Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

[1] **05/2/2024** _____

[2] DATE SIGNATURE

CASE NO: 000087/2023

In the matter between:

MAN FINANCIAL SERVICES SA (PTY) LTD t/a MAN FINANCIAL SERVICES	**APPLICANT / PLAINTIFF**
(REGISTRATION NUMBER: 1997/011686/07)	
and	
ANNA MARIA APPELCRYN	**FIRST RESPONDENT/ /DEFENDANT**
(IDENTITY NUMBER: […])	
JASPER CORNELIUS PETRUS APPELCRYN (IDENTITY NUMBER: […])	**SECOND RESPONDENT/ DEFENDANT**

JUDGMENT

CORAM: NOWITZ AJ

INTRODUCTION

1.

1.1. The Plaintiff seeks Summary Judgment against the First and Second Defendants ("the sureties"), jointly and severally, pursuant to an action that was instituted by the Plaintiff on **3 January 2023,** wherein the Plaintiff claims payment of arrear and future rental amounts in terms of four rental agreements concluded between the parties, as well as interest thereon.

1.2. The First and Second Defendants are members of a Close Corporation **APPELCRYN STOOR EN VERSAKING CC,** under provisional liquidation since **22 October 2022,** after an unsuccessful business rescue process was implemented during **April 2022** (hereinafter referred to as the "Principal Debtor").[1] The Principal Debtor defaulted on the payments as due in terms of the Rental Agreements and the Plaintiff accordingly seeks payment of the outstanding amounts as follows:

1.2.1. the First Agreement (Account Number **91712674**) was entered into on **20 November 2018** for the Rental of certain goods[2] for the total price of **R 786 399.00**. The amount was to be paid to the Plaintiff over a period of 48 months, final rental being payable on **7 February 2023**. The Principal Debtor defaulted on the agreement and is indebted to the Plaintiff in the amount of **R 329 770.86.**[3]

[1] Principal Debtor placed under provisional liquidation on 14 October 2022 – See Affidavit in Support of Summary Judgment at paragraph 2.4 at CL 003 – 5.
[2] See goods as specified at CL 003 – 46.
[3] See Certificate of Balance at CL 003 – 55.

1.2.2. the Second Agreement (Account Number **92674881**) was entered into on **29 July 2019** for the Rental of certain goods in the amount of **R 784 695.60**. The amount was to be paid over a period of 48 months, the last payment being due on **7 October 2023.** The Principal Debtor defaulted on the agreement and is indebted to the Plaintiff in the amount of **R 532 360.77.**[4]

1.2.3. the Third Rental Agreement (Account Number **91713239**) was entered into on **20 November 2018** for the rental of certain goods for **R 786 399.00**.[5] The amount was payable over a period of 48 months, last payment being due on **7 February 2023**. The Principal Debtor defaulted on the agreement and is indebted to the Plaintiff in the amount of **R 313 703.62**.[6]

1.2.4. the Fourth Rental Agreement (Account Number 91710710) was entered into on **20 November 2018** for the rental of certain goods in the amount of **R 786 399.00**.[7] The amount was payable over a period of 48 months, last payment being due on **7 February 2023**. The Principal Debtor defaulted on the agreement and is indebted to the Plaintiff in the amount of **R 306 963.43**.[8]

1.3. All 4 of the Rental Agreements have now terminated through the effluxion of time, (**3 in February 2023**) irrespective of whether or not same were validly cancelled by the

[4] See Certificate of Balance at CL 004 – 61.
[5] See Agreement at CL 004 – 62 to 004 – 68.
[6] See Certificate of Balance at CL 004 – 69.
[7] See Agreement at CL 004 – 70 to 004 – 78.
[8] See Certificate of Balance at CL 004 – 79.

Plaintiff due to the Principal Debtor's default. It is common cause that the First and Second Defendants both signed written suretyship agreements on **18 November 2018** wherein they bound themselves as sureties) and ***co-principal debtor(s), jointly and severally,*** together with the Principal Debtor in favour of the Plaintiff for any debt owed to the Plaintiff by the Principal Debtor.[9] Further, the agreements are not disputed by the First and/or Second Defendants.[10]

1.4. The Plaintiff has duly complied with clause 14 of the Agreement(s), having dispatched by prepaid registered mail, on **8 December 2022**, to the First Defendant a notice of default at her *domicilium citandi et executandi*[11] and to the Second Defendant on **8 December 2022**.[12] Ten business days lapsed from the delivery of the Notice of Default as per clause 10 of the Surety Agreements and the Defendants failed to make payment of the amounts due.

1.5. The First and Second Defendants delivered a Plea on **24 March 2023** and Summary Judgment proceedings were instituted on **14 April 2023** and set down for hearing on **30 May 2023 (**same not being heard that day in view of the Defendants' opposition)**.** The First and Second Defendants delivered an Affidavit Resisting Summary Judgment on **23 May 2023**. There has been no amendment to the Pleadings since then.

DEFENCES AS RAISED:

2.

[9] See First Defendant's Surety Agreement at CL 003 – 33 to 003 – 36; and Second Defendant's Surety Agreement at CL 003 – 37 to 003 – 40.
[10] See Affidavit resisting Summary Judgment at paragraph 3.5 at CL 012 – 6.
[11] See CL 003 – 56 to 003 – 58.
[12] See CL 003 – 59 to 003 – 61.

2.1. The only defence raised by the First and Second Defendants in their Plea, dated **24 March 2023**, is the allegation that a *pactum de non petendo* (agreement not to sue) was concluded between the Principal Debtor and the Plaintiff. This allegedly arose after the Principal Debtor ran into financial difficulties and was placed in Business Rescue in **April 2022**. The rationale for same was to try and reduce the Principal Debtor's debt by finding someone to take over the aforesaid Rental Agreements and the Debtor's obligations in terms thereof. The added proposed benefit (not pleaded) would be to release the Defendants from their Suretyships.

2.2. In paragraphs **8.2.4** and **8.2.5** of the Defendants' Plea, having referred to a telephone conversation in the preceding sub paragraphs on **5 August 2022**, They plead that it was "*ultimately agreed*" (date not specified), that the Plaintiff would hold over for a reasonable period of time (thus brining into existence a *pactum de non petendo*) to afford the Defendants an opportunity to find someone to take over their rights and obligations. What constituted a "*reasonable period of time*" is not spelt out.

2.3. In paragraph **8.3** of the Plea, the Defendants allege that they presented a Mr Farid on **19 August 2022** and in paragraph **8.3.4** (**Caselines 009-5**), the Defendants allege that the Plaintiff represented by Milehom accepted Mr Farid's offer as set out in **8.3.1** to **8.3.4**.

2.4. Nothing is said in the aforesaid paragraphs of releasing the First and Second Defendants as Sureties. (This is added for the first time in paragraph **3.28** of the Affidavit Resisting Summary Judgment. However, the Plea has not been amended).

2.5. The Defendants then rely on a Whatsapp sent on **19 August 2022** (**Caselines 012-31**), which reads as follows:" ***Goeie middag. Hoop dit gaan goed daar. Jammer ek pla jou op Vrydag middag, hier is n ou wat my bel wat die 5 MAN trokke wil koop .Kan jy of iemand hom skakel en praat oor pryse asb sodat jul ook nie verloor nie asb"*** Needless to say, this is at odds with the alleged agreement, *inter alia* since on that date, "*pryse*" still had to be discussed.

2.6. On this version, the "*reasonable period*" would have expired on **19 August 2022**. Further, paragraph **8.7** of the Plea which alleges non acceptance", conflicts with paragraph **8.3.4** of the Plea which alleges an agreement including acceptance.

2.7. In their Affidavit Resisting Summary Judgment, the First and Second Defendants have raised a further defence against the claim, being that the acceleration clause in the agreement constitutes a penalty clause in terms of the Conventional Penalties Act, 15 of 1962 (hereinafter referred to as the "Penalties Act"), that the Plaintiff failed to mitigate its damages by engaging with Mr Faid and substituting him as the Debtor, that the prejudice to the First and Second Defendants significantly outweighs that of the Plaintiff and accordingly that the amount claimed by the Plaintiff should be reduced as per the provisions of the Penalties Act.

2.8. These averments pertain to the Plaintiff's alleged duty to mitigate the damages, especially where such an opportunity was allegedly presented to it by the Defendants in the form of a third party that was allegedly willing to pay all arrear amounts and take over the Rental Agreements from the Defendants.

2.9. In essence, the Defendants contend for "at least" three defences to the Plaintiff's claim to satisfy the Court that are *bona fide* and consist of triable issues which ought to be adjudicated upon at trial. In this regard, and in terms of the relevant legal principles pertaining to Summary Judgment, they aver that "*satisfy*" does not mean prove and contend for "facts" which, if proved at trial, will constitute a *bona fide* defence to the Plaintiff's claim.[13]The Defendants further aver that this does not mean that the defence must be formulated with the precision of a Plea[14].

2.10. The Defendants have not amended their Plea in accordance with the new defence raised and the Plaintiff submits that the Court ought to disregard any new defences raised in its entirety, since a Defendant cannot at Summary Judgment stage, advance defences that were not raised in their Plea[15]

ISSUES TO BE DETERMINED:

3.

3.1. The Court is required to determine whether the defences raised by the Defendants are *bona fide* and whether the defences raise any triable issues. In this respect, the Court is required to consider, for purposes of Summary Judgment:

[13] Visser and Another v Kotze [2013] JOL 29985 (SCA), (519/2011) [2012] ZASCA 73 (25 May 2012) at [11].
[14] Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) 422.
[15] See *Nedbank Limited v Uphuhliso Investments and Projects (Pty) Limited and others* [2022] 4 All SA 827 (GJ).

3.1.1. whether a *pactum de non petendo* had been validly concluded between the parties;

3.1.2. if so, whether a reasonable time had lapsed between the conclusion of the agreement and the institution of the action;

3.1.3. whether the acceleration clause in the written agreements constitutes a penalty clause as envisaged in the Conventional Penalties Act;

3.1.4. if so, whether the Defendants can rely on a defence not pleaded;

3.1.5. if so, whether the Defendants are entitled to a reduction and/or whether the Defendants have sufficiently pleaded such defence.

3.2. The Plaintiff submits that the defences raised by the Defendants do not raise any issues for trial, are not *bona fide* and are solely intended to delay the enforcement of the Plaintiff's claim. The Plaintiff further submits that the Defendants' failure to timeously amend their Plea is indicative of its dilatory approach to the proceedings and is amplified by the Defendants' concession that the agreements were concluded and defaulted upon by the Principal Debtor.[16]

4. It bears mentioning that:

[16] See in this respect for instance Defendants' Plea at paragraph 8.2.3 at CL 009 – 3, confirming that the Principal Debtor had already been in arrears as at July 2022.

4.1 . the alleged willingness of Mr Farid to step into the shoes of the Principal Debtor occurred, on **19 August 2022**, whilst the Principal Debtor was in Business Rescue;

4.2. there is no Confirmatory Affidavit by Mr Fisher, the Business Rescue Practitioner (despite his authority being placed in issue) confirming that either of the Defendants had any authority to represent the Principal Debtor, then in Business Rescue, relating to the alleged proposed substitution and the alleged *pactum de non petendo;*

4.3. there are insufficient details of Mr Farid's alleged proposal, nor is there a Confirmatory Affidavit by Mr Farid;

4.4. there is a discrepancy between the contents of the Whatsapp, the alleged agreement as pleaded, which excludes the First and Second Defendants and what is said in the Plea versus what is said in the Affidavit Resisting Summary Judgment;. (See further, paragraphs **2.2** to **2.6** above);

4.5.. no case is made out by the Defendants as to what constitutes a reasonable period of time *viz a vis* the alleged *pactum de non petendo.* It would appear to be **19 August 2022**. However, this is not pleaded. In any event, this reasonable period of time became academic after **22 October 2022** when the Principal Debtor was placed in provisional liquidation. From that date, the Defendants had no authority whatsoever to enter into any agreement to substitute the Principal Debtor with Mr Farid, or with anyone else, nor could a Substitution Agreement be concluded.

LEGAL PRINCIPLES:

5.

5.1. A surety's liability arises from the time the principal debtor is in default, provided an enforceable claim is proved. The debt of a surety who is also a co-principal debtor becomes enforceable at the same time as the principal debt becomes enforceable.[17]

5.2. Rule 32(3)(b) requires a defendant to *"satisfy the Court by affidavit … that he has a bona fide defence to the action; such affidavit … shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."* The statement of material facts must *"be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial,* ***will constitute a defence to the plaintiff's claim."***[18]

5.3. It is incumbent upon a defendant to formulate his opposition to the Summary Judgment Application and to do so (a) with a sufficient degree of clarity to enable the Court to ascertain whether he has deposed to a defence which, if proved at trial, would constitute a good defence to the action;[19] and (b) with reference to the Plea that was delivered. In this regard a defendant must engage meaningfully with the material in the plaintiff's affidavit supporting the Application for Summary Judgment.[20]

5.4. Thus, a defendant will fail if it is clear from his Affidavit that he is advancing a

[17] *Millman NO v Masterbond Participation Bond Trust Managers (Pty) Ltd (under curatorship)* [1997] 1 All SA 408 (C).
[18] *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 266 (T).
[19] See *District Bank v Hoosain* 1984 (4) SA 544 (C).
[20] *Saglo Auto (Pty) ltd v Black Shades Investments (Pty) Ltd* 2021 (2) SA 587 (GP) at paragraph [55].

defence simply to delay the obtaining a judgment to which the defendant well knows that the plaintiff is justly entitled.[21]

5.5. In ***NPGS Protection and Security Services CC & another v FirstRand Bank Ltd***[22] the Supreme Court of Appeal held as follows:

*"Rule 32(3) of the uniform rules requires an opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor. To stave off summary judgment**, a defendant cannot content him or himself with bald denials, for example, that it is not clear how the amount claimed was made up**. Something more is required. If a defendant disputes the **amount claimed, he or she should say so and set out a factual basis for such denial**. This could be done by giving examples of payments made by them which have not been credited to their account."*

6. **PACTUM DE NON PETENDO:**

6.1. The Defendants allege that a *pactum de non petendo* was reached between the Principal Debtor and the Plaintiff on or about **5 August 2022**. The Plaintiff submits that the defence of a *pactum de non petendo* cannot succeed, *inter alia,* for the following reasons:

6.1.1. firstly, the Defendants have failed to plead a *pactum* with the necessary particularity as to disclose a defence to the Plaintiff's claim;

[21] *Skead v Swanepoel* 1949 (4) SA 763 (T) at 766 - 7.
[22] (314/2019) [2019] ZASCA 94 (6 June 2019).

6.1.2. secondly, the Plaintiff avers that a valid *pactum* never came into effect between the Plaintiff and Defendants and no undertaking was reached not to sue in terms of the Suretyship Agreements;

6.1.3. thirdly, the variation of the original agreement in the form of a verbal *pactum* cannot be allowed; and

6.1.4. fourthly a reasonable time had lapsed between the alleged conclusion of the *pactum*, the Defendants failure to comply timeously and the steps taken by the Plaintiff to enforce the claim.

6.2. The Plaintiff avers that the Defendants have failed to plead whether the agreement was verbal and/or written and/or whether the Plaintiff's representative was duly authorised.[23] The Plaintiff submits that it is clear from the bald and sketchy manner in which the *pactum* is pleaded that the Defendants do not have a defence to the Plaintiff's claim.

6.3. In the matter of ***Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd***[24] Cilliers JA rejected the argument that a clause in a contract amounted to a *pactum de non petendo* as follows:

[23] See Plea at paragraph 8.2.4 at CL 009 – 3.
[24] 2004 (2) SA 535 (W).

"The appellants sought to rely on the provisions of clause 6 as containing a pactum de non petendo. This clause is aimed – however legally ineffective it may be – at an adjustment of rights or obligations of parties in circumstances set out therein. It does not contain any undertaking not to sue in respect of any liability which does accrue as a result of a breach. The contention based on an alleged pactum de non petendo therefore cannot succeed."

6.4. Considering the pleaded version of the *pactum*, no express allegation is made that the Plaintiff furnished a written undertaking that it would not sue the Defendants based on the Suretyship Agreements. The Plaintiff accordingly submits that no *pactum* came into effect and that the defence should be rejected.

6.5. In terms of the pleaded version of the *pactum*, the Defendants were required to source a ***suitable*** third party who could be ***substituted as a debtor*** of the Plaintiff. The Plaintiff submits that it is clear on the Defendants own version that they failed to comply fully with the terms of the alleged *pactum* and that the whatsapp does not support the Defendant's case.

6.6. What raises additional obstacles for the Defendants is that the common cause Agreements (being, the principal Rental Agreements and the Suretyship Agreements) all include non-variation and non waiver clauses. The Affidavit Resisting Summary Judgment contends for a verbal agreement concluded over telephonic discussion.[25]

[25] See Affidavit resisting Summary Judgement at paragraph 3.21 at CL 012 – 9.

6.7. The Non Variation clause in both suretyship agreements at clause 17 reads as follows:

"To the extent allowed by law, this document is the complete agreement between me/us and MAN regarding this suretyship. Each party waives the right to rely on an alleged condition that does not form part of this suretyship."

6.8. Clause 22 of the Rental Agreements provides that no party is legally obliged to comply with any term, condition or undertaking not recorded in the agreements.

6.9. Clause 23 of the Rental Agreements further provides that to be valid, any changes to the Agreement must either be in writing and signed by all parties or be voice recorded in which case, the Plaintiff will send the Defendants a written record of the changes to the Agreement.

6.10. In ***Brisley v Drotsky***[26] the importance of the *Shifren* principle was reiterated. In the matter of ***HNR Properties and another v Standard Bank of SA Ltd***[27] mentioned the following:

"Courts have in the past, often on dubious grounds, attempted to avoid the Shifren principle, where its application would result in what was perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve the violation of the Shifren principle, for example,

[26] 2002 (4) SA 1 (SCA).
[27] 2004 (4) SA 47` (SCA).

where it amounts to a pactum de non petendo or an indulgence in relation to previous imperfect performance."

6.11. Although the above extract proposes that a *pactum* under a contract containing a variation clause may not involve the violation of the *Shifren* principle, the court in *HNR Properties* did not consider any *pactum.* The notion as expressed in the *Miller* case in relation to the conclusion of a verbal *pactum* and a non-variation clause was rejected in the matter of ***Brisley v Drotsky***.

6.12. I have had regard to the unreported Judgment in this Division of Swanepoel J in ***Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa*** **Case No 1298/2022 (and the authorities therein referred to),** which found *inter alia* that despite the "Shifren Straight Jacket", a "*pactum de non petendo*" could succeed if the parties orally agreed to change their contractual regime ***and conducted themselves in accordance with their mutual understanding*** (at para 22).(emphasis added).

6.13. However, in the present instance, the Defendants' complaint is that the Plaintiff did not conduct itself in accordance with the alleged mutual understanding. Further, the facts and discrepancies in this case are at odds with the facts and authorities referred to in the *Phoenix* decision supra. **See specifically in this regard, paragraphs 2.2 to 2.6 and 4 *supra.***

6.14. The mere allegation of a *pactum* is not sufficient to establish the existence of a *bona fide* defence and a triable issue. There should be no conflicting versions, no WhatsApp which says something else and at least some form of corroboration

especially when Mr Fisher's authority is specifically challenged and especially when it is contended that there was no communication between the Plaintiff and Mr Farid, which is unsubstantiated hearsay.

6.15. Even if the Court were to find that a valid *pactum* was concluded, it is clear from the facts that a reasonable period had lapsed between the period on which the agreement was allegedly concluded (being **5 August 2022**) and the date summons was issued (being on or about **4 January 2023**).[28] To compound matters, the granting of a Provisional Liquidation Order on **22 October 2022** put an end to the alleged reasonable period, if it ever existed to begin with. In any event, the Defendants were called upon to comply with the surety agreements during **December 2022** (There was no immediate response to the demand asserting a *pactum de non petendo,* or contending that a reasonable period had not yet expired) In this respect, a party has a right to cancel any agreement where the other party is unable to perform within a reasonable time.[29]

6.16. The Defendants clearly rely on a contract without a definite period of existence. In this regard, the following scenarios can be identified:

6.16.1. the parties intend that the contract will be in force until such a time as it is terminated by (reasonable) notice;[30]

[28] See Affidavit in support of Summary Judgment at CL 003 – 7.
[29] See *Ponisammy v Versailles Estates (Pty) Ltd* [1973] 1 All SA 540 (A), 1973 (1) SA 372 (A).
[30] See *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 827I-828B; *Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers* 2004 (1) SA 538 (A); *Cell C (Pty) Ltd v Zulu* 2008 (1) SA 451 (SCA) at par [11].

6.16.2. the parties intend that the contract will only remain in force for a reasonable period, and then terminate;

6.16.3. certainty is obtained through a determination by one of the parties. A discretion to determine one's own performance or to perform only when one wishes to do so (the *condicio si voluero),*[31] is invalid.

6.17. A party generally has the right to terminate an indefinite contractual relationship on reasonable notice.[32]

6.18. The onus is on the debtor who considers the claim for repayment premature to raise the question and to advance reasons why the debtor is entitled to further time to pay.[33] In this respect, it appears that the Defendants argue that a reasonable time would be considered the remainder of the principal agreement (alternatively, it was suggested in argument that **22 August 2022** might be the applicable date). I am in agreement in the present instance that this cannot be correct, for the factual and legal reasons set forth above. . Should the underlying reasoning for the alleged *pactum* be based on the principal debtor's inability to make the necessary payments and conditional upon the Defendants finding a third party to take over the principal debtor's obligations, this ought to, at the very least, take place prior to the principal debtor being provisionally liquidated as no further rights could be transferred following the winding up of the company.

[31] *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) at 186.
[32] *Bredenkamp v Standard Bank of South Africa Ltd* [2009] JOL 23980 (GSJ).
[33] See *Rustenburg Platinum Mines Ltd v Breedt* [1997] 2 All SA 69 (A), 1997 (2) SA 337 (SCA) pp 352 – 353.

6.19. Alternatively, given the notice delivered to the Defendants on **8 December 2022** as to the enforcement of the agreement, a reasonable time had elapsed, and the Defendants were given a further opportunity between **December 2022** and **January 2023** to comply with the agreement, alternatively the *pactum.*

6.20. Further, given the termination of the Rental Agreements during **February 2023** (for three of the principal agreements), the Defendants argument that this defence can be sustained is misplaced as there is no further possibility to cede any rights and obligations in terms of these Rental Agreements.

6.21. For the reasons set forth in**2.2** to **2.6, 4** and **6.1** to **6.20** above, I find that the defence of ta *pactum de non petendo* is without merit, does not disclose a *bona fide* defence and must fail, for purposes of the present Summary Judgment Application.

7. **THE CONVENTIONAL PENALTIES ACT:**

7.1. The Defendants have for the first time raised this defence in the Affidavit Resisting Summary Judgment. In the matter of ***Nedbank Limited v Uphuhliso Investments and Projects (Pty) Ltd and Others***[34] it was decisively held that ***where the defence was not pleaded, it cannot be raised in the resisting affidavit***. The court ultimately held that the defendants had denied the plaintiff the opportunity to explain why the newly raised defence did not constitute a *bona fide* defence and/or why it did not raise any issues for trial.

[34] [2022] 4 All SA 827 (GJ).

7.2. The Summary Judgment Application *in casu* had previously been set down for hearing during **May 2023**. Despite a further lapse of time, the Defendants failed to take any steps to amend their Plea. As such, the Plaintiff avers that the defence should be rejected from the outset.

7.3. By virtue of the aforegoing, I am of the view that the Defendants cannot raise this defence for the first time in the Affidavit Resisting Summary Judgment. Nonetheless, for the sake of completeness, I address certain aspects of this defence hereunder.

7.4. The Defendants aver that the Plaintiff could have taken the trucks and entered into new rental agreements with another company, which is specifically within the business model of the Plaintiff to do, and could therefore have continued to receive a rental income from the trucks. However, given that the Principal Debtor was in Business Rescue from **April 2022** and in provisional liquidation from **October 2022** coupled with the termination of the Rental Agreements during **February 2023** (for three of the principal agreements), the Defendants argument that this defence can be sustained is misplaced as there was no further possibility to cede any rights and obligations in terms of these Rental Agreements.

7.5. In order to determine whether a clause constitutes a penalty as envisaged in the Penalties' Act, it is necessary to firstly enquire as to whether what is being complained of is a "penalty". If not, the enquiry goes no further.[35] If the penalty is out of proportion to the prejudice suffered by reason of the defendant's breach of contract the question arises as to whether it would be equitable for the court to reduce the penalty.

[35] Footnote 3

7.6. The Act leaves the term “penalty” undefined and thus it must be taken in its common-law sense as a provision intended to operate *in terrorem* of the offending party.[36]

7.7. If the contract contains an acceleration clause making the entire balance of the debt payable on the debtor’s failure to pay any one instalment it will only be necessary to examine the clause carefully in order to see whether anything in addition to the debtor’s default, such as written demand, is required to bring it into operation.[37]

7.8. In this respect, the principal agreements concluded specifically provide that where the debtor is in default *and it has not remedied the default after written notice to do so,* the Plaintiff may demand immediate payment of all/any arrear amounts as well as the full Outstanding balance in terms of our Agreement whether or not it is due and payable at the time, all of which will immediately become due and payable in full, together with interest and costs until the Plaintiff has received payment.[38]

7.9. In the matter of ***Nedbank Limited v Uphuhliso Investments and Projects (Pty) Limited and others***[39] the court held that it is not to say that defendants were not entitled to challenge the penalty interest as disproportionate penalty but rather that for them to have done so permissibly, they should have pleaded appropriately and set out sufficient facts in their resisting affidavit to demonstrate that the pleaded issue is triable.[40]

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[36] See *Cape Municipality v F Robb & Company Ltd* 1966 (4) SA 329 (A) at 336C-D.
[37] *SA Bank of Athens Ltd v Solea* [1977] 2 All SA 461.
[38] See clause 14, 14.2 and 14.2.1 at CL 004 – 39.
[39] [2022] 4 All SA 827 (GJ).
[40] See *Nedbank Limited v Uphuhliso Investments and Projects (Pty) Limited and Others* [2022] 4 All SA 827 (GJ).

7.10. Some authorities require the defendant to quantify the actual reduction, or at least set out the facts from which it appears that the penalty is so to be reduced.[41] It is submitted by the Plaintiff that the Defendants have failed to do so *in casu*.

7.11. Prior to the amendment of Rule 32, certain authorities found that summary judgment proceedings were inappropriate for purposes of recovering a penalty.[42] In contrast, other decisions, particularly more recent decisions of this Division required that the Defendant should quantify the actual reduction, or at least set out facts from which it appears that the penalty.[43] *In casu*, the Defendants have failed to discharge this onus.

7.12. Moreover, the Defendants' averment that the trucks were in any event returned to the Plaintiff on **19 August 2022**, is a bald and unsubstantiated allegation, with no proof provided.

7.13. For the reasons set forth in **7.1** to **7.12** above, I find that the defence based on the Conventional Penalties Act cannot be raised since it was not pleaded, is without merit, does not disclose a *bona fide* defence and must fail, for purposes of the present Summary Judgment Application.

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[41] See *Premier Finance Corporation (Pty) Limited v Rotainers (Pty) Limited and another* 1975 (1) SA 79 (W) at 84A; *Citibank NA, South Africa Branch v Paul NO and another* 2003 (4) SA 180 (T) [also reported at [2003] 2 All SA 484 (T) – Ed] at paragraphs [21] – [24].
[42] See *Premier Finance Corporation (Pty) Ltd v Steenkamp* and Others 1974 (3) SA 141 (D).
[43] *Premier Finance Corporation (Pty) Limited v Rotainers (Pty) Limited and another* 1975 (1) SA 79 (W), *Citibank NA, South Africa Branch v Paul NO and another* 2003 (4) SA 180 (T).

CONCLUSION:

8.

8.1. In the light of my findings above, I find that the defences raised are not *bona fide* and do not raise any issues for trial. In the premises, Summary Judgment should be granted as prayed for.

8.2. The Surety Agreements provide that the certificate of balance constitutes proof of any applicable interest rate and of the resulting amount of the debt; or any other fact relating to the suretyship for the purposes of judgment, including provisional sentence and summary judgment or proof of claims against insolvent and deceased estates.[44] The agreements further make provision for the payment of costs on an attorney and client scale.[45]

8.3. In the premises, Summary Judgment should be granted with costs on an attorney and client scale.

9.

ORDER

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 as follows:

ACCOUNT NO 917126 74

1.1. Payment of the sum of R329 770.86

[44] See Clause 14.
[45] See Clause 15.

1.2. Interest on the aforesaid sum at the rate of 11.25% per annum *a tempore morae* from date of Summons to date of final payment.

1.3. Costs of Suit

ACCOUNT NO 92674881

1.4. Payment of the sum of R532 360.77

1.5. Interest on the aforesaid sum at the rate of 11.5% per annum *a tempore morae* from date of Summons to date of final payment.

1.6. Costs of Suit

ACCOUNT NO 91713239

1.7. Payment of the sum of R313 703.62

1.8. Interest on the aforesaid sum at the rate of 11.25% per annum *a tempore morae* from date of Summons to date of final payment.

1.9. Costs of Suit

ACCOUNT NO 91710710

1.10. Payment of the sum of R306 963.43

1.11. Interest on the aforesaid sum at the rate of 11.25% per annum *a tempore morae* from date of Summons to date of final payment.

1.12. Costs of Suit

M NOWITZ

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA GAUTENG DIVISION , JOHANNESBURG

5 FEBRUARY 2024

APPEARANCES

FOR PLAINTIFF:

Adv Z Marx-Du Plessis

FOR DEFENDANTS:

Adv J Hershensohn