



**IN THE HIGH COURT OF SOUTH AFRICA  
[EAST LONDON CIRCUIT DIVISION – EAST LONDON]**

**CASE NO.: EL 705/2021**

**In the matter between:-**

**SALDOSOL INVESTMENTS (PTY) LTD**

**PLAINTIFF**

**and**

**AMATHOLE DISTRICT MUNICIPALITY**

**DEFENDANT**

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**JUDGMENT**

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**NORMAN J:**

[1] This is an application for summary judgment. Plaintiff claims payment of an amount of R8 087 241.74 in respect of arrear rental and other charges pursuant to a lease agreement concluded between it and the defendant together with interest thereon and legal costs.

*Common cause facts*

[2] It is common cause that the parties entered into a written lease agreement concluded on 1 August 2014 in respect of an immovable property, known as Phase 4 Waverly Office Park, Phillip Frame Road, Chilselhurst, East London for a period of three (3) years commencing on 1 November 2014. On 1

November 2014 the parties concluded a written addendum to the lease agreement which related to further tenant installation items and to provide the defendant with hygiene services. They further entered into a second addendum to the lease which was concluded on 15 December 2014 extending the lease for a period of two (2) years to December 2017 with plaintiff undertaking to attend to further tenant installations as referred to in the second addendum.

[3] On 24 August 2016, the parties concluded a third addendum to the lease agreement where the plaintiff undertook to attend to further tenant installations. The parties agreed that the further tenant installations and services referred to in the first to third addenda would be amortized over the lease period.

[4] On 8 February 2018 the parties concluded a written renewal of the lease agreement where they agreed to renew the lease for a further period of three (3) years with an option to renew for a further two (2) years.

#### *Alleged breach*

[5] Plaintiff alleges that the defendant breached the lease agreement in that it failed to make payments of the monthly rentals and other charges as and when they fell due. It alleged that as of 4 June 2021 the defendant was in arrears in the amount of R4 782 838.30 in respect of outstanding rental and other charges. It also claimed an amount of R3 304 403.50 in respect of accumulated interest. The total sum allegedly owed is R8 807 241.74. Plaintiff relies on a statement attached to its particulars of claim, marked "POC6".

[6] Defendant defended the action and it raised two special pleas. The first one is based on the plaintiff's failure to comply with the provisions of section 3 and 4 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Institution Act). The defendant contended that without compliance with the provisions of this Act, the plaintiff is non-suited.

[7] The second special plea raised is that of prescription. The defendant contends that the entries made in "POC6" were made in December 2014 and that summons was only served on 10 June 2021 and therefore a period of more than three (3) years had lapsed. It contended that any amount that would have been payable more than three (3) years before service of the summons, had prescribed.

#### *Plaintiff's replication*

[8] In respect of the prescription point, the plaintiff replicated on the basis that prescription of the debt claimed from defendant was interrupted in terms of section 14 of the Prescription Act 68 of 1969 in that the defendant acknowledged indebtedness of its liability before the debt became prescribed.

[9] In so far as the non-compliance with sections 3 and 4 of the Institution Act, plaintiff contends that the claim is for specific performance arising out of the defendant's breach of contract and not for a debt as defined in the Institution Act (for payment of damages). It further contends that there was no obligation on the plaintiff to comply with the aforesaid provisions of the Institution Act or to allege compliance therewith.

#### *Summary judgment application*

- [10] In the application for summary judgment, deposed to by the director of the plaintiff, Jean Prieur du Plessis, plaintiff addressed the defences raised by the defendant. It contends that the defence that there was no demand for interest is meritless. Plaintiff makes a point that *“I am advised that it is the function of the Court to interpret the relevant provisions of the lease and not that of the parties.”* However, it proceeded to give an interpretation to certain clauses, namely 4.1 and 4.3. It further contends that interest charged on arrear rental was reflected on the monthly invoices and statements issued to the defendant as reflected on annexure “POC6”.
- [11] In relation to the prescription plea, plaintiff alleged that the plea is vague because the defendant has not indicated which portion of the claim has become prescribed. The defendant never disputed the statements and invoices issued to it by the plaintiff and instead made payments in respect thereof, and by so doing, such conduct constitutes acknowledgement of the defendant’s liability.
- [12] Prescription was interrupted by an express or tacit acknowledgement of liability by the defendant. In this regard it relies on various documentation such as the emails exchanged between the plaintiff and the Senior Manager: Accounting Officer of the defendant, a Mr Sicelo Kweleta, where the defendant expressed an intention to settle the arrears.
- [13] Plaintiff relied and drew the attention of the Court to clause 4.2 of the lease in terms of which the plaintiff has a discretion to allocate payments made by the defendant. It then produced an updated statement marked “JP5”.

[14] Plaintiff disputed the defendant's defence that no demand was made because according to it all the invoices and monthly statements issued during the subsistence of the lease constituted legitimate means of demand. It relied on the letters sent to the defendant on 16 February 2021 and 21 April 2021, as letters of demand.

[15] It stated that the Institution Act is not applicable in the action and there was accordingly no obligation to comply therewith. In the alternative, it submitted that if it is found that the notice was necessary then it sought condonation for its non-compliance with the Institution Act.

[16] It concluded by stating that *"the defendant's attempted defences alleged in the amended plea, are vague, sketchy and laconic and demonstrate that the defendant does not have any bona fide defence to the plaintiff's claim nor does it raise any triable issues in its amended plea."*

#### *Defendant's opposing affidavit*

[17] Defendant in resisting the summary judgment application filed an opposing affidavit deposed to by Thandekile Themba Mnyimba, its municipal manager.

He raised the following preliminary points:

1. *That the plaintiff failed to comply with the provisions of section 3 and 4 of the Institution of Legal Proceedings against Organs of State Act 40 of 2002;*
2. *That the claim where it refers to amounts which are more than three (3) years before the institution of a claim have become prescribed.*
3. *That according to the initial lease agreement it provided that any other amounts other than those listed in clauses 4.1.1 to 4.1.3 were payable on demand. That clauses 4.1.1 to 4.1.3 do not provide for the payment of interest and therefore interest is only payable on demand."*

[18] Defendant contended that:

- (a) Annexure “POC6” represents account entries commencing on 1 December 2014, a period of more than three (3) years from the date upon which plaintiff’s summons was served on the defendant. Plaintiff’s claim has prescribed or alternatively, a portion thereof has become prescribed in terms of section 11 of the Prescription Act 86 of 1969.
- (b) Any claim for accumulated interest which is not supported by demand, which the plaintiff was obliged to make before any rights thereof vested, is not payable because plaintiff has not complied with its obligations.
- (c) That plaintiff has claimed a total sum of R3 304 403.54 for accumulated interest and it only relied on a demand made in its letter dated 21 April 2021.
- (d) The letters that were sent on 16 February 2021 and 21 April 2021, to the defendant by the plaintiff, did not comply with the provisions of sections 3(1) and 4(1) read with sections 4(2) of the Institution Act. Those letters, he averred, were not addressed to the municipal manager as contemplated in the Institution Act.
- (e) The plaintiff’s attempt to seek condonation for its non-compliance with the provisions of sections 3 and 4 of the Institution Act in the affidavit for summary judgment, is impermissible.
- (f) Plaintiff, in its particulars of claim, failed to give the exact dates and months when rentals were not paid. Plaintiff failed to indicate precisely when any debt became due and payable. It also made reference to further invoices issued but failed to state which invoices were not paid

and in respect of which months those invoices related to and/ or which rentals were outstanding in respect of which months.

- (g) The municipal manager submitted that the defendant's defence to the claim is *bona fide*. The defendant relied on certain invoices and a reconciliation of utilities from July 2020 to March 2022 as annexures "MM1" to "MM3".
- (h) The plaintiff invoked the provisions of clause 4.2 of the lease agreement for the first time in the summary application whereas that clause is not pleaded in its particulars of claim.

*Plaintiff's legal submissions*

[19] Mr Pretorius appeared for the plaintiff and Mr Matotie for the defendant.

[20] It was submitted on behalf of the plaintiff that the defences raised are not *bona fide*. To the extent that there are differences in figures, it was argued, this court must simply deduct what has been paid and grant summary judgment on the outstanding amounts.

[21] It was argued that clause 4.2 is not pleaded in the particulars of claim because plaintiff does not rely on it for the breach. It was simply raised in reaction to the defendant's affidavit. It was submitted that plaintiff is not required to tabulate the months not paid for because it is impossible to do so because of the arbitrary payments made by the defendant. There are payments that do not co- relate with invoices, however, there is a running balance that gives the exact payments made on which dates.

[22] It was submitted that a creditor is only required to give notice to an organ of state in respect of a claim for damages. In this regard reliance was placed on **Director- General, Department of Public Works v Kovacs Investments 289 (Pty) Ltd<sup>1</sup>**, for the submission that:

“There are therefore two legs to the enquiry whether a claim is a debt in terms of the Act. First, it must arise from a contract, a delict or ‘any other liability’. Second, it must render the organ of State liable for damages.”<sup>2</sup>

[23] It was submitted that, based on the aforementioned decision, there was accordingly no obligation to send the notice because the Institution Act does not apply to the debt claimed herein.

[24] It was argued that the defence raised by the defendant that it had paid and owe nothing to the plaintiff should not be allowed. The onus is on the defendant because it raised payment as a defence, it was argued. In this regard reliance was placed on, *inter alia*, **Pillay v Krishna and Another<sup>3</sup>**.

[25] Relying on **Eerste Nasionale Bank van Suidelike Afrika BPK v Vermeulen<sup>4</sup>** case, plaintiff submitted that it is not disputed that invoices were continuously issued and payments were continuously made. Each payment made interrupted prescription, argued the plaintiff.

[26] Plaintiff argued that this court does not have to concern itself with anything prior to 31 May 2017 because the account of the defendant was in credit. Plaintiff argued that interest is something that was agreed between the parties. If payment was not made on time parties agreed that there would be a charge.

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<sup>1</sup> 2010 (6) SA 646 (GNP); See also: **Thabani Zulu & Co ( Pty ) Ltd v Minister of Water Affairs and Another** 2012 (4) SA 91 ( KZD) ; **Nicor IT Consulting ( Pty ) Ltd v North West Housing Corporation** 2010 (3) SA 90 ( NMW) paras [12] – [14], [27],[33]and [34].

<sup>2</sup> Kovacs, supra, para [8] at 648 E-F.

<sup>3</sup> 1946 AD 946.

<sup>4</sup> 1997 (1) SA 498 (OFS) @ 503 G-1.



*Defendant's legal submissions*

[27] Mr Matotie argued that the defences raised are bona fide and the court should refuse summary judgment. He relied on ***Tumileng Trading CC v National Security and Fire (Pty) Ltd***<sup>5</sup>, where Binns-Ward J held:

“A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognizable defence on the face of it, and that the defence is genuine or *bona fide*, summary judgment must be refused. The defendant's prospects of success are irrelevant”.

[28] He further submitted that an acknowledgment after a claim had already prescribed does not interrupt prescription. In this regard he relied on ***Desai NO v Desai and Others***<sup>6</sup>

[29] He submitted that the accumulated interest that is being claimed was never demanded. The particulars of claim do not allege that a demand was made prior to the issuing of the summons. The correctness of any interest calculated is placed in dispute and that is an issue for determination by the trial court.

[30] It was submitted that if the court has regard to “MM3”, it would observe that no interest is claimed on that invoice. It was further submitted that a comparison of amounts in “POC6” or “JP5 “with the amount contained in the unsigned ‘settlement agreement’ that was prepared by the plaintiff there was a difference of (R6 365 350) which has not been explained. On this basis alone, it is submitted, the court should refuse summary judgment. It was further submitted that the suggestion by the plaintiff in argument that the court should simply subtract any amounts in dispute or prescribed would not assist in overcoming the issues relating to “POC 6” , which is the bedrock of the claim.

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<sup>5</sup> 2020 (6) SA 624 (WCC) at para 13.

<sup>6</sup> 1996 (1) SA 141 (A) at 147 G.

[31] Mr Matotie did not argue the non-compliance with the Institution Act point but did not abandon it either. In its opposing affidavit the defendant had submitted that failure to give notice as envisaged in the Institution Act bars the plaintiff from continuing with the action. It was also argued that the attempt to seek condonation for the non-compliance with the Institution Act in the application for summary judgment is impermissible.

### *Discussion*

[32] At the hearing of this matter on 13 April 2023 the plaintiff's counsel produced a document marked annexure "D". Annexure "D" reflected a summary for rental, utilities & other accounts per detailed ledger as R10 499 028.98 and for accumulated interest as R 2 751 514.29. In argument counsel for the plaintiff submitted that the balance owing was R5 525 459.49 for the months of March and April for rentals and interest for those months being R71 864.97 and R44 009.63, respectively. In its further supplementary affidavit submitted on 21 April 2023, plaintiff annexed another annexure "SA3" which has a total of R5 451 251.07.

[33] As a result of this annexure the parties were afforded an opportunity to consider the annexure and make further submissions in relation thereto. Plaintiff did so timeously and the defendant submitted an affidavit on 26 May 2023. Upon considering both submissions this court is of the view that nothing turns on those further submissions.

[34] Plaintiff contends that invoices were issued and were not contested. In its additional affidavit it attached one invoice that reflected an interest charge in the amount of R16 799.38, the remaining invoices had no interest or arrear amounts reflected thereon.

[35] In its supporting affidavit plaintiff stated at para 53:

*“53. I draw the court’s attention to clause 4.2 of the lease in terms of which the plaintiff has a discretion to allocate payments made by the defendant. An updated statement which reflects invoices issued, interest charged on arrear rental and payment made by the defendant after 4 June 2021 is attached hereto marked “JP5” ,the contents of which I verify as correct.”*

[36] Clause 4.2 of the lease agreement provides:

*“4.2 The landlord may appropriate any payment received from or for the benefit of the tenant in reduction of any amount payable by the tenant to the landlord in terms of the contract.”*

[37] In paragraph 3.3 of the particulars of claim the plaintiff does not rely on 4.2 as it has expressly recorded those clauses upon which it relies. This clause is directly relevant to, *inter alia*, how the payments were allocated to the various invoices. There is merit in the defendant’s complaint that this clause is not pleaded. It is relevant for the purposes of adequately defending the claim to know how the payments were allocated. That should appear from the pleadings.

[38] Clause 4.1.4 provides that the defendant will pay monthly rental in advance, monthly contributions to property assessment rates, stamp duty, contract costs and deposit and at 4.1.4 the parties agreed that:

*“4.1.4 any other amount on demand”.*

It is for this reason that the defendant contends that any interest claimed became due and payable only on demand.

[39] It seems to me that the plaintiff has accorded to itself a right of reply in the summary judgment application because it replied to an opposing affidavit filed

by the defendant. This was in relation to the first application. It contends that the reconciliation done by the defendant is irrelevant and is intended to cloud matters because it covers only a small portion of a relevant period upon which the plaintiff's claim is based.

[40] In the opposing affidavit deposed to by the defendant, he contends that the plaintiff has not alleged which exact months it has not paid rentals or other charges. The defendant disputes the correctness of "POC6" and it further disputes its indebtedness to the plaintiff. It is crucial in action proceedings that a party that is being sued must know the case that it has to meet. The rentals claimed herein are substantial amounts. It is not unreasonable to seek the kind of detail that the defendant is asking for especially where the claim is supported only by entries. It may be a cumbersome exercise but it is a necessary one especially where the plaintiff on its own has verified its cause of action by relying on various different amounts.

[41] Plaintiff bears the onus to prove its claim against the defendant. The defendant has put up documentation indicating that, for example, from July 2020 to March 2022 the only amount due to plaintiff was R352 376.41. It further annexed "MM1" reflecting a reconciliation from July 2020 to March 2022 which showed entries of various invoices amounting to R65 012 571.84 and the full amount was, according to it, paid in full. This reconciliation is in support of the defendant's plea of denial of any monies owing. To that extent it raises at least a cognizable defence.

[42] The defendant attached "MM2" which is a copy of an invoice dated January 2021. That invoice reflected: rental for office space, rental for open parking ,

rental for covered parking and cleaning removals of the 'SHE bins'. The total amount due was R2 901 964.09. That is all. There are no arrear amounts reflected or interest due and payable. On the invoice there is an endorsement that:

"Rental invoices payable on the 1<sup>st</sup> of each month and utility invoices payable on receipt. Late payments will attract penalties. Use your account number as reference when making payments. (Banking details furnished).

Rental for office space	-	R2 625 595.40
Rental for open parking bays	-	R146 107.50
Rental for covered parking bays	-	R126 236.00
Cleaning remover	-	R4 046.99

All these amounts included VAT. (my *emphasis*).

[43] A reconciliation for July 2020 to September 2021 reflects that all those invoices listed therein were paid and dates of payment are reflected on the reconciliation statement. It is also reflected thereon that the invoices amounted to R45 540 253.27 and that the exact same amount was paid. This reconciliation too, because it incorporates a period after 4 June 2021, (which is pleaded in paragraph 15 of the particulars of claim), does raise a defence that may be good in law.

[44] The defendant disputes the entries in "POC6", which is the document upon which the claim is founded. As it was found in *Maharaj v Barclays National Bank Ltd*<sup>7</sup> by Corbett JA, the defendant has disputed the entries of facts alleged by the plaintiff. This court has no obligation to determine whether or not there is a balance of probabilities in favour of one party or the other. The defendant has fully disclosed the nature and grounds of its defense and the

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<sup>7</sup> 1976 (1) SA 418 at 426 (a) – (e).

material facts upon which its defenses are based. Those facts appear to constitute a *bona fide* defence which is good in law.

### *Prescription defence*

[45] The special plea of prescription is a legal defence. Plaintiff replicated to it. By so doing it created a *lis* between it and the defendant. It requires a court to determine whether or not a claim has prescribed. That enquiry is different from an enquiry that obtains in a summary judgment application, namely, whether or not a defence advanced is *bona fide*.

[46] It was further submitted by the plaintiff that the prescription point taken related only to rentals. There is no merit in this submission because it goes against what is expressly and clearly raised by the defendant when it stated:

*“15.3 Subject to what I state hereafter, should the accumulated interest in the PoC be computed on this basis only, the claim for any amounts more than three (3) years before service of the Summons, has clearly prescribed. “*

[47] It is not within my province at this point to decide whether the special pleas are going to succeed or not. The fact that the plaintiff has conceded that certain amounts prior to 31 May 2017 may be disregarded by this court is indicative of the fact that there is merit in the defenses raised by the defendant.

### *Institution notice point*

[48] Plaintiff advanced legal argument in relation to the Institution Act and argued that the institution point had been abandoned. There were no submissions made in relation to this point by the defendant. However, it was also not abandoned. It is for that reason that I find it necessary to deal with it since it is one of the special defences raised. In attacking the point, plaintiff relied on *Director- General, Department of Public Works v Kovacs*<sup>8</sup> , where Cassim AJ found:

*“[8] The enquiry does not stop in para (a) of the definition of ‘debt’ in the Act. Paragraph (b) of the definition lists, in addition to the features mentioned in para (a) , another feature that the contractual, delictual or other claim must possess: it must be a claim for which an organ of State is liable for the payment of damages. There are therefore two legs to the enquiry whether a claim is a debt in terms of the Act. First, it must arise from a contract, a delict or any other liability’. Second, it must render the organ of State liable for damages.”*

[49] In *Mothupi v Member of the Executive Council, Department of Health Free State Province*<sup>9</sup> , Leach JA stated:

*“[12] But more importantly, the respondent does not allege that it has suffered any prejudice. The object of a provision such as s 3 is to enable the State, a large and cumbersome organisation, to investigate claims so as to consider whether to settle or compromise a claim before costs escalate unnecessarily, or to properly prepare its defence – which may be frustrated if it is unable to investigate relatively soon after the alleged incident occurred. In the present case, however, the identity of the medical practitioner who administered the spinal anaesthetic which the appellant alleges led to her paraplegia, is not only known but an affidavit from her, in which she disputes any negligence on her part, has been filed of record. In these circumstances, the respondent cannot allege that the underlying purpose of the notice provisions has not been met or that it has been prejudiced by the lack of receiving notice.” (my emphasis).*

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<sup>8</sup> 2010 (6) SA 646 GNP para 8.

<sup>9</sup> (20598/2014) [2016] ZASCA 27 (22 March 2016) at para [12].

[50] A trial court may find that the notice was necessary in order to enable the defendant to investigate the claim prior to the institution of the action, especially in a matter that dates as far back as 2014.

*Condonation for non-compliance with the Institution Act*

[51] Plaintiff, as an alternative, purported to seek condonation for its alleged non-compliance with the Institution Act. That is not what summary judgment is intended for. In fact, seeking condonation demonstrates that the defence raised by the defendant in this regard may be sound in law. On this ground alone, and to the extent that the failure to give notice point is a good one, the claims against the defendant cannot be granted summarily without a proper condonation application brought in terms of the Institution Act. That is a process that falls outside the summary judgment application.

[52] Importantly, the condonation sought cannot be granted in these proceedings because the defendant has pleaded prescription of the claim or a portion thereof. A court when granting condonation must satisfy itself, amongst others, that the debt forming the subject matter of the action has not been extinguished by prescription as envisaged in section 3(4)(b) of the Institution Act. The prescription point raised by the defendant relates to both the amount of rentals claimed plus interest claimed. Defendant also contends that the interest claimed was not alleged and is not readily ascertainable. That is no small issue that can simply be ignored as it constitutes a dispute between the parties which is worth taking to trial. Most importantly I am not persuaded that these defences were raised as a tactical strategy to delay the claim.



[53] It is not the function of this Court when entertaining the summary judgment, to trawl through several pages of disputed entries and decide whether or not the defences raised are valid based on those entries. That is the work of the trial court where such entries will be supported by evidence and the veracity thereof will be tested.

#### *Acknowledgement of liability*

[54] Plaintiff relies on, *inter alia*, the decision in ***Investec Bank Ltd v Erf 436 Elandspoort (Pty) Ltd & Others***<sup>10</sup> for its contention that each payment made was an express or tacit acknowledgment of liability. I am of the view that the facts in the *Investec* case are distinguishable from the facts of this case. In *Investec*, the facts as summarized by the Supreme Court of Appeal were: There was a loan made by a company Erf 436 which was secured by the passing of a notarial mortgage bond over a 50 year- long notarial lease in respect of a commercial property concluded by Erf 436 as lessee and the South African Rail Commuter Corporate (SARCC) as lessor. Erf 436 defaulted about two and a half years later. The lease was cancelled by an order of court. That rendered *Investec's* security worthless. *Investec* then demanded payment of the loan from Erf 436 following its default. *Investec* exercised its option and concluded a lease with the SARCC. The terms of the agreement between *Investec* and Erf 436 were that Erf 436 would continue to manage the property and collect rentals from subtenants. Those amounts were

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<sup>10</sup> 2021 (1) SA 28 (SCA).

credited to Erf 436's loan account with *Investec*. That arrangement remained up to a certain point. The parties further agreed to make efforts to sell *Investec's* rights in terms of the lease with a view to have the purchase price being used to settle Erf 436's loan obligations.

[55] There was another agreement between *Investec* and Erf 436 wherein *Investec* took over the function from Erf 436 of managing the property and collecting rentals from subtenants. The income collected by *Investec* was also allocated to the payment of the Erf 436's loan. Later *Investec* sold its rights to Johnny Prop (Pty) Ltd. After the sale a certain amount was credited to Erf 436's loan account. *Investec* claimed the balance of the loan from Erf 436, whereupon Erf 436 raised the plea of prescription. In replication to the plea, *Investec*, pleaded that on the basis of the payments made to reduce Erf 436's loan and various statements made in letters on behalf of Erf 436 it made a series of acknowledgements of liability.

[56] Plasket JA, in the *Investec* case emphasized that the context in which the payments were made is relevant. In paragraphs 41 and 43 of the judgment, that context is clear and that was:

*"That context was an agreement between Investec and Erf 436 that Investec would collect rentals from subtenants and credit Erf 436 with the net amount so collected every month and that when Investec's rights were sold the purchase price would likewise be credited to Erf 436's account. The basis for the acknowledgment of liability in respect of each of those payments does not rest on agency, but on the agreements entered into by the parties as to how the loan would be repaid."*

[57] In the *Investec* matter evidence was led at the trial which enabled the court to consider the context in which the payments were made which facts were largely not in dispute. That is not what obtains in the case at hand, prescription is raised and the plaintiff replicated to it, the parties attached

letters and correspondence. Such letters and correspondence viewed in isolation may not bring about the context which would enable this court to reject or accept the prescription plea in the summary judgment application.

[58] Plaintiff also relies on acknowledgment of debt at, *inter alia*, a meeting that was held between the plaintiffs, defendant and national treasury on 14 May 2021. It contends that such acknowledgement interrupted prescription. Plaintiff submits that the defendant acknowledged its indebtedness to it at that meeting. The defendant, on the other hand, submits that the meeting was to convey to the defendant's largest service providers and creditors, the mandatory financial recovery plan that was being developed by the National Treasury's Municipal Recoveries Systems Team, for the defendant and not to make any admissions of liability. Each of the parties attributes a different purpose and outcome to that meeting. That can only be resolved at trial through *viva voce* evidence and not by way of summary judgment. I find that the determination of whether or not there was an acknowledgment of liability, constitutes a triable issue.

[59] In ***Pentz v Government of the Republic of South Africa***<sup>11</sup> the Court found that for an acknowledgment of liability to interrupt prescription it must be given by a debtor to a creditor or the creditor's agent. In that case it was found that the policeman was not the agent of the government department concerned. The plaintiff bears the onus to prove that the payments made by the defendant constituted an acknowledgment of liability by the defendant for prescription to be interrupted<sup>12</sup>.

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<sup>11</sup> 1983 (3) SA 584 (A).

<sup>12</sup> See ***Frost Consolidated Lease Incorporation (Pty) Ltd v Service SA (Pty) Ltd & Another*** 1981 (4) SA 380 (W) at 383 (f) – 384 (e).

[60] Plaintiff, in argument, suggested that the court must disallow the amounts that have prescribed and grant summary judgment in respect of those that have not prescribed. This submission loses sight of the fact that the plaintiff in its replication to prescription disputed that any of the claimed amounts have prescribed. The other difficulty with this submission is that it focuses on the rental amounts only when the defendant had raised prescription in relation to interest as well. The entries relied upon by the plaintiff are disputed and the defendant has placed facts upon which the disputes are based.

[61] Prescription in respect of all the above decided cases is a legal issue that was decided by the trial courts and not through summary judgment proceedings. The fact that the defendant raised prescription of the claim and interest or a portion thereof, for example, cannot be ignored or regarded as a delaying tactic, in the circumstances of this case.

#### *Test in summary judgment applications*

[62] *Erasmus, Superior Court Practice*, comments as follows when dealing with Rule 32:

*“Summary judgment was a procedure introduced in England, in the second half of the last century, to assist a plaintiff in a case where a defendant, who cannot set up a bona fide defence or raise against the plaintiff’s case an issue which ought to be tried, enters appearance merely in order to delay the granting of the plaintiff’s rights. (footnotes omitted).”*

[63] The test to be applied is that, a court faced with a summary judgment application is not<sup>13</sup>, charged with determining the substantive merit of a defence, nor with determining its prospects of success. It is concerned only with an assessment of whether the pleaded defence is genuinely advanced, as opposed to a sham put up for purposes of obtaining delay. A court engaged

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<sup>13</sup> Tumileng judgment para 23.

in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case.

[64] In ***Tumileng Trading CC v National Security and Fire (Pty) Ltd***<sup>14</sup> Justice Binns-Ward stated:

*“A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant’s prospects of success are irrelevant.”*

[65] Binns-Ward J cautioned against what has happened in this case where the plaintiff has submitted several documentations in support of the summary judgment application. The plaintiff’s additional affidavit dated 30 March 2023 consisted of several photographs, that depict toilets, basins and lights. The pages consisting of those photographs attached to the additional affidavit amounted to approximately fifty pages. These photographs burdened the summary judgment application unnecessarily.

[66] Lastly, plaintiff relied on ***Pillay v Krishna & Another***<sup>15</sup> for its contention that once the defendant alleged that it had paid, it bears the onus. That is correct but in the context of the *Pillay* matter, such onus had to be established through evidence that had to be led. The fact that a defendant says that it has made a payment does not on its own justify that the matter must be summarily dealt with, without it going to trial. Even in the *Pillay* matter, witnesses were led and that is how in the end the court decided whether or not the party who bore the onus discharged it.

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<sup>14</sup> 2020 (6) SA 624 (WCC) at para 13.

<sup>15</sup> 1946 AD 946.

[67] At page 955 of the *Pillay* judgment Davis AJA stated:

*“In other words, his cause of action is that the defendant obliged himself to pay and that he has not paid. If the defendant admits the original obligation to pay but claims that he has discharged it, the onus still remains up to the plaintiff to establish his cause of action. It may well be that at the trial the defendant will find some difficulty in rebutting the plaintiff’s denial on oath that the money has been paid, but that is a question of the sufficiency of proof, and not of the onus of proof. If no evidence is led at all, the plaintiff must fail because he has not proved his cause of action. Similarly, if the evidence is led and the court cannot decide whether the debt was paid or not the plaintiff again must fail, because one of the facts essential to his cause of action remains unproved.”*

[68] The plaintiff also relied for its contention that this Court must grant summary judgment on, *inter alia*, **Standard Bank of South Africa Ltd v Oeanate Investments (Pty) Ltd (in liquidation)**<sup>16</sup> the Court dealt with entries made in the bank’s book and Zulman JA at page 821 had this to say:

*“In order to properly evaluate Oeanate’s contentions it is necessary to have regard not simply to the entries in the bank’s books when the credits were passed to Oeanate’s account on 23 May 1988 and to the reversal of that credit by way of a debit on 01 July 1988 but also to the entire matrix of facts against which such entries came to be made. In addition regard needs to be heard to Oeanate’s plea of payment and to certain admissions made by Oeanate at a pre-trial conference concerning the plea.*

[69] At page 823 the Court stated that:

*“Entries on bank accounts may reflect valid juristic acts but that is not necessarily so. Whilst in general it may be said that entries in the bank’s books constitutes prima facie evidence of the transactions so recorded, this does not mean that in a particular case one is precluded, unless say by estoppel, from looking behind such entries to discover what the true state of affairs is. So, for example, if a customer deposit a cheque into its bank account, the bank would upon receiving the deposit pass a credit entry to that customer’s account. If it is established that the drawer’s signature has been forged it cannot be suggested that the bank would be precluded from reversing the credit entry previously made. So, if a customer deposits bank notes into its account the bank would similarly pass a credit entry in respect thereof. If it subsequently transpires that the bank notes were forgeries, it can again not be successfully contended that the bank would be precluded from reversing the credit entry.*

[70] For all the reasons given above, I am satisfied that the defenses that have been raised by the defendant are *bona fide* and do raise triable issues that warrant ventilation before a trial court. It follows that summary judgment

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<sup>16</sup> 1998 (1) SA 811 SCA.

should be refused. On the issue of costs I am of the view that costs should follow the result.

[71] **I accordingly make the following Order:**

- 1. Summary judgment is refused.**
- 2. Defendant is granted leave to defend the action.**
- 3. Plaintiff is ordered to pay costs of the summary judgment application.**

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**T.V NORMAN**

**JUDGE OF THE HIGH COURT**

**Matter Heard on** : **13 April 2023**  
**Judgment Delivered on** : **13 June 2023**

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