IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO.: 2022/5936

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

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DATE SIGNATURE

In the matter between:

FIRSTRAND BANK LIMITED Applicant

and

BADENHORST, JOHANNES JACOBUS N.O. First Respondent

O'NEIL, QUINTON ROWAN N.O. Second Respondent

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Third Respondent

In re:

FIRSTRAND BANK LIMITED Plaintiff

and

BADENHORST, JOHANNES JACOBUS N.O. First Defendant

O'NEIL, QUINTON ROWAN N.O. Second Defendant

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Third Defendant

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JUDGMENT

Q LEECH AJ

1. I received the file in this application for summary judgment at the end of a motion court week on the day prior to the hearing. This case delivered the expectation in *Propell Specialised Finance (Pty) Ltd v Point Bay Body Corporate SS493/2008 and Another,*[1] that, "the papers in opposed summary judgment applications may now be expected to often be more voluminous than used to be the case", and the prediction by the authors of Erasmus, Superior Court Practice,[2] that, "[r]ule 32 in its amended form … will probably increase the workload of judges as well as the costs for parties."[3] The difficulties experienced by practitioners in understanding the requirements of the amended rule 32 resulted, in this matter, in papers in excess of 950 pages. The majority of the material consists of annexures to pleadings and affidavits in the summary judgment application. The summary judgment application papers alone are over 600 pages. The attachments to the affidavits supporting and opposing summary judgment include the papers in another summary judgment application, and a full set of affidavits and the judgment in a previous application between the parties. The approach I should adopt to this material is unsettled. As stated in *Tumileng Trading CC v National Security and Fire (Pty) Ltd,*[4] "[i]t is … not self-evident how the courts are expected to deal with

1 (14191/2019) [2020] ZAWCHC 45 (26 May 2020).
2 *Van Loggerenberg DE and Bertelsmann E,* 2nd ed.
3 D1-385.
4 2020 (6) SA 624 (WCC).

the extra material, in many cases disputatious material, that will now be put before them in such applications, in determining whether a defendant has shown that it has a *bona fide* defence."[5] Counsel adopted markedly different approaches. Counsel for the applicant submitted that there was no authority which precluded the additional material. Counsel for the respondents submitted that the additional material should be ignored.

The affidavits

2. The affidavits in this matter strain the meaning to be attributed to the requirements of rule 32. Rule 32(4) states that, "[n]o evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2)". Rule 32(2)(b) requires that plaintiffs, "verify the cause of action", "identify … the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial." Rule 32(3)(b requires that defendants, "disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

3. The amendment to rule 32 was preceded by an investigation by the superior courts task team of the rules board for courts of law. The task team recommended and motivated the amendment in a memorandum. The memorandum of the task team, as quoted in Erasmus *supra*,[6] indicates that to a certain degree the inclusion of evidence is permitted in the affidavit supporting the summary judgment application. In para. 8.1 of the memorandum the task team states, referring to the rule prior to amendment, that, "[a] plaintiff at present does not have to indicate what exactly its cause of action is, or what facts it relies on, or why a defendant does not have a defence." Although I disagree with aspects of this statement, paragraph 8.1, read with the paragraphs that follow, indicates an intention to provide an opportunity to plaintiffs to bolster the prospect of obtaining summary judgment. Para. 8.1.3 includes the statement that, "[t]he lack of specificity as to the plaintiff's claim, … coupled with the absence of any replying affidavit, also means that the plaintiff can easily be frustrated by a defendant who is prepared to construct or contrive a defence …". And, para. 8.3 states that under the amended rule,

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5 para. 5.
6 RS 17, 2021, D1-384A - B.

> "… the plaintiff would be able to explain briefly in its founding affidavit why the defences proffered by the defendant do not raise a triable issue … Requiring the plaintiff to set out why, in its view, it has a valid claim and why the defendant's defence is unsustainable, would also remove the criticism that the defendant is being required to commit itself to a version when the plaintiff is not similarly burdened. Obliging the plaintiff to engage meaningfully with the case in its founding affidavit would moreover have the added benefit of reducing the temptation for a plaintiff to seek summary judgment as a tactical move (and as a way of forcing the defendant to commit to a version on oath, which can be subsequently used in cross- examination to discredit a witness of the defendant)."

4. In para. 8.4, the task team expressed the hope that the debate in summary judgment applications would, as a result, be "more informed, and less artificial, … and engage with the real issues in the matter". In motivating against a replying affidavit, the task team stated in para. 8.6 that, "[a] plaintiff would have had a chance to address the averments in the defendant's plea in its founding affidavit in support of summary judgment. If the defendant has a further rebuttal in its answering affidavit, then, if that is credible, the summary judgment application would be defeated".

5. In summary, the task team indicated that the problems with the rule prior to amendment included *inter alia a* plaintiff being unable to set out, "exactly its cause of action", "what facts it relies on", "specificity as to the … claim", "why a defendant does not have a defence" and the reasons why the defence was constructed or contrived, and the inability to expose "bogus defences". The purpose of the amendment was to address these problems. The task team envisaged that the amended rule would require plaintiffs to set out a version on oath and the reasons why the defence does not raise a triable issue and is unsustainable, and to address the averments in the plea. This indicates an intention to permit more than the mere repetition or referencing of the facts contained in the particulars of claim or declaration.

6. The rule prior to amendment required plaintiffs to verify the cause of action and state an opinion that there is no *bona fide* defence. In comparison, the amendment specifically requires plaintiffs to "verify the cause of action", "identify the facts upon which the claim … is based" and "explain … why the defence … does not raise any issue for trial". The additional requirements would be rendered superfluous and the amendment, ineffective by attributing to all the words used in the amendment a meaning that practically has the same content as the rule prior to the amendment.

7. The rule prior and post the amendment required plaintiffs to verify the cause of action. The cause of action consists of the facts required for judgment, not the evidence.[7] A formulaic verification of the cause of action was accepted by our courts prior to the amendment. The deponent verified the cause of action by referring to the facts alleged in the summons, particulars of claim or declaration. The deponent did not have to repeat the facts.[8] In *All Purpose Space Heating Co of SA (Pty) Ltd v Schweltzer,*[9] the court held that,

> "[S]uch an affidavit must verify all the facts supporting the cause of action. This includes every element of the cause of action. … In my view, it is permissible for a plaintiff in an affidavit filed in support of a summary judgment application, to incorporate by reference only the allegations contained in his summons."[10]

For example, in *Maharaj v Barclays National Bank Ltd,*[11] the deponent said, "I hereby verify the cause of action as set forth in the summons and pray that same be read as if incorporated herein", without any adverse comment, and in *Van den Bergh v Weiner,*[12] the statement that, "the first defendant is truly and lawfully indebted to the plaintiff on the grounds as set out in the summons", was held to be in substantial compliance with the requirement prior to amendment.

8. The task team was aware of this interpretation and the formulaic manner of its application prior to the amendment, and considered it to be unsatisfactory, as indicated in the memorandum. The requirement to verify the cause of action, and with it the established interpretation, was nevertheless retained and the amendment sought to address, "the problems with the formulaic nature of the founding affidavit", through the introduction of the requirements to identify the facts and explain why the defence does not raise an issue for trial. These new requirements replaced the requirement to express an opinion that there is no *bona fide* defence. This indicates that the statement of an opinion, without the facts on which the opinion was founded, was considered to be inadequate. The amendment expressly requires the facts and an explanation.

9. The additional requirement to identify the facts upon which the plaintiff's claim is based has been interpreted as a reference to the facts set out in the

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7 *McKenzie v Farmers' Cooperative Meat Industries Ltd* 1922 AD 16, p. 23.
8 *Strydom v Kruger* 1968 (2) SA 226 (GW), headnote and p. 227B.
9 1970 (3) SA 560 (D).
10 p. 563G.
11 1976 (1) SA 418 (A), p. 421F.
12 1976 (2) SA 297 (T), p. 299G.

particulars of claim or declaration. As a result, the authors of Erasmus say that the requirement to identify the facts, "seems to require that such facts must indeed be repeated in the affidavit or, at least, must be identified with cross-reference to the facts set out in the declaration or particulars of claim." This appears to have been accepted in *Absa Bank Limited v Mphahlele N.O and Others,*[13] where it is quoted without disapproval, and near identical statements are found in *Standard Bank of South Africa Limited and Another v Five Strand Media (Pty) Ltd and Others,*[14] and in *Saglo Auto (Pty) Ltd v Black Shades Investments (Pty) Ltd,*[15] which repeats verbatim the corresponding section of the judgment in *Five Strand Media supra.* The particulars of claim and declaration should set out the facts required for judgment and should not contain evidence.[16] In other words, the facts which should be identified by repetition or referencing are those, and only those, that constitute the cause of action. In maintaining this interpretation, the court in *Five Strand Media,* held that the requirement to identify the facts on which the claim is based does not require plaintiffs, "to amplify the cause of action as set out in the particulars of claim".[17] *ABSA Bank Limited v Mashinini N.O and Another,*[18] contains a similar statement and accordingly in *Tumileng supra,* the court held that, "[n]o purpose will be served by a laborious repetition of what the judge and the defendant should be able to discern independently from the pleaded claim." However, in this instance, the applicant has not done so. The applicant has included in the supporting affidavit, evidence upon which the claim is based or which explains why the defences raised in the plea are not *bona fide*.

10. In *Morgan Cargo (Pty) Ltd v Zakharov,*[19] the court found that "identify" can mean "select for analysis" and held that, "the selection can only be from the facts already set out as envisaged in Rule 18(4)." The court does not explain the reasons why the plaintiffs' pleadings are the only source from which the facts upon which the claim is based may be selected, and why plaintiffs are not entitled to select facts from a broader range of available sources. The language used by the court indicates that plaintiffs are permitted to identify the facts set out in a replication where one is delivered. (See for example

13 (45323/2019, 42121/2019) [2020] ZAGPPHC 257 (26 March 2020), para. 19.
14 (745/2020) [2020] ZAECPEHC 33 (7 September 2020).
15 2021 (2) SA 587 (GP).
16 *Deltamune (Pty) Ltd and Others v Tiger Brands Ltd and Others* 2022 (3) SA 339 (SCA), para. 25.
17 para. 10.
18 (32016/2019;32014/2019) [2019] ZAGPPHC 978 (22 November 2019), p. 12, line 20.
19 (11850/20) [2022] ZAWCHC 132 (4 July 2022).

Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd.)[20] There is no appreciable reason why the facts to be set out in a replication yet to be delivered cannot be set out in the supporting affidavit. The court suggests that "amplify" would have been used if the addition of further details to the statement of material facts was intended. A number of other words could be suggested. However, the word "identify" does not clearly exclude any other interpretation. Another dictionary meaning is, "[e]stablish the identity of",[21] the facts upon which the claim is based and the synonyms, among many, include: remember, recall and recollect.[22] None of the meanings indicate the source of the facts, and particularly none indicate that the source is limited.

11. In any event, in *South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and another,*[23] the Supreme Court of Appeal cautioned that,

> "[T]he lawyer's reverence for dictionaries has limits. As this Court has observed, to stare blindly at the words used seldom suffices to yield their meaning in a statute or contract. … There is no straightforward attribution of a dictionary meaning of a word as the word's ordinary meaning so as to construe a statute, subordinate legislation or a contract. The dictionary meaning of a word will often give rise to further questions … And the different shades of meaning with which a word has been used, over time, quite often lead to selectivity bias. That is to say, the interpreter chooses the dictionary meaning that best suits the preferred outcome of the case, rather than the meaning that shows the greatest fidelity to the meaning that best fits what has been written, given what we know as to the institutional originator of the words, what the words are used for, and the larger design of the instrument we are called upon to interpret."[24]

12. As intimated above, I have my doubts whether the requirement to identify the facts upon which the claim is based, refers only to the facts constituting the cause of action. I appreciate that there is no apparent difference in the language used in rules 17(2)(a) and 20(2), read with 18(4), and that used in rule 32(2)(b). However, the suggestion in some authorities that a requirement to repeat those facts would serve no purpose and cause unnecessary material to be incorporated in the supporting affidavit, indicates that another meaning may have been intended. As indicated above, in interpreting the requirement to verify the cause of action under the rule prior to amendment, our courts concluded that it was unnecessary to repeat the facts alleged in the summons,

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20 (9845/2022) [2023] ZAWCHC 129 (29 May 2023).
21 SOED, note 2
22 Oxford Compact Thesaurus, 2nd ed.
23 2023 JDR 1900 (SCA).
24 para. 15.

particulars of claim or declaration and referencing the alleged facts was sufficient. The repetition of the alleged facts is no more necessary under the amended rule, and the introduction of an express requirement to reference the alleged facts would be superfluous in the context of the established interpretation of the requirement to verify the cause of action. An interpretation that requires the referencing of the alleged facts implies that the amendment was intended to state, as a separate requirement, the established meaning of verify and renders redundant either the requirement to verify the cause of action or the requirement to identify the facts: verifying the cause of action identifies the facts and identifying the facts in an affidavit is the equivalent of verifying. The court in *Maharaj supra* identified the relevant meanings of verify in the Shorter Oxford English Dictionary. The most apposite meanings currently are, "[s]upport (a statement) by evidence or testimony; … pend an affidavit to (pleadings) … assert or affirm to be true or certain", and "confirm the truth or authenticity". A deponent cannot do so without identifying the facts and accordingly, there is no need or use in requiring the deponent to the supporting affidavit to both verify the cause of action and identify the facts constituting the cause of action.

13. The similar phrase in rule 32(3)(b), "the material facts relied upon", is not understood to refer to the facts set out in the plea.[25] The defendants are required to set out the nature and grounds of the defence, which is comparable to the cause of action. The authors of Erasmus, submit that, "the 'nature' of the defence relates to the character or essential qualities of the defence", and that "'grounds' as the word is used in the subrule relates to the facts upon which the defence is based."[26] (Cf. the expression of the requirement to verify the cause of action in *Van den Bergh supra*.) This requirement was part of the rule prior to the amendment and presumably less is required to satisfy this requirement under the amended rule as summary judgment applications are brought after the plea is delivered and the plea should contain the nature and grounds of the defence. I assume defendants may now merely reference the plea. In addition, the defendants are required to set out the material facts relied upon.[27] The defendants are not required to give "a preview of all the evidence" but the defendants are required to "set out facts which if proven at trial will constitute a good defence to the claim."[28]

25 Rule 22(2) and 18(4).
26 RS 20, 2022, D1-416 and 416A.
27 *Breitenbach supra,* p. 228B.
28 *Cohen NO and others v Deans* 2023 JDR 1216 (SCA), para. 31.

Despite the use of the word, “fully” after disclose, defendants are not required to set out, “the full details of all the evidence which he proposes to rely upon”, but the material facts must, “be sufficiently full” and not “averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy”.[29] Although, "the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness …”.[30] The interpretation applied to the requirement in rule 32(3)(b) indicates that “facts” is not to be understood to mean only the *facta probanda* (the facts to be proved) or pleaded facts in the context of rule 32. The word “facts” in the context of the rule includes *facta probantia*. In *Deltamune (Pty) Ltd and Others v Tiger Brands Ltd and Others*,[31] the supreme court of appeal referred to *facta probantia* as, “facts or evidence”, which accords with the translation of that latin phrase: “facts proving the facta probanda”.[32] The rules board may have intended, “the facts upon which the plaintiff’s claim is based”, to mean *facta probantia* .

14. The language used in relation to the supporting affidavit is similar, although not identical to the requirement for the opposing affidavit. The plaintiffs must, “identify … the facts upon which the plaintiff’s claim is based”, and the defendant must “disclose … the material facts relied upon” for the defence. The difference in language is found in the use of the words “identify” and “disclose”. The word “disclose” may mean, “[m]ake known, reveal”.[33] Although there is a subtle difference, the difference in language cannot account for a significant disparity in the interpretations afforded to the requirements for the supporting and opposing affidavits. The use of different words does not, in this instance, indicate that the intention was to give the requirement for the supporting affidavit the meaning attributed to similar words in other rules, and the requirement for the opposing affidavit a unique meaning only applicable in rule 32(3)b). In my view, the meaning attributed to a similar phrase within the rule is to be preferred to a meaning attributed to a similar phrase in other rules. In *Mphahlele supra*, the court held that summary judgment is,

> “[A] self-contained procedure with its own well-established principles. As such, it is not bound by those principles governing other procedures as contained, *inter alia,* in the Uniform Rules of Court. It is for this reason

29 *Breitenbach v Fiat supra,* p. 228C - E.
30 *Maharaj supra,* p. 426D.
31 2022 (3) SA 339 (SCA).
32 VG Hiemstra and HL Gonin, Trilingual Legal Dictionary, 3rd ed.
33 SOED, note 3.

> that great caution should be exercised when seeking guidance, to one degree or another, from the provisions of other rules when interpreting Rule 32."[34]

The contrary view implies that the rules board intended similar phrases in the same rule to have different meanings. I doubt that was the intention, particularly if that would result in a pointless and valueless exercise. The rule must be given a sensible meaning. The requirements may have been intended to have the same meaning, being the meaning established for the requirement in rule 32(3)(b).

15. Our courts have nevertheless accepted in a number of judgments that evidence is permissible under the requirement to explain briefly why the defence as pleaded does not raise any issues for trial. In *Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another,*[35] in the context of an application for amendment, a triable issue was described as an issue that has a foundation. In other words, an issue for which there is supporting evidence, where evidence is required, and is not excipiable.[36] In *Cohen supra*, the Supreme Court of Appeal held that defendants are required to disclose a defence that is "legally cognisable in the sense that it amounts to a valid defence if proven at trial",[37] and the test is "whether the facts put up by the defendants raise a triable issue and a sustainable defence in the law, deserving of their day in court."[38] (In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture,*[39] "triable issue or a sustainable defence", was used.) These authorities indicate that an issue for trial is an issue that entails the assessment of evidence. In my view, plaintiffs cannot meaningfully explain the absence of a triable issue, in the sense that the defence is unsustainable on the evidence, by referring to the disputes of fact in the pleadings. A denial in a plea *prima facie* raises an issue for trial which is *bona fide*. The very purpose of a denial is to signal that available evidence will be presented at trial to disprove the allegation. The plaintiffs can only explain that the defence is not *bona fide* by referencing evidence. The dictionary meanings are capable of sustaining that interpretation.[40] In the

34 para. 28.
35 1967 (3) SA 632 (D).
36 p. 641A.
37 para. 29.
38 para. 31.
39 2009 (5) SA 1 (SCA), para. 32.
40 Explain may mean: make clear or intelligible, state the meaning or significance of but may also mean: give details of, account for, make clear the cause (SOED).

absence of evidence, the explanation will be nothing more than an unsubstantiated opinion.

16. Although in *Tumileng supra,* the court stated that the requirement to identify the facts should be addressed as succinctly as possible and a formulaic response would be sufficient in most matters, the court said that the requirement for an explanation provided a plausible reason for the requirement for something more. The court arrived at the conclusion that,

> "What the amended rule does seem to do is to require of a plaintiff to consider very carefully its ability to allege a belief that the defendant does not have a *bona fide* defence. This is because the plaintiff's supporting affidavit now falls to be made in the context of the deponent's knowledge of the content of a delivered plea. That provides a plausible reason for the requirement of something more than a 'formulaic' supporting affidavit from the plaintiff. The plaintiff is now required to engage with the content of the plea in order to substantiate its averments that the defence is not *bona fide* and has been raised merely for the purposes of delay."[41]

17. In *Propell Specialised Finance supra,* the court held that,

> "A plaintiff contemplating making application for summary judgment now not only has to consider the defendant's plea before instituting the application, it also has to support the application with a more elaborate affidavit than was previously required, dealing not only with a motivated reiteration of the grounds of its own case, but also engaging with the content of the defendant's plea."[42]

18. In Erasmus *supra*, the authors provide the following example:

> "[I]f the defendant raises a defence of reckless credit in an action based on a credit agreement falling under the National Credit Act 34 of 2005, and resists an application for summary judgment on the basis of such a defence, the plaintiff will in terms of subrule (2)(b) be entitled to set out facts, supported by the necessary documents, to briefly explain why the defence as pleaded does not raise any issue for trial."

19. In *Five Strand Media supra,* the court held that, "[t]he plaintiff now has the opportunity to amplify the previously formulaic averment that the defendant does not have a *bona fide* defence to the action".[43] This statement is repeated in *Saglo Auto supra.*[44] In *Volkswagen Financial Services South Africa (Pty) Ltd v Pillay,*[45] the court permitted evidence under the requirement for an

41 para. 22.
42 para. 5.
43 para. 13.
44 para. 48.
45 2022 (5) SA 639 (KZP).

explanation.[46] There is no indication in the *Pillay* judgment that the referenced documents were attached to the supporting affidavit. Erasmus *supra,* however, contains the following statement, "there is in any event nothing in rule 32(2)(b) which prohibits the attachment of documents in support of the explanation as to why the defence as pleaded does not raise any issue for trial." In *Mashinini supra,*[47] the court held that,

> "[t]he Rule as amended clearly did not envisage a mini-trial by the production of extensive *facta probantia*, but where, as in the present instance that which would have been a bare or bald denial can be refuted or, in the imprecise words of the amended Rule, 'briefly' be explained by way of an annexed document or documents, that should in my view be allowed. To not do so would be to revert to the unsatisfactory position which was in existence prior to the amendment of the Rule."[48]

The court provided the following example:

> "[S]ay a plaintiff has pleaded payment of an agreed purchase price and the pleaded defence is a bare denial. Surely the Rule envisaged that the production of proof of payment or a receipt would indicate that the denial did not raise any 'issue for trial'. Such production should be allowed."[49]

20. The answer may be that the defendant will be required to set out the defence in a manner which is not "needlessly bald, vague or sketchy" and, if the defence remains bare, the plaintiff would be justified in seeking summary judgment. This would be consistent with the approach under the rule prior to amendment. The explanation, in the form of argument, would be provided in the heads of argument or oral argument at the hearing. The amendment signals a break from past practices. The amendment requires the explanation to be provided in the supporting affidavit and the intention could not have been to merely shift the argument to the supporting affidavit contrary to the very purpose of affidavits. The inclusion of evidence would serve the purpose of affidavits and provide context to the assessment of the defence. The process would be less artificial, more informed and engage with the real issues. In the example mentioned above, the allegation of payment may be supported with a simple response in the opposing affidavit which is difficult to dismiss on the traditional basis. An interpretation that permits evidence would increase the prospect of exposing defences that are not genuinely advanced. The

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46 para. 13 - 15.
47 (32016/2019;32014/2019) [2019] ZAGPPHC 978 (22 November 2019).
48 para. 3.11.
49 p. 10, line 20.

defendants who intend to do so may find it difficult or be reluctant to address the evidence. As stated in *Breitenbach v Fiat SA (Edms) Bpk,*[50]

> "The penalty (or one of the penalties) for making a false statement on oath is imposed after a trial for perjury. And in such a trial a man will find it easier to escape conviction if the averment to which he swore was brief, bald and vague, than if it was clear and supported by such detail as an honest deponent might reasonably have been expected to put forward even in a concise reply to a summary judgment application. A dishonest deponent, if he is wise, will present as narrow a front as possible, and (if it is practicable) a blurred one."[51]

21. A prohibition on evidence in the affidavits may encourage plaintiffs to attempt to include such material in the particulars of claim or declaration to be verified or identified in the supporting affidavit, which will debase the pleadings to the inconvenience of the parties and the court, and the effectiveness of the civil litigation process. The uncertainty about the material that may be permitted may have been the cause of the pleadings being unduly prolix in this matter. The pleadings contain evidence and the attachments include correspondence, tracking receipts, the results of a deeds registry search, bank statements, and the notice of motion, founding affidavit with annexures, order and judgment in the application mentioned above. The pleadings with annexures are over 185 pages. There should be no encouragement to parties to attempt to facilitate or frustrate summary judgment by including such material in the pleadings.

22. The inclusion of some evidence in the supporting affidavit would serve another purpose. If the granting of summary judgment "is based upon the supposition that the plaintiff's claim is unimpeachable" and "[o]ne of the aids to ensuring that this is the position is the affidavit filed in support of the application",[52] an interpretation that requires evidence would assist in ensuring that summary judgment is granted in appropriate circumstances and subject the parties to the same requirements. The use of the summary judgment procedure as a tactic to obtain a version on oath from the defendant which could be used cross-examination, was noted in the task team memorandum and is mentioned in a number of judgments. The task team envisaged that the amendment would reduce this temptation by placing a similar burden on plaintiffs. A purpose of the amendment was to create a level playing field, and not to entrench the advantages and disadvantages experienced by plaintiffs and defendants.

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50 1976 (2) SA 226 (T).
51 p. 228H.
52 *Maharaj supra,* p. 423G - H.

23. An interpretation which permits the inclusion of evidence in the supporting affidavit is aligned to the language, context and purpose of the amendment. However, in *Mphahlele supra,* under the heading, "Is a plaintiff in a summary judgment application entitled to introduce evidence in the affidavit in support of summary judgment in order to rebut a defence pleaded by a defendant?", the court held that,

> "[A]s a general proposition, a plaintiff should not be entitled to introduce evidence or facts which do not appear in a plaintiff's particulars of claim or declaration."[53]
>
> "As to the 'brief explanation as to who the defence as pleaded does not raise any issue for trial', this must be confined solely thereto. This brief' explanation does not open the door to entitle a plaintiff to introduce new evidence as to why, at summary judgment stage, a defendant should not be given leave to defend an action and to attempt to show that a plaintiff has an unanswerable case."[54]
>
> …
>
> "In the premises, the identification of points of law and facts by a plaintiff must be confined to those as set out in a plaintiff's particulars of claim or declaration: be set out succinctly without the introduction of any further documentary evidence and the explanation pertaining to why the defence as pleaded by a defendant does not raise any issue for trial should, as specifically required by the subrule, be brief. Certainly, this explanation, like the identification of points of law and facts, cannot be supported by a plaintiff attaching further documents to the affidavit in support of summary judgment."[55]

24. The conflicting judgments of *Mashinini* and *Mphahlele supra* were noted in *Ridge Line Roofing CC v Devan 01 (Pty) Ltd and Another,*[56] but the court found that it was unnecessary to decide the issue, and in *T-Systems (Pty) Ltd v BDM Technology Services (Pty) Ltd and Others; In re BDM Technology Services (Pty) Ltd and Others v T-Systems (Pty) Ltd,*[57] in the context of a complaint in terms of rule 30. The complaint was that the applicant, in the summary judgment application, had *inter alia* relied on evidence in the supporting affidavit that was contained in additional annexures that did not relate to any allegation in the particulars of claim and introduced new evidence upon which the case for summary judgment was premised. The court decided the application on another basis.

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53 para. 32.
54 para. 33.
55 para. 37.
56 (37618/2021) [2022] ZAGPPHC 278 (29 April 2022), para. 4.6.
57 (2019/39986) [2020] ZAGPJHC 243 (7 October 2020), para. 30 - 31.

25. The judgments in *Mashinini, Mphahlele* and *Tumileng supra* were delivered in close proximity to one another and do not refer to each other, and the subsequent authorities are beginning to diverge on the fault line of a preference for one or the other approach. In *Ingenuity Property Investments (Pty) Ltd v Ignite Fitness (Pty) Ltd,*[58] a matter in which the respondent objected in terms of rule 30 to the simultaneous delivery of a replication and an application for summary judgment, the court, relying on *Tumileng,* held that,

> "In circumstances where the defendant pleads, for example, a sham denial of the plaintiff's authority, it would be necessary for the plaintiff to answer the defendant's plea with the necessary facts to show that the denial is a sham."[59]
>
> "… A plaintiff is required to engage meaningfully with the defence raise (sic) in the plea. One of the ways in which the plaintiff can do does so is by delivering a replication. A replication may be necessary where a sham defence is pleaded, and in doing so it does not mean that the plaintiff concedes that the defence is not a sham."[60]
>
> "A replication also serves as a response to the defences raised in the plea and explains why they do not raise triable issues. It does not serve as amplification of the cause of action. In this sense a replication and the summary judgment affidavit under the amended Rule 32 effectively perform similar functions."[61]

26. In *Nissan Finance, a product of Wesbank, of FirstRand Bank Limited v Gusha Holdings and Enterprises (Pty) Ltd and Another,*[62] the court, relying on *Mphahlele supra,* held that,[63]

> "Rule 32(4) expressly precludes the applicant in summary judgment proceedings from adducing any evidence otherwise than by the affidavit referred to in subrule 2. No annexures to a plaintiffs verifying affidavit are allowed except if the claim is founded on a liquid document, in which instance a copy of the document must be annexed to the affidavit, although the inclusion of evidence in the affidavit, or the annexing of documentary evidence, will not invalidate the application, but will simply be ignored by the court. In dealing with the provisions of Sections 129(1) and 130 of the National Credit Act, No. 34 of 2005 in the context of a summary judgment application, the Supreme Court of Appeal has held that Rule 32(4) limits a plaintiff's evidence in summary judgment proceedings to the affidavit supporting the notice of application and that reliance on a document not annexed to the summons but handed up at the hearing without complaint, was simply inadmissible."

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58 (9845/2022) [2023] ZAWCHC 129 (29 May 2023).
59 para. 48.
60 para. 49.
61 para. 50.
62 (2022/9914) [2023] ZAGPJHC 303 (5 April 2023).
63 para. 29.

27. As noted in *Nissan supra,* rule 32(4) does provide that, "[n]o evidence may be adduced by the plaintiff otherwise than by the affidavit referred to in subrule (2)". The rule nevertheless contemplates some evidence. The limits of the permissible evidence must be determined by interpreting rule 32(2)(b). The inclusion in the supporting affidavit of such evidence as may be permitted under rue 32(2)(b) will not contravene rule 32(4). There seems to be limited value in applying authorities that interpreted rule 32(4) in the context of the rule prior to its amendment when the limits were set at verifying the cause of action and stating an opinion that there is no *bona fide* defence. This was acknowledged in *Nissan,* but resolved by reference to *Mphahlele supra,* which arrives at the same conclusion.[64] As mentioned above, a number of other judgments have arrived at the opposite conclusion by relying on or preferring *Tumileng supra.*

28. In regard to whether plaintiffs may attach documents, the court in *Nissan supra,* referred to *Rossouw v Firstrand Bank Ltd,*[65] a judgment of the Supreme Court of Appeal*,* in which a "List of Registered Letters", proving that the requisite notice had been sent by registered mail was placed before the court at the hearing of the application for summary judgment without objection from the defendants. The appeal court nevertheless held that the document was inadmissible.[66] However, in a separate concurring judgment, Cloete JA held that,

> "The certificate of balance, also handed up to the court *a quo,* stands, however, on a different footing. The court a quo refused to have regard to the certificate. That approach was not correct. The certificate did not, as the court a quo considered, amount to new evidence which would be inadmissible under rule 32(4). To the extent that the certificate reflects the balance due as at the date of hearing, it is merely an arithmetical calculation based on the facts already before the court that the court would otherwise have to perform itself. Such calculations are better performed by a qualified person in the employ of a financial institution. And to the extent that such a certificate may reflect additional payments by the defendant after the issue of summons, or payments not taken into account when summons was issued, this constitutes an admission against interest by the bank, and the bank is entitled to abandon part of the relief it seeks. Certificates of balance handed in at the hearing (whether a quo or on appeal) perform a useful function and are not hit by the provisions of rule 32(4)."[67]

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64 fn. 26.
65 2010 (6) SA 439 (SCA).
66 para. 36 and 47.
67 para. 48.

29. This judgment indicates that under the rule prior to amendment, plaintiffs were entitled to a limited extent to refine the case made out in the summons, particulars of claim or declaration based on evidence that was discovered by the plaintiff or alleged by the defendant and conceded.

30. The judgment in *Mphahlele supra,* initially appears to maintain a distinction between the requirements to identify the facts upon which the plaintiff's claim is based and to explain briefly why the defence as pleaded does not raise any issue for trial. The court appears to adopt the view that the former requirement permits the plaintiffs to attach documents and the latter does not. In addressing the requirement to identify the facts upon which the plaintiffs claim is based, the court held that, "[i]n terms of the subrule the plaintiff is entitled to attach documents in support of facts upon which it relies in support of that plaintiffs cause of action with the exclusion of facts in support of points of law raised and relied upon by the defendant."[68] And in respect of the example provided in Erasmus that, "the plaintiff in that example, would not be entitled to attach documents to the Affidavit in support of Summary Judgment insofar as these documents related to the point of law raised by the defendant."[69] However, the last of the paragraphs quoted from the judgment above, appears to apply to both requirements.

31. The weight of the authorities is in favour of the approach in *Tumileng supra,* probably because, as the Supreme Court of Appeal held in *Cohen supra,* "[t]he only decision to trace the history and reasoning behind the amended procedure for summary judgment in detail is *Tumileng …".* In contrast, the application of the judgment in *Mphahlele supra,* and the results of its application have been variable.[70] In *Morgan supra,* despite adopting *Mphahlele,* the court held that, "[e]vidence as to the respondent's signature of the deed of suretyship, which was presented to the liquidation application, is admissible as it was relevant and material and could conduce to prove or disprove the fact at issue between the parties."[71] In addition, the court appears to have accepted that plaintiffs could attach documents when identifying the facts and relied on evidence derived from the documents. The court did not comment on the requirement for an explanation. In *Municipal Employees*

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68 para. 22.
69 para. 22.
70 Cf. *Morgan Cargo, Five Strand, Saglo* and *Nissan supra,* and *Municipal Employees Pension Fund v Eliopoulos* [2023] ZAGPJHC 669 (8 June 2023).
71 para. 9.

Pension Fund v Eliopoulos,[72] the court excluded the documentary evidence on the authority of *Mphahlele* but had regard to facts alleged in the supporting affidavit in reply to the defence raised in the plea.

32. In some of these matters, attention does not appear to have been drawn to the conflicting judgments and in others a preference was adopted without mentioning or resolving the conflicting judgments. The most peculiar of which are *Mashinini* and *Mphahlele supra* which seem to have involved some of the same parties. The judgment in *Mashinini* was *ex tempore,* and revised and published after the hearing but prior to the judgment in *Mphahlele.* The judgment in *Mashinini* does not appear to have been brought to the attention of the court in *Mphahlele. Mashinini* appears to be in accordance with *Tumileng supra,* and drawing it to the attention of the court in *Mphahlele* probably would have had the effect of avoiding the conflict*. Mashinini* has not been found to be clearly wrong and I understand that I am bound by that judgment*.*

33. This does not mean that there is no limit to the material that is permissible in the supporting affidavit. The task team apparently discussed but did not decide whether there should be a limit on the length of a founding affidavit in a summary judgment application brought under the proposed amended rule.[73] The concern was that the amended rule could, in the absence of a page limit, impose an intolerable burden on the administration of justice, and also drive up costs for the parties. The parties should not conduct summary judgment applications as opposed motions and deal exhaustively with the facts and evidence relied upon in their affidavits. In *Tumileng supra,* the court commented,

> "It seems to me, however, that the exercise is likely to be futile in all cases other than those in which the pleaded defence is a bald denial. This is because a court seized of a summary judgment application is not 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 in that exercise is not going to be willing to become involved in determining disputes of fact on the merits of the principal case. As the current applications illustrate, the exercise is likely therefore to conduce to argumentative affidavits, setting forth as averments assertions that could more appropriately be addressed as submissions by counsel from the bar. In other words, it is likely to lead to unnecessarily lengthy

72 (038375/2022) [2023] ZAGPJHC 669 (8 June 2023), para. 48.
73 *Mphahlele supra,* para. 12.

> supporting affidavits, dealing more with matters for argument than matters of fact."[74]

34. The applicant is not only constrained by the approach to be adopted in summary judgment applications and the futility of setting out material that merely demonstrates that the plaintiff has more probative material available than the defendant and the claim is more likely to succeed than the defence. A supporting affidavit in such terms would only serve to demonstrate that there is an issue for trial and the existence of some need for an explanation of apparent contradictions in the evidence, does not mean that there is no triable issue.[75] The plaintiff must demonstrate that the defence is not genuinely advanced and the plea is contrived for an ulterior purpose such as delay. In *Majola v Nitro Securitisation 1 (Pty) Ltd,*[76] the supreme court of appeal held that summary judgment, "is a procedure that is intended 'to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights' …".

35. In *Tumileng supra,* the court held that,

> ""[A] plaintiff would be justified in bringing an application for summary judgment only if it were able to show that the pleaded defence is not *bona fide*; in other words, by showing that the plea is a sham plea."[77]
>
> …
>
> "I consider that the amended rule 32(2)(b) makes sense only if the word 'genuinely' is read in before the word 'raise' so that the pertinent phrase reads 'explain briefly why the defence as pleaded does not genuinely raise any issue for trial'. In other words, the plaintiff is not required to explain that the plea is excipiable. It is required to explain why it is contended that the pleaded defence is a sham."[78]

And,

> "[T]he enquiry is not whether the plea discloses 'an issue for trial' in the literal sense of those words, it is whether the ostensible defence that has been pleaded is *bona fide* or not."[79]

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74 para. 23.
75 *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants CC* 2015 (4) SA 103 (GJ) at 107I - 108J in the context of an application for rescission.
76 2012 (1)S A 226 (SCA) para 25.
77 para. 15.
78 para. 21.
79 para. 40.

36. The rule does not encourage the setting out of material that demonstrates a strong or even an overwhelming case, unless it has this effect. The Constitution affords the entitlement to the resolution of any dispute in a fair public hearing to every person irrespective of the evidence for or against their cause. The rule is not there to weed out weak cases. The amended rule restrains the abuse of the court process by defendants who are not genuinely advancing the defence set out in the plea. The requirement for a *bona fide* defence balances access to courts and the administration of justice.

37. The summary judgment procedure is not intended to provide a unilateral advantage to the plaintiff or to replace the exception as an appropriate procedure to test the sustainability of the defence.[80] A court may, in the exercise of its discretion, defer summary judgment on a law point, unless the point is "crisp" and unarguable.[81] The reason why unarguable, crisp law points may be determined is that a meritless defence on readily resolved point provides a plausible reason for a finding that the defence is not *bona fide*. The crisp law point may be decided where the court is in the same position as a court determining the exception and the point does not deprive the defendant of the rights the plaintiff would be afforded in the same position. In *Skead v Swanepoel,*[82] the court held that, "[i]t is to be remembered that a summary judgment has a character of finality; while a successful exception may be countered by an appropriate amendment."[83] And in *Edwards v Menezes,*[84] the court held that,

> "in deciding whether the facts alleged would constitute a good defence as a 'crisp law point' against defendant (cf. *Nkungu v. Johannesburg City Council,* 1950 (4) SA 312 (T)) the Court should only grant summary judgment where it is satisfied also that it is not depriving [the] defendant of the right he would have had, in an appropriate case, had the crisp law

80 *Skead v Swanepoel* 1949 (4) SA 763 (T), p. 7685; *Bentley Maudesley and Company, Ltd v 'Carburol' (Pty), Ltd* and Another 1949 (4) SA 873 (C), p. 878; *Edwards v Menezes* 1973 (1) SA 299 (NC), p. 304F - G; *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC), para. 2; and *Tumileng surpa,* para. 21.

81 *Shingadia v Shingadia* 1966 (3) SA 24 (R), p. 26; *Lovemore v White* 1978 (3) SA 254 (E), p. 260H - 261B; *Hollandia Reinsurance Co Ltd v Nedbank Ltd* 1993 (3) SA 574 (WLD), p. 577G-H; *Freeman NO v Eskom Holdings Ltd* 2011 JDR 0226 (GSJ), para. 21; *Bafokeng Rasimone Management Services (Pty) Ltd v Van Wyk* (87403/2014) [2015] ZAGPPHC 87 (26 February 2015), para. 9. Cf. *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* 1994 (4) SA 320 (W), p. 322J - 323B; *Nkungu v Johannesburg City Council* 1950 (4) SA 312 (T), p. 314E - H; and In *Collotype Labels RSA (Pty) Ltd v Prinspark CC* 2016 JDR 2155 (WCC), para. 11.

82 1949 (4) SA 763 (T).

83 p. 768.

84 1973 (1) SA 299 (NC).

> point been decided against him on exception, of amending his pleadings and trying again."[85]

38. In *Barclays National Bank Ltd v Brownlee,*[86] for example, the court was referred to *Edwards supra,* and held that,

> "In the present case there is no suggestion whatever in defendant's opposing affidavit that he may have another defence up his sleeve, or that there is any other basis upon which he may 'try again' if the defence which he does raise fails. The issue argued in the summary judgment application is one which may also be properly raised on exception, but there are, in my view, no considerations which preclude me from resolving it in these proceedings, or even which render it desirable that it be resolved on exception."[87]

39. The authorities on this issue indicate that the material placed before the court will be futile unless it demonstrates that the defence is practically unarguable. The absence of such a defence is demonstrated, not by the abundance or weight of the material, but the specific facts which are unanswered or do not constitute an answer or answered "in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy".[88] This is recognised in rule 32(2)(b), which specifically requires the the applicant to be brief. This requirement naturally limits the material that may be placed before the court. The complexity of the case is no excuse for heaping material on the court. The summary judgment procedure assists in the administration of justice by removing from the system matters in which the defence is not genuinely advanced and thereby improves the efficiency of the administration. The procedure is intended to be effective and efficient. In *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters 21,*[89] the court held that,

> "The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice."[90]

The application of resources to matters that are not concise, and as a result time consuming, negates the advantages of the rule. The inability to be brief simply means that the issue is not suited to summary judgment, even if the material demonstrates that the defendant does not have a *bona fide* defence.

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85 p. 305
86 1981 (3) SA 579 (D).
87 p. 581.
88 *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T), p. 228E.
89 2020 (1) SA 623 (GJ).
90 At 627E–F.

40. The requirement to be brief, read with the prohibition in rule 32(4) and in the context of the approach to be adopted by a court in summary judgment applications, indicates that, generally, documents should not be attached to the supporting affidavit. In *Mashinini supra,* the court held that, "[t]he use of the word 'briefly' in Rule 32(2)(b) however, indicates that the instances and extent where use can be made of such allegations and annexures should be limited."[91] A person who can swear positively to the facts should be able to identify the facts and provide the brief explanation without recourse to documents which would, in most instances, contribute nothing to the debate concerning the *bona fides* of the defence. However, undue formalism in procedural matters is always to be eschewed and courts may and do have regard to documents properly placed before them. In *Maharaj supra,* the supreme court of appeal stated that, "[t]he principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter 'at the end of the day' on all the documents that are properly before it".[92] And as mentioned above, in *Rossouw supra,*[93] the supreme court of appeal held that it was useful for the certificate of balance to be handed up at the hearing of the matter. A document is properly before the court if the applicant is within the bounds mentioned above, which require a pragmatic approach.

41. The supporting affidavit in this matter goes well beyond the permissible bounds. The supporting affidavit has over a hundred pages of attachments, most of which are bank statements, correspondence and tracking receipts. In my view, the applicant could have made the points it wished to make in the affidavit without attaching the documents which add nothing to the debate. The approach adopted by the applicant had a cumulative effect on the papers because the trust responded in a similar manner with a far lengthier affidavit. Although, as stated in *Breitenbach v Fiat supra,*[94] "what a defendant can reasonably be expected to set out in his affidavit, depends, to some extent, upon the manner in which the plaintiff's claim, which he is seeking to answer, has been formulated",[95] this is not,

> "an encouragement to present, lengthy and prolix affidavits in summary judgment cases. All that is required is that the defendant's defence be not set out so baldly, vaguely or laconically that the Court, with due

91 p. 10, line 20.
92 p. 423H.
93 2010 (6) SA 439 (SCA), para 48. See too *ABSA Bank Ltd v Tebeila N.O.* (unreported, GJ case no 2019/14019 dated 29 November 2022), para. 8.
94 1976 (2) SA 226 (T).
95 p. 229B.

> regard to all the circumstances, receives the impression that the defendant has, or may have, dishonestly sought to avoid the dangers inherent in the presentation of a fuller or clearer version of the defence which he claims to have."[96]

The applicant has not complained about this material and the trust has merely asked that I ignore the impermissible material in the supporting affidavit. This is consistent with the approach adopted before and after the amendment and, in my view, the very least that should be done.

The defences

42. As intimated above, this matter has a prolonged litigation history which dates back to early 2011. The applicant is undoubtedly frustrated by the delay and the respondents, by the repetitive litigation. I suspect that the applicant was spurred into this summary judgment application by a comment in the judgment in the application mentioned above which is referred to in greater detail below. The application was dismissed but, in doing so, this court said that, "[b]ut for the question of *locus standi* of [the applicant], I would have granted [the applicant] the relief it seeks as there was no real dispute on the papers in respect of the Respondents' indebtedness to the Applicant." The applicant submits that, in this action, it has pleaded, "all the necessary allegations with reference to its *locus standi* (which was not done in the 2017 application)." And there are aspects of the supporting affidavit which intimate an absence of *bona fides* in respect of some of the defences raised in the plea. As a result, counsel for the applicant implored me to grant summary judgment.

43. The claim is founded on two written contracts of loan, allegedly concluded during August and November 1999 between Saambou Bank Limited ("Saambou") and the Goran Family Trust ("the trust"). The loans are secured by two mortgage bonds concluded in September and November 1999. The applicant alleges that, "[d]espite a diligent search, it has been unsuccessful in tracing a copy of the first loan agreement …" but "[t]he relevant material terms of the first loan agreement have … been captured on the plaintiff's centralised computer system and are also reflected in the first mortgage bond …". The second contract of loan and the mortgage bonds are attached to the

96 p. 229A.

particulars of claim. In terms of clause 9 of the second loan agreement, "[a]ll existing and future loans … shall be regarded as one consolidated loan …". The applicant pleads that Saambou advanced the loan amounts to the trust, the trust breached the loan agreements, "read with the mortgage bonds", by failing to "make punctual payments of the repayment instalments" and the trust is in arrears. The applicant alleges that, "[t]he consolidated loan amount has therefore become due, owing, and payable by the trust." In another section of the particulars of claim, the applicant pleads that, "the full outstanding balance owing in terms of the loan agreements has at the plaintiff's option become due and payable and the plaintiff is entitled to claim payment of the full amount …". The applicant pleads that despite demand, the trust has failed to pay. The applicant claims payment and a declaration that the bonded property be declared executable.

44. The contracts of loan do not contain an express term, and the applicant does not plead a material term of the contracts of loan, which founds the claim. However, the mortgage bonds provide that,

> "Should any payment not be made punctually on the due date thereof, or should the Mortgagor fail to comply with any condition of this mortgage bond … then the full outstanding capital amount secured under this mortgage bond, together with any amount whatsoever due by the Mortgagor to the Mortgagee in terms of this mortgage bond, shall forthwith, without any notice and notwithstanding anything to the contrary set out herein, become payable. Interest on the capital amount shall then be capitalised at the end of the current month during which any of the aforesaid occurrences take place … Interest shall be payable on the capital amount determined as such from the end of the said current month …".

The applicant pleads this clause as one of the material express terms of the mortgage bonds and I assume the applicant founds its claim on this term.

45. The mortgage bonds record the indebtedness of the trust to Saambou, "its order, successors or assigns". The applicant's standing is founded on the following allegations: Saambou changed its name to "Saambou Limited", Saambou was placed under curatorship, Saambou ceded the loan agreements and the mortgage bonds to Secured Mortgages Two (Pty) Ltd ("Secured Mortgages Two"), which sold its entire business, including the loan agreements and the mortgage bonds, to the applicant, the sale was implemented and the applicant received cession of the mortgage bonds "by way of registration in the office of the Registrar of Deeds, Johannesburg". The

applicant refers to the endorsements on the mortgage bonds recording the cessions to the applicant. The applicant concludes with the allegation that, "[a]s a result of the cessions the plaintiff is now the lawful holder of the rights, title and interest in the first and second loan agreements as well as the first and second bonds …" and, "has the necessary *locus standi* to bring the action."

46. The respondents are the current trustees of the trust. The respondents were appointed after the loan agreements and mortgage bonds were concluded and after the death of the previous trustees. The respondents have elected to attempt to satisfy the court that the trust has a *bona fide* defence to the action. The respondents claim to have no knowledge of the loans and the advance but admit the mortgage bonds and the terms of the mortgage bonds to the extent that the pleaded terms accord with the attached documents. The respondents deny the alleged breach, that the trust is in arrears, the indebtedness and the entitlement to the amount claimed.

47. The respondents do not deny that Saambou was placed under curatorship. The respondents plead an absence of knowledge to the allegations concerning the change of name, the cessions from Saambou to Secured Mortgages Two, the alleged sale between Secured Mortgages Two and the applicant, the implementation of the sale, the cession of the mortgage bonds to the applicant by way of the registration in the office of the registrar, and the conclusion that the plaintiff is now the lawful holder of the rights, title and interest in the first and second loan agreements as well as the first and second bonds. The respondents, accordingly, deny the applicant's *locus standi*.

Res judicata

48. In a special plea, the respondents contend that the applicant's claim was finally determined in application proceedings instituted by the applicant in this court. The application was between the same parties and, according to the respondents, based on the same cause of action. The respondents attach *inter alia* the notice of motion which indicates that the same relief was claimed, other than the additional prayer in the current action authorising the registrar to issue a warrant of attachment. The applicant did not contend that this difference distinguished the relief claimed in the application from the relief claimed in the current action.

49. This court dismissed the application. In the result, the respondents contend that the claim is *res judicata.* The applicant maintains in the affidavit delivered in support of the application for summary judgment that the cause of action is different. The applicant bases that contention on the explanation that, "[t]he application was in respect of the period up to 6 July 2017 …", and,

> "Subsequently to the application being brought and dismissed … there have been subsequent breaches, resulting in new causes of action arising with each new breach. The Trust failed to pay the monthly instalments since the founding affidavit [in the application] was deposed to … Thus … the Trust has caused new breaches to the first and second loan agreements and / or mortgage bonds to occur."

50. The requirements of *res judicata* are: (i) there must be a previous judgment by a competent court (ii) between the same parties (iii) based on the same cause of action, and (iv) with respect to the same subject-matter or thing. The applicant contends that the onus is on the trust to prove the defence of *res judicata*. Although the trust will have the onus of proving the defence of *res judicata,* if the matter proceeds to trial, in summary judgment proceedings the applicant must persuade the court that the defence does not raise an issue for trial and the incidence of onus is pragmatically irrelevant.

51. In *McKenzie v Farmers' Co-operative Meat Industries Ltd,*[97] the appellate division, considering the meaning of the words, "if the cause of action arose wholly within the district," approved of the adoption in *Belfort v Morton* (1920 CPD 589) of the definition found in the English case of *Cook v Gill* (L.R., 8 C.P. 107). The definition is,

> "[E]very fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It [does] not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

And proceeded to consider "[t]he material facts which the plaintiff in the present case has to prove to support his right to judgment."[98]

52. In *Abrahamse & Sons v SA Railways and Harbours,*[99] a case concerning the prescription of a claim, the court held that,

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97 1922 AD 16.
98 p. 23.
99 1933 CPD 626.

> "The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action."

53. In *Evins v Shield Insurance Co Ltd,*[100] another case concerning prescription, Trollip JA held that, "'[c]ause of action' is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complementarily, the dependant's (sic) 'debt', the word used in the Prescription Act."[101] Corbett JA referred to the authorities mentioned above and proceeded to consider, "the basic ingredients of the plaintiff's cause of action" and held that, "[t]he material facts which must be proved in order to enable the plaintiff to sue (or *facta probanda*) would relate to these three basic ingredients and upon the concurrence of these facts the cause of action arises."[102] Corbett JA explained that although there may be a measure of overlapping, the *facta probanda* in a bodily injury claim differ substantially from the *facta probanda* in a claim for loss of support, even though the bodily injury and death result from the same occurrence. Corbett JA continued,

> "[T]he principle of *res judicata* … establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between the same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions".[103]

54. In *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others,*[104] Khampepe JA, delivering the judgment for one half of the court in a split decision, referred to the judgments mentioned above and emphasised that,

> "Of significance is the fundamental distinction that the court in *McKenzie* drew between the material facts which the applicant is required to prove in order to establish his or her case (*facta probanda*), and the evidence which the plaintiff must advance in order to establish those material facts (*facta probantia*). What this amounts to is that the 'cause of action' in a particular case consists of the *facta probanda* as opposed to the *facta probantia*. In simple terms, the court in *McKenzie* endorses the view that

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100 1980 (2) SA 814 (A).
101 p. 825G.
102 p. 838H - 839C. See too *Truter and Another v Deysel* 2006 (4) SA 168 (SCA), para. 19.
103 p. 835F - G.
104 2020 (1) SA 327 (CC).

> the central basic facts of the case are not to be confused with the various items of evidence required to prove those facts."[105]

55. In *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd,*[106] Olivier JA used "same issue", "same ground", "same cause" and "cause of action" interchangeably and held that,

> "The fundamental question in the appeal is whether the same issue is involved in the two actions: in other words, is the same thing demanded on the same ground, or, which comes to the same, is the same relief claimed on the same cause, or, to put it more succinctly, has the same issue now before the Court been finally disposed of in the first action?"
>
> "In my view, the answer must be in the negative. The same thing is not claimed in the respective suits, nor is reliance placed on the same ground or cause of action. …"
>
> "Nor are the respective claims based on the same grounds or same cause of action. …"[107]

56. And Cameron J, delivering the judgment of the other half of the court in *Ascendis supra,* held that,

> "The commissioner rightly discerned that the 'real issue' between the parties … Throughout, the parties' contest has been about nothing other than whether Merck's patent is valid. Why else are they litigating? That has been the issue and the sole issue all along. And it is the issue here. In my view, that question — the patent's validity — has been conclusively determined between these parties. In lawyer-speak, it is res judicata."[108]

57. The doctrine of *res judicata* is an implement of justice that seeks to protect litigants, and the courts, from repetitive litigation. There are, however, other principles which achieve that objective and, as the doctrine implicates the rights contained in section 34 of the Constitution,[109] a balance must be found between the public interest in finality of litigation and ensuring a just result on the merits.

58. The doctrine has ancient roots founded on good sense and fairness[110] and, although the boundaries of *res judicata* are still being developed,[111] the bookend is placed after cause of action and before legal proceedings or the

105 para. 52.
106 2001 (2) SA 232 (SCA).
107 para. 3 - 5.
108 para. 110.
109 *Ascendis supra,* Khampepe J, para. 32.
110 *Ascendis supra,* Cameron J, para. 111 and 112.
111 *ibid,* para. 113.

conclusions in the legal proceedings. In *National Sorghum Breweries supra,*[112] the court held that, "[t]he mere fact that there are common elements in the allegations made in the two suits does not justify the *exceptio*". However, the differences must not be so wide and obvious that the court is unable to say that the same thing was claimed in both suits or that the claims were brought on the same grounds.[113] In *Ascendis surpa,* Khampepe J warned that,

> "The court in *Bisonboard* held that it is a well-established principle of our law that there is a distinction between causes of action on the one hand and legal proceedings on the other. The result of this distinction is that it is not the legal proceedings that will be terminated by *res judicata*, but the individual causes of action that have been decided."[114]

And held that,

> "In light of the definition of cause of action and the distinction between *facta probanda* and *facta probantia*, I do not think that the grounds of revocation constitute a single cause of action. The opposite is true. Each of the grounds of revocation as set out in s 61 of the Act constitutes separate, distinct and independent causes of action because the *facta probanda* that need to be proven for each ground are different. Although the legal conclusion that results from claims of either novelty, obviousness or inutility may be the same (in other words, the finding of a patent's invalidity), it does not follow that they all represent a single cause of action. The facts required to prove a claim of novelty, inutility and obviousness are markedly different as the elements constituting each ground are different."[115]

59. The statements mentioned above, echo those of Corbett JA in *Evins v Shield supra* that a measure of overlapping is insufficient and the finding that a bodily injury claim differs substantially from a claim for loss of support arising from the same accident. In *Ascendis supra* the court was split on whether the alleged invalidity of the patent was the issue or cause of action, or the result which followed on the determination of the alleged grounds of invalidity or causes of action. The latter view means that the invalidity of the patent can be repeatedly challenged in separate legal proceedings on each of the alleged grounds of invalidity, constrained only in the event that the repetitive litigation constitutes an abuse of process. The former view means that there is only one opportunity to raise the invalidity of the patent. Cameron J held that,

> "[T]he commissioner, in concluding that the Supreme Court of Appeal had finally determined the patent's validity, relied on *Alcatraz II.* Rightly so. There, a first revocation challenge failed. A second challenge was

112 2001 (2) SA 232 (SCA).
113 para. 3 - 5.
114 para. 66.
115 para. 54.

> then launched. To this, the patent-holder excepted on the ground that validity had been determined in its favour (res judicata). To avoid the exception, the challenger contended that the previous court did not adjudicate the evidence relating to the prior art; nor was there a determination on the lack of inventive step. But these contentions were fanciful, since the previous court had dismissed the evidence in question for late filing and there was indeed a final judgment on the merits. In coming to this conclusion, the *Alcatraz II* court, borrowing from the English courts, remarked that — '(w)hen the question of the validity of a patent is brought for trial by reason of the defendant's contesting that question, he is bound to put his whole case before the court and if he does not do so, then it is his own misfortune'."[116]

60. As Cameron J explained, "it has become well accepted that enforcing the requirements of *res judicata* should yield to the facts in each case."[117] The issue in this matter is whether the applicant can repeatedly claim standing.

61. The basic ingredients or the factual basis - the necessary, material, central basic facts - of the applicant's case in this matter include *inter alia* the alleged breach of the terms of the contracts of loan and the mortgage bonds and the consequences. As stated above, the applicant alleges that the trust breached the loan agreements by failing to pay the monthly instalments. The consequence of such non-compliance is found in the mortgage bonds which provide that the full outstanding capital amount secured under the mortgage bonds was payable. To the extent that this term provides the applicant with an option, as suggested in the applicant's particulars of claim, the applicant indicates that the option was exercised.

62. The applicant does not plead any particularity in respect of the alleged failure to pay. The applicant does not do so because the specific instalments which the trust failed to pay are immaterial to the cause of action. The applicant is not claiming the outstanding instalments. The applicant is claiming the full outstanding capital amount which is allegedly payable either as a result of the failure to pay or as a result of the exercising of the option afforded to the applicant as a result of such non-compliance. The aforementioned facts are material. The applicant must prove that the trust is obliged to pay the claimed amount - the obverse of which is that the right to claim the full outstanding capital amount has accrued. The obligation arose and the right accrued on the occurrence of the aforementioned events. The date when those events occurred, and accordingly when the obligation arose and the right accrued, is

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116 para. 119.
117 para. 113.

material to determining whether the alleged failures to pay the subsequent monthly instalments constitute "new" breaches and "new" causes of action, as contended by the applicant. The date is material because the obligation and right cannot repeatedly arise and accrue. If the obligation arose and the right accrued prior to the application mentioned above, the alleged subsequent failures to pay the monthly instalments are irrelevant.

63. The applicant does not plead the date when the full outstanding capital amount allegedly became payable. However, the papers indicate that this occurred prior to the application mentioned above. The papers indicate that the full outstanding capital amount was claimed in an action instituted in March 2011. The summons in that action is attached to the affidavit opposing summary judgment and in which the claimed amount is described as "the principal debt together with finance charges". The aforesaid "sum being claimed [is] now due and payable in terms of the First and Second Mortgage Bonds …, by reason of the failure of the Trust to pay the instalments punctually due …". And, "due, owing and payable by the Trust … by reason of the Trust's failure to make prompt and timeous payment … of all amounts punctually due …". The summons refers to a certificate which "will constitute *prima facie* proof of all outstanding amounts …". The application mentioned above, instituted in July 2017, contains materially similar allegations. In the founding affidavit the applicant alleged that, "[i]n breach of its obligations in terms of the loan agreement, the Trust failed to make punctual payments of the instalments due under the loan agreements …". And, "[i]n the premises the full outstanding balance owing in terms of the loan has at the Applicant's option become due and payable and the Applicant is entitled to claim: [12.1.1] payment of the full amount due …". The applicant attached a certificate for "the total amount due by the Trust …". The certificate records the "home loans account balance, standing to the debit of the trust". The judgment in the application provides support for the view that the full outstanding capital amount became payable prior to the application mentioned above as the court was seemingly prepared to grant judgment for the amount claimed. The particulars of claim in the current action and the affidavit delivered in support of summary judgment contain materially similar allegations. The applicant appears to have consistently claimed the full outstanding capital amount on the basis that the trust failed to punctually pay the instalments due in terms of the contracts of loan and / or the exercising of the option. In the supporting affidavit, the applicant merely says that the application was in respect of a

prior period and that subsequent to the founding affidavit, the trust failed to pay. The deponent does not state that the applicant does not rely on the alleged failures to pay or the option purportedly exercised in that prior period, and particularly, the deponent does not state that the full outstanding capital amount did not became payable as a result in that prior period.

64. In the context mentioned above, the mere assertion in the supporting affidavit that there were subsequent failures to pay does not demonstrate that the causes of action are different and accordingly that the defence of *res judicata* does not raise an issue for trial.

65. Counsel for the applicant did not enthusiastically pursue this point and instead pivoted to a point raised in the heads of argument. The trust did not contend that this point should have been raised in the supporting affidavit as part of the explanation that the defence of *res judicata* does not raise an issue for trial. Counsel submitted that there is no merit in the special plea of *res judicata* because the allegations which found the applicant's standing in the current action are materially different to those in the application mentioned above. Counsel refers to the founding affidavit in the application and a section in the particulars of claim addressing the transfer of the rights from Saambou to the applicant and maintains that, "[i]n this action, the [applicant] pleaded the cession and furthermore made all the necessary allegations with reference to its *locus standi* (which was not done in the 2017 application)." However, in the affidavit opposing summary judgment, the trust refers to approximately eighty paragraphs of the founding affidavit in the application and maintains that the facts "are exactly similar" and "based on the exact same set of facts." Counsel for the respondents submits that, "[u]pon a proper interpretation of the notice of motion …, the founding affidavit, the answering affidavit, the replying affidavit and the judgment of [this court], … the facts relied upon by the [applicant] … are exactly the same facts." And that, "[a]s the facts are the same, the defence of *res judicata* is to be upheld and a demonstrable defence, which is genuine, exists."

66. In the application, the applicant stated in the founding affidavit that Saambou changed its name to FirstRand Finance Company Ltd which transferred its assets and liabilities to the applicant. The applicant claimed standing on the basis of this transfer. In the replying affidavit, the applicant confirmed that Saambou had changed its name to FirstRand Finance Company Ltd and sold

the business as a going concern to the applicant …". The sale appears to have occurred as the applicant attached to the replying affidavit in the application portions of the written business sale agreement between FirstRand Finance Company Ltd and the applicant. The effective date of that sale is recorded as 1 March 2009. In the answering affidavit, the trust referred to the action instituted by Secured Mortgages Two. In the particulars of claim in that action, the allegation was made that on 14 February 2002, Saambou "ceded its' rights and entitlements under the mortgage bonds to [Secured Mortgages Two]." In the replying affidavit in the application, the applicant confirmed, "the cession of the mortgage bonds that took place on 14 February 2002 wherein the rights under the loan and mortgage bonds were ceded to … Secured Mortgages Two …". The applicant referred to this cession in the particulars of claim in the current action. In the particulars of claim in the current action, the applicant pleads that Saambou "ceded its' rights and entitlements under the mortgage bonds to [Secured Mortgages Two]" on 14 February 2002. In other words, prior to the sale between Saambou and the applicant, the contracts of loan and mortgage bonds were ceded to Secured Mortgages Two. This appears to render the sale of business between Saambou and the applicant irrelevant. The applicant does not mention this sale in the particulars of claim in the current action. The applicant pleads, however, that on 1 July 2011, Secured Mortgages Two sold its entire business, "which included the right title, and interest in the first and second loan agreements together with the concomitant cessions of the first and second bonds", to the applicant. The applicant pleads further that the sale of business between Secured Mortgages Two and the applicant was implemented and the applicant received cession of the mortgage bonds "by way of registration" on 15 January 2014. The applicant did not mention this sale in the affidavits in the application. The applicant nevertheless stated in the replying affidavit in the application that, "on 15 January 2014 the loans and mortgage bonds were ceded to the applicant …" by Secured Mortgages Two. Accordingly, if these dispersed allegations are filtered to the material, Saambou ceded the loan agreements and mortgage bonds to Secured Mortgages Two and Secured Mortgages Two ceded them to the applicant. The aforementioned allegations are found in the replying affidavit in the application and in the particulars of claim in the current action, and in both the applicant relies on the endorsements on the mortgage bonds recording the cessions to the applicant.

67. The basis for the applicant's standing in the founding affidavit in the application was different to that made out in the replying affidavit. As indicated above, the applicant initially founded its claim on the direct transfer of rights from Saambou to the applicant which was effectively abandoned in the replying affidavit and reliance placed on the cessions. The applicant relies on those cessions in the particulars of claim in the current action. The only material difference in the allegations contained in the application and the particulars of claim in the current action is the absence of any reference to the sale of business between Secured Mortgages Two and the applicant, which is not mentioned in the application. The issue is whether this difference is sufficient to find that the defence of *res judicata* does not raise an issue for trial.

68. In *Hippo Quarries (Tvl) (Pty) Ltd v Eardley,*[118] the appellate division described the cession as "an essential link in the plaintiff's case".[119] The description is appropriate in this matter and, on an application of the authorities mentioned above, the cessions on which the applicant relies form part of the cause of action. In *Johnson v Incorporated General Insurances Ltd,*[120] the appellate division held that,

> "Cession, in our modern law, can be seen as an act of transfer ("oordragshandeling") to enable the transfer of a right to claim (*translatio juris*) to take place. It is accomplished by means of an agreement of transfer ("oordragsooreenkoms") between the cedent and the cessionary arising out of a *justa causa* from which the intention of the cedent to transfer the right to claim to the cessionary (*animus transferendi*) and the intention of the cessionary to become the holder of the right to claim (*animus acquirendi*) appears or can be inferred. The agreement of transfer can coincide with, or be preceded by, a *justa causa* which can be an obligatory agreement ("verbintenisskeppende ooreenkoms") such as, eg, a contract of sale, a contract of exchange, a contract of donation, an agreement of settlement or even a payment (*solutio*)."[121]

69. In *Lief, NO v Dettmann,*[122] which concerned the cession of rights in terms of loans and mortgage bonds, the substantial issues included whether the averments in the claims evidenced a common intention to effect a cession of rights and,

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118 1992 (1) SA 867 (A).
119 p. 873D.
120 1983 (1) SA 318 (A).
121 p. 331G - H.
122 1964 (2) SA 252 (A).

> "In so far as an intention to effect a cession of those rights may be inferred from the facts pleaded in the declaration, was a cession effected in law, having regard to the absence of any averment that the cession was registered in terms of the provisions of the Deeds Registries Act, 47 of 1937."[123]

70. In respect of some of the claims, the intention was inferred from the pleaded facts and in others, the averments did not disclose that intention. However, the matter principally turned on whether registration of the cessions was necessary. In a judgment delivered by Wessels JA, the majority of the court held that registration was necessary to effect the cession of the real rights in the mortgage bond, and the transfer of the principal debt was dependent on and must await the registration of the cession of the real rights. The court held that,

> "On the registration of a mortgage bond a real right in the property hypothecated is constituted in favour of the mortgagee. In terms of the provisions of Act 47 of 1937 that right can be conveyed from the mortgagee to another person only by means of a cession of the mortgage bond duly registered by the Registrar in terms of the provisions of sec. 3 (f) read with sec. 16 of the Act."[124]

And in relation to the first of the claims, it was held that,

> "The declaration contains no averment that the grant of the participations (which I will, for the moment, assume sufficiently indicate an intention on the part of the Board to cede the rights to which they refer) or the subsequent cession (said to 'confirm' the participations) were registered in accordance with the provisions of Act 47 of 1937. It follows that the declaration does not disclose a cause of action either in respect of plaintiff's claim for an order declaring that he had a real right 'in, to and under' the bond to the extent of R6,100, or in respect of his claim that he is entitled to payment of that sum by reason of his having held such a right prior to the realisation of the bond."[125]
>
> …
>
> "In so far as this claim is concerned the Board purported to 'confirm' the grant of the participations by executing a written cession. From all the facts pleaded an intention to effect a cession may, therefore, be inferred. In my opinion, however, it is not sufficient to show that the parties contemplated a cession; it must be shown that they effected a cession. It must appear that the parties took legally effective steps, where such are required, to transfer the subject matter of the cession from the cedent to the cessionary, so that the former is divested of his rights, which thereafter vest exclusively in the cessionary. (*Voet:* 18.4.15; *Fick v Bierman,* 2 S.C. 26; *Jeffery v Pollak and Freemantle, supra*).[126]

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123 p. 264A - B.
124 p. 273H.
125 p. 274F - H.
126 p. 275D - F.

71. The distinction between the cession of the personal and real rights in a mortgage bond was emphasised in relation to the alternative claim. The majority of the court asked,

> "[W]hether it might be said that although the Board did not effectively cede a portion of the secured debt, a cession of portion of the principal debt was, nevertheless, effected, so as to vest in the participant an unsecured right of action against the mortgagor to claim payment from him of that amount of the principal debt to which the cession relates."[127]

And held that,

> "A right of action, such as a right to claim payment of a sum of money, is transferred to the cessionary immediately upon the conclusion of the agreement to cede that right of action to the cessionary. In the case of a right of action embodied in a registered mortgage bond, the parties contemplate the cession not only of the principal obligation but also of the auxiliary real right in the immovable property hypothecated thereby. It follows that the parties must be taken to have intended that the transfer of the principal obligation would be dependent on the conveyance of the real right in the mortgaged property. Registration is essential to the conveyance of the real right to the cessionary. In the result the transfer of the principal obligation must inevitably await the registration of the cession."[128]

72. However, Van Wyk JA, however, delivering the minority judgment, disagreed and said,

> "In my opinion there can be no doubt that the parties intended that this document should have the effect of bringing about a cession; there was no intention that the Board should be the plaintiff's debtor. The words 'Do hereby cede, etc.', 'all our right, title and interest in and to the said bond', and 'without recourse to us' speak for themselves, and leave no room for any doubt in this regard. They clearly purported to cede not only the debt, but also the security. The latter, however, could only be effected by registration, and the question is whether the fact that the parties attempted something which is legally impossible, i.e. the cession of the security without registration, vitiates the cession of the debt. In my view this is not a simple case where a mutual mistake of law results in no agreement being entered into. The parties aimed at a dual result: the cession of the debt and the cession of the real rights. The cession of the debt required no more than an agreement, and in my opinion this result was achieved the moment the cession was agreed to. I can see no reason why the plaintiff should not in the circumstances be able to claim registration of the cession on the ground that an effective cession of all the Board's real rights in respect of the said portion of the bond was intended, but there is no evidence of any intention that the cession of the debt should be delayed until registration."[129]

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127 p. 276A.
128 p. 276B - D.
129 p. 260A - E.

73. The judgments adopted contrasting views on the intention to cede the principal debt and right of action. The intention of the parties is a question of fact and transfer of such personal rights does not, in all instances, require the registration of the transfer of the real rights in the mortgage bond by registration of the cession. In this regard, in *Louw v WP Koöperatief Bpk en Andere,*[130] the appellate division said,

> "There is no reason why parties to a cession cannot agree that a debt due to the cedent is to be ceded independently from any bond that serves to secure such debt. *Lief NO v Dettmann* does not necessarily support the narrow interpretation of the Provincial Division that a right of action secured by a bond was in all cases by operation of law inseparably bound to the real right resulting from the registration of the bond, irrespective of the parties' intention. It could thus not be said that because there had been no registration of the cession of the covering bonds, the transfer of the co-operative's rights of action had necessarily been void."[131]

The court did not decide the issue but in *Standard General Insurance Co Ltd v SA Brake CC*,[132] the appellate division held that,

> "There could also have been no doubt that the cession would have constituted both the obligationary and transfer agreements. Apart from the fact that cession is according to our law primarily just that: an act of transfer (*Johnson v Incorporated J General Insurances Ltd* 1983 (1) SA 318 (A) at 331G-H), the document, is unequivocally framed in the present tense. In it SA Brake says that it effects transfer forthwith: 'I/we . . . *do hereby cede . . . transfer . . . make over all* my/our right'; and nothing more could have been required of the bank, which immediately asked Stangen to take cognisance of the right given to and taken by it. Compare also *Louw v WP Koöperatief Bpk en B Andere* 1994 (3) SA 434 (A) at 443F-G."[133]

74. The authors of Amler's Precedents of Pleadings,[134] state that,

> "It is necessary to distinguish between the agreement to cede and the cession itself (the real agreement whereby rights are bilaterally transferred). Although the undertaking to cede and the actual cession will often coincide and be consolidated in a single document, they remain discrete juristic acts. They are distinct in function and can be so in time: by the former a duty to cede is created, by the latter it is discharged."
>
> …

130 1994 (3) SA 434 (A).
131 Headnote and p. 442G-443B.
132 1995 (3) SA 806 (A).
133 p. 814I - 815A.
134 9th ed., Cession, p. 70.

> "A party relying on a cession must allege and prove the contract of cession that is, a contract in terms of which a personal (and not a real) right against a debtor is transferred from the creditor (cedent) to a new creditor (cessionary)."

The authors are clear that the pleading of a contract of cession is required in respect of personal rights that are transferred in terms of the contract. The statement is not intended to apply to the transfer of real rights or personal rights that must "inevitably wait" the transfer of the personal right.

75. As stated above, the applicant did not mention the sale between Secured Mortgage Two and the applicant in the application but nevertheless stated that on 15 January 2014, "the loans and mortgage bonds were ceded to the applicant …" and "[t]he proof of cession appears on the last pages of the respective mortgage bonds." The proof on which the applicant relied in the application is the endorsements on the mortgage bonds recording the cessions to the applicant, i.e. the registration of the cession in the deeds registry. The endorsements are dated 15 January 2014. The sale is pleaded in the particulars of claim. The sale is alleged to have included the rights in "the first and second loan agreements together with the concomitant cessions of the first and second mortgage bonds …". The applicant proceeds to plead that cession of the mortgage bonds was taken on 15 January 2014 "by way of registration in the office of the Registrar of Deeds, Johannesburg". In the application, the applicant appears to have accepted a view that accords with the view that the transfer of the personal right had to await the transfer of the real right and in the particulars, the view that the personal right was transferred in terms of the contract of sale and the real right by registration.

76. The following statements are found in the judgment of this court in the application:

> "In argument, counsel for [the applicant] brought to my attention that both mortgage bonds had been endorsed by cessions, which it was argued was evidence that a cession had taken place. … This, it was argued, was sufficient evidence of the cession, though not specifically pleaded and should be accepted by the Court."
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> "Counsel for the [trust] argued that [applicant's] case, as pleaded, was at odds with the endorsement of the mortgage bond and that this did not evidence a legal basis, properly pleaded, that a cession had occurred."
>
> "The contentions in the founding affidavit are at odds with that in the replying affidavit. A cause of action founded on cession (contended for in the replying affidavit and in argument) is in stark contrast to one founded

> on a transfer of assets and liabilities in terms of a sale of business (contended for in the founding affidavit)."
>
> …
>
> "[The applicant] has not pertinently pleaded the cession, nor has it provided proof of the contract of cession. What [the applicant] relies on, is the consequences of the cession, namely the endorsement of the mortgage bond, a public document. There is no evidence apparent in the affidavits filed of record of a regular and valid cession, as required, to sustain a cause of action reliant on a cession."
>
> "The respondents do not dispute the endorsement; they merely dispute that the endorsement in and of itself is proof of the cession to clothe [the applicant] with the necessary *locus standi.* I agree."

77. As indicated above, the applicant appears to have adopted the view in the application that the transfer of the personal rights, the principal debt and right of action, depended on the cession of the real rights and the transfer of both, was effected by the registration of the cession of the mortgage bonds. The trust did not dispute the registration of the cession. The court nevertheless appears to have found that the applicant was required, and failed, to plead and prove the obligatory agreement from which the intention to cede can be inferred, because the applicant does appear to have pleaded, and sought to prove, the transfer agreement effected by the registration of the cession. The judgment does not indicate whether the court was asked to infer the intention to cede from the fact that the cession was registered or whether it was argued that the production of an apparently regular and valid cession is *prima facie* proof which shifts the evidentiary burden.

78. The issue is not whether the judgment is correct. The judgment is presumed to be correct. The applicant sought to rectify this declared deficiency in the particulars of claim in the current action. The alleged sale constitutes the obligatory agreement and evidences the intention to cede. The issue is whether this addition is sufficient to sustain the submission that the cause of action in the current action is not the same as the cause of action in the application.

79. In application proceedings, the cause of action must be pleaded in the founding affidavit.[135] However, the defence of *res judicata* is not limited to the

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135 *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D), p. 469C - E; *Nkengana and another v Schnetler and another* [2011] 1 All SA 272 (SCA), para. 10; *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA), para. 13; and *National Council of Societies for the*

cause of action set out in the founding affidavit. In *S v Molaudzi,*[136] the constitutional court referred to *Amtim Capital Inc v Appliance Recycling Centres of America,*[137] a judgment of the court of appeal for Ontario, Canada, in which it was held that the doctrine of *res judicata* is not to be applied mechanically. The constitutional court held that, "[c]ourts have, over time, expressed the view that the doctrine of *res judicata* should not be applied rigidly."[138] The constitutional court was referring to the introduction of issue estoppel but the statements reflect the general approach to the doctrine of *res judicata*. In *National Sorghum Breweries supra,*[139] which commenced as an action, Olivier JA, delivering the majority judgment of the supreme court of appeal, held that, "one must look at the claim in its entirety and compare it with the first claim in its entirety." There is no reason to apply a different approach to applications. In applications, the affidavits serve the function of both pleadings and evidence,[140] the affidavits define the disputes and the parties may expand on the allegations, evidence and issues by the way in which they conduct the proceedings. The issues that arise in the course of the proceedings may found the defence of issue estoppel. In *Ascendis supra,* for example, Khampepe J stated that, "[t]he claim of inutility was neither pleaded nor argued …", which suggests that either the pleading or argument may have been sufficient to sustain the defence of issue estoppel*.* The defence of issue estoppel is merely an extension of the principles of *res judicata* and there is no justification for a different approach to be adopted in respect of the requirements for *res judicata.* In my view, the cause of action must be determined from an assessment of the whole of the case in which the final judgment was delivered. The basic ingredients or the factual basis - the necessary, material, central basic facts - that emerge from such an assessment must be compared against the facts distilled from the subsequent case in which the defence of *res judicata* is raised. The defence will find application if those facts are the same, and the other requirements are satisfied*.*

Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA), para. 29.

136 2015 (2) SACR 341 (CC).

137 2014 ONCA 62.

138 para. 22.

139 para. 3 - 5.

140 *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA), para. 13; *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA), para. 43; and *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA), para. 23.

80. The facts of this matter may found a defence of *res judicata.* Although the basis on which the applicant contended for the transfer changed between the founding affidavit and the replying affidavit, the issue remained the same. In the application, the issue between the parties was whether the applicant had received transfer of the rights. The applicant initially claimed standing on a direct transfer of rights from Saambou. The applicant abandoned that contention in reply and claimed standing on an indirect transfer from Saambou to Secured Mortgages Two and from Secured Mortgages Two to the applicant. The applicant sought to prove the indirect transfer from Saambou, and argued its standing on that basis at the hearing of the application. The applicant was permitted to introduce and ground its standing on the indirect transfer in the replying affidavit and, in doing so, introduced the indirect transfer into the cause of action. The indirect transfer was a basic ingredient or the factual basis - a necessary, material, central basic fact - in the claim made in the application. The indirect transfer is a central feature in the particulars of claim in the current action. The allegations concerning the cession are materially similar and only differ in respect of the obligatory agreement. The apparent failure of the applicant to allege that obligatory agreement in the application seems to be insufficient to distinguish the causes of action. The transfer is a common element in both legal proceedings and, as indicated by the split decision in *Ascendis supra,* its presence alone may found a defence of *res judicata.*

81. Counsel for the applicant argued that the defence of *res judicata* required a final judgment on the merits and as standing was decided before the merits, a determination on standing could not found the defence of *res judicata.* The argument is derived from the requirement for a final judgment on the merits, spliced with a distinction between standing and merits. In *MV Wisdom C United Enterprises Corporation v STX Pan Ocean Co Ltd,*[141] the supreme court of appeal held that, "what is required for the defence to succeed is a decision on the merits." And, in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd,*[142] the constitutional court referred to Hoexter, *Administrative Law in South Africa,*[143] in which the author states that, "[t]he issue of standing is divorced from the substance of the case. It is therefore a question to be decided *in limine* [at the outset], before the merits are considered." The court held that the applicant did not have standing and accordingly, it was not

141 2008 (3) SA 585 (SCA), p. 589B.
142 2012 JDR 2298 (CC).
143 2 ed (Juta & Co, Cape Town 2012), p. 488.

necessary to consider the merits.[144] The submission equates merits and cause of action, and implies that standing is not part of the cause of action.

82. As the supreme court of appeal recognised in *Land and Agricultural Bank of South Africa v Parker and Others,*[145] the question of standing is both a procedural issue and an issue of substance.[146] If the issue of substance is determined, the judgment may found a defence of *res judicata.* In the Lesotho case, *Masara v Tsepong (Pty) Ltd,*[147] mentioned by Khampepe J in *Ascendis supra,* the court of appeal held that the defence of *res judicata* requires the same facts to be finalised on the merits of the same cause of action,[148] and the defence applies where "a cause of action has been litigated to finality".[149] This emphasises that the relevant requirement for *res judicata* is the same cause of action or the same issue, ground or cause, and a decision on the merits of the cause of action may found a defence of *res judicata.* In this matter, the alleged transfer of rights to the applicant is an essential link in the applicant's case and forms part of the cause of action. If the merit of the alleged transfer was determined, the purpose of the doctrine of *res judicata* is not served by permitting the applicant to repeatedly litigate on the issue in the hope that a different result will be obtained from the court. The rationale for the doctrine of *res judicata* is to prevent contradictory conclusions, ensure certainty on matters that have already been decided, promote finality and prevent the abuse of court processes.[150] The purpose of *res judicata* is not served by permitting a litigant who has no legal interest in the adjudication of the merits of a matter to institute repetitive litigation in respect of those merits, and *Giant Concerts supra* is not authority for a submission to the contrary. Although "the purpose of *res judicata* is to balance the public interest in the finality of litigation with the public interest of ensuring a just result on the merits",[151] the balance is not found by partitioning the essential facts into those to which the principle applies and those to which it does not.

83. A judgment on the merits is required because, as stated in *MV Wisdom supra,*[152] "in our law a defendant who has been absolved from the instance

144 para. 58.
145 2005 (2) SA 77 (SCA).
146 para. 44.
147 [2015] LSLC 59.
148 para. 71.
149 para. 70.
150 para. 40 and 70.
151 para. 72.
152 2008 (3) SA 585 (SCA)

cannot raise the *exceptio rei judicatae* if sued again on the same cause of action".[153] The issue is whether the dismissal in the application is a decision on the merits or the equivalent of absolution from the instances. In *Purchase v Purchase,*[154] Caney J stated that, "I think that dismissal and refusal of an application have the same effect, namely a decision in favour of the respondent."[155] In *African Farms and Townships Ltd v Cape Town Municipality,*[156] the appellate division, referred to *Purchase supra,* and stated,

> "Counsel for the appellant further argued that the order in the original proceedings, which as such is an order dismissing the application, is to be equated with absolution from the instance, leaving the issue undecided. In my view there is no substance in that argument. … As pointed out in *Purchase v Purchase,* 1960 (3) SA 383 (N) at p. 385, dismissal and refusal of an application have the same effect, namely a decision in favour of the respondent. The equivalent of absolution from the instance would be that no order is made, or that leave is granted to apply again on the same papers. … In the present case, having regard to the judgment, the import of the order is clearly that on the issues raised the Court found against the appellant and in favour of the respondent."
>
> "In the result, I agree with the conclusion of the Court below that the matter is *res judicata*."

84. However, *MV Wisdom supra,*[157] the supreme court of appeal referred to *African Farms supra,* and held that,

> "It was held in *African Farms …* that the dismissal of an application (which ordinarily would be regarded as the equivalent to granting absolution from the instance: *Municipality of Christiana v Victor* 1908 TS 1117; *Becker v Wertheim, J Becker & Leveson* 1943 (1) PH F34 (A)) can give rise to the successful raising of the *exceptio rei judicatae* where, regard being had to the judgment of the court which dismissed the application,
>
> > 'the import of the order [was] clearly that on the issues raised the Court found against the appellant [which had been the applicant in the previous proceedings], and in favour of the respondent.'
>
> "It is thus clear that it is not the form of the order granted but the substantive question (did it decide on the merits or merely grant absolution?) that is decisive in our law and that what is required for the defence to succeed is a decision on the merits."

85. Counsel for the applicant referred to a number of decisions which merely served to indicate that the issue is resolved on the facts. The background and

153 para. 9.
154 [1960] 3 All SA 363 (D).
155 p. 365.
156 1963 (2) SA 555 (A).
157 2008 (3) SA 585 (SCA), p. 589B.

context to the application and relevant aspects of the judgment in the application are set out above. The applicant has repeatedly litigated on the issue of transfer. The trust has faced three separate claims founded on the mortgage bonds and their transfer and, in the interim, the trustees of the trust passed away and were succeeded by the current respondents. The applicant was involved in all of those attempts. The applicant was first involved in about March 2011 as an agent managing the home loan books and legal action on behalf of Secured Mortgages Two, which was “effectively run as a division of the applicant”. The applicant is a bank which I assume is not without the resources to ensure the proper prosecution of its claim and has been assisted throughout by legal managers, attorneys and counsel. The applicant had ample opportunity to consider the facts required to be alleged and proved in order to establish its standing, and decided to rely on the evidence mentioned below. The applicant was afforded a fair hearing and the judgment does not contain any reason to permit the applicant another opportunity to return to court. The allegations indicate that the applicant was aware of the fact that success depended on proof of the transfer of rights from Saambou to Secured Mortgages Two and from Secured Mortgages Two to the applicant. The applicant sought to rely on the evidence of the deponent to the replying affidavit, a legal manager, and the endorsement on the mortgage bonds, a public document, that the rights had been transferred from Secured Mortgages Two to the applicant. In the application, the trust did not dispute the endorsement but contended that the endorsement was not proof of the cession. The trust apparently argued that the pleaded allegations were inadequate and the evidence presented by the applicant was contradictory and insufficient, and “did not evidence a legal basis … that a cession of rights had occurred.” The applicant does not appear to have indicated at the time that any other evidence was available and persisted in the application. The applicant sought judgment and the trust sought dismissal. The court permitted the new matter in the replying affidavit and the endorsement despite the deficiencies in the manner in which it was produced. The court agreed with the respondent and dismissed the application. There is no indication in the judgment that either the applicant or the trust submitted that there should be absolution from the instances in the event that the evidence produced by the applicant was insufficient or that the court considered granting absolution from the instance. The granting of absolution after argument in an application is similar to doing so in a trial at the end of the whole case, which is seldom sought and unusual. The applicant nevertheless argues that the dismissal is

the equivalent of absolution from the instance. The trust argues that the dismissal is judgment in its favour.

86. In *Bouwer v City of Johannesburg and Another,*[158] Zondo JP, as he then was, delivering the majority judgment of the labour appeal court, held that,

> "If I were to extract a principle from my approach to this matter, it would be this: if in motion proceedings the parties have placed before the Court such evidence as they have chosen to place before it and the matter has been argued and, thereafter, the Court issues an order that the application is dismissed and the basis of that decision is that the applicant failed to prove its case, the judgment or order of the Court is a judgment or order on the merits of the case and it is final and any attempt to institute proceedings later to effectively seek the same relief on the same cause of action would properly be met by the special plea of *res judicata*."[159]

87. The basis for the order on which the defence of *res judicata* was founded in *Bouwer supra,* was that the learned judge, Landman J, had "after considering the affidavits filed, concluded that there was not enough evidence placed before him by the appellant to prove" the case sought to be made out in the application. This should be compared with the judgment of this court in the application in which it was held that "[t]here is no evidence apparent in the affidavits filed of record of a regular and valid cession, as required, to sustain a cause of action reliant on a cession."

88. Zondo JP explained that,

> "[S]ometimes a court issues an order of absolution from the instance in a case where both parties have adduced all the evidence that they chose to adduce, have presented their oral argument and none of them has indicated that there is any witness he wishes to call who was unavailable earlier on."[160]
>
> "I have serious doubt that an order of absolution from the instance is competent in a case such as the one referred to immediately above. …"[161]
>
> "… Once the parties have led all the evidence they wish to lead the Court must decide the case on the merits and not in effect grant an absolution from the instance. In my view, when, in motion proceedings, a Court finds that the applicant has failed to prove his case on the merits, the order that it makes to decide the case on the merits against the applicant is to make an order dismissing the application. … The appellant failed to prove his case before Landman J. He was, in my

158 (JA64/06) [2008] ZALAC 15 (23 December 2008).
159 para. 44.
160 para. 20.
161 para. 21.

> view, obliged to dismiss the appellant's application on the merits and, therefore, give judgment in favour of the first respondent. That is precisely what Landman J did in the case before him. …"[162]
>
> "… I have never understood our law to be that, when in motion proceedings, a Court dismisses an application because the applicant has failed to prove his case by necessary and proper evidence, its decision to dismiss the application is not a decision on the merits of the dispute. My understanding has always been that that is a final and definitive decision on the merits of the dispute and the applicant cannot later come back to Court on the same dispute and say: I now have more or better evidence and institute fresh proceedings for the same relief as before on the same cause of action! If my view in this regard does not reflect the legal position and a litigant is, indeed, permitted to have a second or even a third or fourth bite at the cherry in such circumstances, this part of our law is bad and needs to be changed. In my view, any litigant who brings an application to Court should place before the Court all relevant and material evidence in support of his case on the first occasion and should not institute multiple applications one after the other until the court says he has proved his case."[163]

89. However, in *Zietsman v Electronic Media Network,*[164] the supreme court of appeal held that,

> "On an analysis of the SCA judgment (especially paras 19 and 20), it is clear that the ratio for the decision was that insufficient evidence had been placed before the court and the respondents had not disclosed a defence. Neither the respondents' defence, nor their prospects of success in the main action were dealt with in the first application. … The respondents' application for security for costs was thus dismissed."[165]
>
> "In my view the effect of the SCA judgment is that it only granted absolution from the instance. It clearly did not deal with the merits. …"[166]

90. The judgment of this court in the application is terse and not readily susceptible to an interpretation. The context in which that interpretation should take place is set out above and in which, if the court intended to grant absolution from the instance, I would expect to find some indication of the rationale for absolution. The language used does, however, indicate an exception based approach. The trust apparently argued that there was no "evidence of a legal basis, properly pleaded, that the cession had occurred" and the court held that "[t]here is no evidence … of a regular and valid cession … to sustain a cause of action reliant on a cession", and the endorsement is not sufficient to "clothe [the applicant] with the necessary *locus standi*". And the court did not find that the cession had not occurred. In my view, these

162 para. 27.
163 para. 42.
164 (771/2010) [2011] ZASCA 169 (29 September 2011).
165 para. 15.
166 para. 16.

indications are insufficient, particularly considering the judgments in *African Farms* and *Bouwer supra,* to establish that the trust does not have a *bona fide* defence. The prospect of the defence of *res judicata* succeeding are irrelevant.[167] As stated in *Tumileng supra,* "[a] defendant is not required to show that its defence is likely to prevail",[168] "[t]his is because a court seized of a summary judgment application is not charged with determining the substantive merit of a defence, nor with determining its prospects of success."[169] Accordingly, summary judgment must be refused.

91. A further reason for granting leave to defend is that the dispute concerning *res judicata* has at its core the applicant's standing. The submission that the trust "does not aver that the [applicant] does not have the necessary *locus standi* to sue …", is incorrect. The trust denies the applicant's standing but pleads no knowledge to the material allegations and puts the plaintiff to the proof thereof. The applicant contends the denial is bare. The question is whether the denial raises a triable issue. In *Joob Joob Investments supra,* the supreme court of appeal held that,

> "The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. … Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out."[170]

92. In my view, the dispute raises a triable issue. The applicant has failed to prove standing on two previous occasions, and adds to the previous occasion only the bare allegation that there was a sale between Secured Mortgages Two and the applicant that was implemented. Secured Mortgages Two was "effectively run as a division of the applicant", and there is scant particularity of the sale in the particulars of claim. The applicant does not plead whether the contract is written or oral, where and by whom the contract was concluded, and the material terms. The applicant does not present any evidence of the sale in the supporting affidavit. The allegations made by the deponent are typical of those that have been held to be insufficient for the purposes of summary judgment. See for example, *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd.*[171] If the contract of sale is written, the deponent

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167 *Cohen NO and others v Deans* 2023 JDR 1216 (SCA), para. 25.
168 para. 13.
169 para. 23.
170 para. 32 and 33.
171 Unreported, WCC case no 20266/2015 dated 12 September 2016.

does not indicate that the document was perused. The deponent states that, "I have perused the combined summons, particulars of claim and defendants' special plea filed …". In comparison in *Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited,*[172] which concerned a cession, the deponent specifically stated that, "[t]he Applicant's file pertaining to the above-captioned matter which contains, *inter alia,* a cession of book debts in favour of the Applicant … is currently in my possession and under my control and I am fully conversant with the content thereof." There is no such allegation in the present matter and the inconsistencies in the applicant's case mentioned above suggest that the terms have not been considered.

93. In *Maharaj supra,* the appellate division held that, "[t]he grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law."[173] In my view, the applicant's claim cannot be described as "unimpeachable". The trust has successfully impeached the transfer of rights on two previous occasions. The alleged transfer of rights requires evidence which has not materialised in any of the proceedings to date and accordingly the denial, albeit founded on an absence of knowledge, establishes a triable issue. Instead of demonstrating that the contract of sale and cession are unimpeachable, the applicant attempted to rely on the bank statements attached to the affidavit in support of the summary judgment application to contend that the dispute regarding the applicant's standing was not *bona fide.* The applicant contended that the bank statements revealed that the trust had paid the applicant after the cession, and an inference could be drawn that the trust had knowledge of the transfer and effectively conceded the transfer. As indicated above, the attachment of the bank statements to the supporting affidavit to the extent to which the applicant did so in this matter, was impermissible. In any event, the inference must be the most probable, plausible, readily apparent and acceptable inference from a number of possible inferences on the facts.[174] I am not satisfied that the inference can be drawn and the inference does not demonstrate that the defence is not *bona fide*, particularly in circumstances where the applicant acted as an agent for another entity prior to the alleged cession.

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172 (676/2013) [2014] ZASCA 79 (29 May 2014).
173 1976 (1) SA 418 (A), p. 423A - H.
174 *Cooper and Another NNO v Merchant Trade Finance Ltd* 200 (3) SA 1009 (SCA), *p. 1027, para. 7; Meyers v MEC, Department of Health, EC* 2020 (3) SA 337 (SCA), para. 82.

Costs

94. In terms of the rule 32(9), the court may make such order as to costs as to it may seem just. The usual order is costs in the cause. However, rule 32(9)(a) specifically provides for a deviation from the normal order, “where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle such defendant to leave to defend”. The main defence raised by the trust was *res judicata.* Although the plaintiff could have anticipated that it would experience some difficulty in obtaining summary judgment, I cannot infer that the plaintiff knew that the trust would be entitled to leave to defend on that defence. As stated at the outset, some of the defences raised in the papers do not appear to be *bona fide* and the trust did not contend that the application was defective. In my view, there are no reasons which justify a deviation from the usual order.

95. In the result, I make the following order:

1. The application for summary judgment is refused.

2. The defendant is granted leave to defend.

3. The costs of the summary judgment application shall be costs in the action.

Q LEECH
Acting Judge of High Court
Gauteng Local Division, Johannesburg

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First and second respondents:

Counsel:	J.W. KLOEK
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Third respondent: No appearance

Heard on: 20 April 2023
Delivered on: 10 July 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to Case Lines and by release to SAFLII.