AJ

Date reserved: 14 May 2026

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **17 September 2026**.

ORDER

- i. The application for summary judgement is dismissed.
 - ii. The applicant shall pay the Respondent's costs on attorney and own client scale B.
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JUDGMENT

Introduction

[1] In this matter the applicant brought an application for summary judgement against the respondents in respect of loan repayment agreement against the first respondent, as a principal debtor, and second respondent, the surety. The first respondent fell into arrears, despite several demands, the second respondent failed to perform his surety obligations under the suretyship.

Brief relevant factual background

[2] The applicant, entered into a written loan repayment agreement with the first respondent, at all relevant times represented by the second respondent, in his capacity as the first respondent's sole director on or about 14 February 2017, the initial capital amount loaned was R326 245.93 (three hundred and twenty-six thousand two hundred and forty-five rand and ninety-three cents).

[3] The loan was secured by a suretyship agreement between the applicant and the second respondent, the loan was to be paid back within 36 (thirty-six months as from 01 October 2016, being R5 000.00 per month, including interest at a rate of 2 % per month.

[4] On 19 February 2025, a summons was issued by the applicant against the first and second respondents, emanating from a breach of a loan repayment agreement after the first respondent fell into arrears and second respondent failed to fulfil the surety obligations.

[5] A notice of intention to defend was filed on 28 February 2025, followed by five special pleas, the applicant filed an application for summary judgement on 15 April 2025, the respondents filed their affidavit resisting summary judgement on 01 December 2025.

[6] The defences set out in the respondent's affidavit were mainly that: (a) the applicant's claim has prescribed, (b) the excussion of the first respondent, (c) the *in duplum* interest.

Issues for Determination

[7] Against this background, this application turns on the following issues:

7.1 whether the applicant's claim has prescribed in terms of s11 of Prescription Act 68 of 1969,

7.2 whether the second respondent is entitled to the benefit of excussion and division of first respondent and the application against the second respondent is premature,

7.3 whether the application of *in duplum* interest to the quantum is incorrect.

7.4 last but not least, whether the respondents demonstrated a *bona fide* defence.

The applicant's case

[8] The applicant's contention is that the respondents have failed to disclose a *bona fide* defence or raise any triable issues in their special pleas to meet the requirements of Rule 32 (3) (b) of the Uniform Rules of Court.

[9] The applicant's counsel submitted that in this application he relies on the principles established in *Joob v Joob Investment (Pty) Ltd v Stocks Mavundla Zek Joint Venture*¹ where the Supreme Court of Appeal held that the summary judgement procedure is not intended to unjustly prevent a defendant from defending a claim unless it is clear that the defendant has no valid case.

[10] The applicant further argued that the respondent's affidavit opposing the summary judgement contains bare denials and fails to disclose essential material facts, in support of this argument the applicant pointed out that this is supported by *Maharaj Barclays National Bank Ltd*² where the court held that the remedy of summary judgement is granted where the plaintiff/applicant is unimpeachable, and the defendant/respondent's defence is bogus or bad in law.

Prescription

[11] The applicant asserts that their primary case on prescription is straightforward in that, the last payment received from the respondent was R5 000.00 on 01 March 2022 interrupted prescription under section 14(1) of the Prescription Act 68 of 1969, therefore prescription accordingly ran afresh from 1 March 2022 and expired 28 February 2025, proof is annexure "SJ1" this annexure was noted in the particulars of claim as annexure "POC 8".

[12] The applicant contends that the respondent's contention that the last payment received by the applicant was on 30 September 2021 is a bare denial, as it is clearly seen and legible on "SJ1" and "POC 8" annexure, without counter-evidence, their defence is unsupported by any factual basis and does not constitute a *bona fide* defence.

¹ [2009] ZASCA 23, 2009 (5) SA 1 (SCA); [2009] 3 All SA 407 (SCA) at paras 31-32.

² [1976] 2 All SA 121 (A).

[13] Applicant's further contends on 22 January 2025 an email sent to the second respondent in which the second respondent acknowledged the existence of the loan, without any dispute and undertook to recommence payments constitute an express acknowledgement of liability by the respondents, this was annexed on "POC9", therefore, the running of the prescription was further interrupted on 22 January 2025 before summons were served to the respondents on 19 February 2025. The respondents defence on prescription is a bare denial and bad in law.

Excussion of the first respondent

[14] Counsel for the applicant submits that the defence of excussion of the first respondent cannot be sustainable because suretyship remains valid and enforceable where the first respondent could not fulfil its obligations to make repayments, the second respondent is bound to perform in full, at all times the second respondent had the first respondent's benefit of excussion and division.

[15] Counsel for the applicant argued that because of the suretyship the excussion was automatically applicable, and was not excluded from the loan repayment agreement, the second respondent has not pleaded any factual or legal basis for his bare denial, no evidence was provided in his resisting affidavit to sustain such excussion, the counsel for applicant further argued that excussion was always available when the summons were served on 19 February 2025 the second respondent does not have any *bona fide* defence on excussion.

In duplum

[16] The applicant's contention is that the amount of R561 143.00 constitutes the true principal debt owed by the respondents, made out from the outstanding balance as R326 245.93 in Capital and R234 897.07 in Contractual Interest. The agreed combined amount of R561 143.00 was expressly agreed as the amount to be repaid, which is the reason they deviated from the initial claim of R1

815670,02 to R1 122 286 which they further reduced to R 652 491.86 was for the purpose of this application.

[17] Counsel argued that the respondent's reliance on the amount reduced to R1 122 286.00 for purposes of this application to pursue its defence is not a valid defence as none of the defences were raised by the respondents on the total amount of arrear interest which has accrued to outstanding principal debt as it was agreed between the parties, as in any event, the *in duplum* limits the quantum, which is the reason that, in the alternative, in this application the applicant claims R652 491.86 as there are no triable issues warranting referral to trial on *in duplum* rule.

The respondent's case

[18] The respondents contend that all the three defences raised in their special pleas and opposing affidavit are triable issues that requires to be ventilated in an open court, to determine the applicant's claim, the defences are valid and not bad in law.

[19] In its resisting affidavit on summary judgement, the respondents argued that applicants claim prescribed on 31 August 2024 not 28 February 2025 in terms of section 11 of the Prescription Act 68 of 1968,³ more than three years after claim lapsed.

[20] The respondents deny that payment of R5 000.00 was made to the applicant on 1 March 2022, which payment could have cause the prescription to run afresh, and deny that the correspondences sent by the applicant to the second respondent to which respondent responded to on 22 January 2025 constituted acknowledgement of liability have also interrupted prescription.

³ (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.

[21] The respondents submitted that the last payment made to the applicant according to annexure “SJ1” was made on 1 September 2021, which is the period prescription run afresh and such prescription was not interrupted until the debt became prescribed on 31 August 2024, the sporadic payments prepared by the applicant on annexure “POC8” which are illegible document, do not show the exact payments, dates when and how those payments were made by the first respondent to the applicant, the cause of action arose from the summons.

[22] The applicant’s debt was long extinguished by prescription on 31 August 2024, the applicant’s debt cannot be revived by acknowledgement on the 22 January 2025, when its period of prescription had run its full course and could no longer be interrupted or extended by agreement, unless the acknowledgement amounted to a new undertaking, which was never there, applicant’s claim is premised on the prescribed loan repayment agreement and not on any new undertaking to make payment by the respondents.

[23] In support of its argument counsel for the respondent relied also on s14(1) of the Prescription Act, 68 of 1969 where it is stated that after the prescription has run its course, as there is no running prescription to be interrupted, basically applicant’s claim had long run its course by 31 August 2024, it cannot be interrupted on the 22 January 2025. *my emphasis*

[24] In support of its argument the respondents pointed out to various legal authorities in which they relied upon with the issue of prescription *Loubser, Extinctive Prescription* 2nd ed, p18, *Vilakazi v National Employer’s General Insurance Co Ltd* 1985 (4) SA 251 (C) where it was held that an acknowledgement of liability after expiry of the prescription period can also not constitute interruption of that period.

[25] Based on excussion of the first respondent, the second respondent contends that in relation to suretyship, he relies on the benefit of excussion and division, because in the loan agreement he did not bind himself personally as co-principal debtor for the first respondent's indebtedness towards the applicant, he did not waive or renounce the benefits of excussion and division, he is entitled to demand excussion of the first respondent as a surety before he can be held liable towards the applicant, the suretyship.

[26] The respondents contend that at the time the applicant served the summons to the first respondent on 19 February 2025, the applicant's claim had already on 31 August 2024 and first respondent was deregistered on 21 January 2024 and reinstated on 13 May 2025, if the trial court finds the applicant's claim to have prescribed, the claim against the surety would have prescribed, and the first respondent cannot be held liable as co-surety before excussion of the first respondent has taken place, it is the second respondent's right as surety to raise the benefit of excussion in trial court, in his defence, which is the reason the court should refer this matter for trial, as this is a triable.

[27] With regard to *in duplum* interest, the respondents contend that applicant's claim for capital and accrued interest totalling to R1 815 670.02 which has now been reduced for purposes of this summary judgement application is in contravention of the *in duplum* rule, the arrear interest exceeded the amount of capital it was agreed upon.

[28] The respondent submitted to this court their defence does have merit in this application and is *bona fide* applicant is not entitled to the summary judgement, this issue is triable to determine the exact amount the first respondent is owing should the applicant's claim be found not to have become prescribed.

Applicable Law

[29] Rule 32 (3) (b) - states that:

‘The defendant may satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard) or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action, such affidavit of evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon thereof.’

[30] In terms of Rule 32 of the Uniform Rules of Court. Summary judgements may be applied for claims only- (a) on a liquid document; (b) for a liquidated amount in money; (c) for delivery of specified movable property; (d) for ejectment; together with any claim for interest and costs.

[31] The primary purpose of summary judgement is to provide a mechanism for the expeditious resolution of cases where the plaintiff’s claim is unanswerable and where the defendant does not have a *bona fide* defence. It is designed to prevent unnecessary delays in litigation and avoid the costs associated with a full trial when there is no genuine dispute of fact. Summary judgement is considered an exceptional remedy and should be granted only in clear cases where the plaintiff’s claim unassailable and the defendant’s defence is manifestly without merit.

[32] A plaintiff may apply for summary judgement after the defendant has delivered the plea, and file an affidavit verifying the cause of action and stating that, in their belief, the defendant has no *bona fide* defence and has entered an appearance to defend solely for the purposes of delay.

[33] To resist the summary judgement, the defendant must satisfy the court that they have a *bona fide* defence to the plaintiff’s claim.

[34] The rationale for summary judgement is to prevent recalcitrant debtors from delaying payments where no genuine defence exists, a defendant opposing the summary judgement must fully disclose the nature and grounds of the defence and the material facts relied upon,⁴ bare denials do not constitute a *bona fide* defence,⁵ this requires the defendant to:

- (a) disclose fully the nature and grounds of the defence;
- (b) provide material facts upon which the defence is based.
- (c) show that the defence is *bona fide* and raises triable issues.

[35] The onus is on the plaintiff to establish that the defendant has no *bona fide* defence and the claim is unanswerable, however, once the plaintiff has made out a case a *prima facie* case, the onus shifts to the defendant to show that there is a genuine issue for trial.

[36] The court has a discretion in granting or refusing summary judgement. Even if the defendant's affidavit does not fully meet the requirements of Rule 32, the court may still refuse summary judgement if it is satisfied that there is a reasonable possibility that the defendant has a defence that should be heard at trial.

[37] The court must guard against the abuse of the summary judgement procedure, the procedure is not intended to deprive a defendant of their constitutional right to a fair trial but rather to prevent frivolous or vexatious defences that serve only to delay the resolution of the matter,

⁴ Uniform rule 32(3) (b); *Nedbank Ltd v Richardson* [2022] ZAECGHC 96 at para 19.

⁵ *Absa Bank Ltd v Peacock & Another* [2020] ZAWCHC 154.

[38] Section 34 of the Constitution of the Republic of South Africa 1996,⁶ guarantees the right of access to the courts. The court must ensure that the summary judgement procedure does not infringe upon the defendant's constitutional right to access the courts and to a fair trial as enshrined in s34.

Analysis

[39] The crux of this summary judgement is centred around three issues being the defences raised by the respondent to the applicant's claim, the first is the significance of prescription, the second issue is benefit of the excussion and the third issue is the *in duplum* interest owing by the debtor.

[40] It is common law in South Africa that most consumer debts prescribe after three years, section 11 of the Prescription Act 68 of 1969 specifies the exact time period after which different types of debts are extinguished, in this current matter there is an ordinary debt in a form of contract, a loan agreement between the applicant and first respondent, and second respondent being the surety.

[41] The applicant's claim prescribed on 30 September 2019, applicant's illegible document annexed as 'POC8' in particulars of claim and 'SJ1' in its application is not clear enough to read, it is not a legible print for this court to make out the letters and words, it is faded to the point where this court cannot be able to read it, the applicant cannot use the illegible document as proof of payment, knowing well that the onus is on them to establish that the respondent have no *bona fide* defence. I am of the view that the applicants should have submitted proper bank statements obtainable from the bank to prove prescription claim.

⁶ Section 34 of the Constitution provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[42] The onus shifts to the respondent to show that there is a genuine issue for trial, the respondent's argument that last payment was made to the applicant on 1 September 2021 and applicants claim has prescribed on 31 August 2024 is also not supported by sufficient evidence but by the "SJI" submitted by the applicant, the 'SJ1' is the concrete proof to substantiate their defence as well. I am not satisfied with the annexure 'POC8' in which the applicant relied on sporadic payments, I cannot penalise the respondent based on illegible documents, I am satisfied that there is a reasonable possibility that the respondent has a defence that should be heard at trial.

[43] Suretyship is accessory in nature and remains binding until the principal debtor is discharged.⁷ It is trite that where the principal debtor is in default, the creditor may call on the surety for performance, subject to the surety's right to raise the benefit of excussion.

[44] I am of the view that the second respondent had the right to raise the benefit of excussion as his defence, where there is a specific performance to be made on under suretyship and the applicant should have called the second respondent prior to issuing the summons to perform his surety obligations and enquire on the benefit of excussion and division, not to speculate as they did in this application.

[45] The second respondent's argument that the reinstatement of the first respondent had a complete and automatic retrospective effect now, at the time of deregistration it had not effect on the second respondent's defence on excussion, is a valid defence, a material fact which is capable of being sustained at trial.

[46] Same as it applies to the *in duplum* interest, the applicant does not know the exact amount is the respondent indebted to it, the applicant could not verify

⁷ *Liberty Group Ltd v Illman* [2020] ZASCA 38 2020 (5) SA 397 (SCA).

the exact amount claimed, this is also a material fact that requires to be ventilated and be heard in trial. There are two different amounts claimed by the applicant from the summons, tripling the capital amount into R1 815 670.02 and reducing the amount to R1 122 286.00 or alternatively R652 491.86 in their founding affidavit, this material fact upon which the respondent's defence is based requires to be ventilated, calculated at trial, and for settlement.

[47] Summary judgement proceedings are not intended to be a trial by affidavit⁸ the court is not required to determine the merits of the case or resolve factual disputes at this stage, instead the court must assess whether the defendant's affidavit simply disclose a defence that is *bona fide* and raises a triable issue.

[48] Having considered the evidence before me, the respondents have a constitutional right to a fair trial, respondents have defences that should be heard at trial.

[49] A *bona fide* defence is one that is genuinely advanced and is not merely a delaying tactic, I am of the view that respondents met the requirements of Rule 32 (2) (b) by fully disclosing the nature and grounds of their defences to support their claims, I found the defences raised very relevant in law, with the validity of suretyship, the applicant have an answerable claim especially on prescription, *in duplum* and excussion.

Costs

[50] The general rule in matters of costs is that the successful party should be given costs. In determining who the successful party is, the court looks to the substance and not the form of the judgement.

⁸ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A);

Conclusion

[51] I find that the applicant did not make out a *prima facie* case for summary judgement, this application stands to be dismissed, respondent's defence are *bona fide* and good in law.

Order

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

- i. The application for summary judgement is dismissed.
- ii. The applicant shall pay the Respondent's costs on attorney and own client scale B.



B. F. MNYOVU
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

For the Applicant :

Instructed by

Adv. Alex Ellis

Chambers Attorneys INC, Potchefstroom
C/o CJP Oelofse Attorneys, Mahikeng

For the respondents:

Instructed by:

Adv. R GRUNDLINGH

Scheepers & Aucamp Attorneys
Potchefstroom
C/o LFS Attorneys, Mahikeng