Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

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

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NUMBER : 374/2022
DATE HEARD : 25 August 2023
DATE DELIVERED : 10 November 2023

In the matter between:

SOUTH AFRICAN SECURITISATION PROGRAMME (RF) LTD
(REG NUMBER: 1991/002706/06) — **APPLICANT**

and

VALUCORP 105 C/C T/A AGRISOLAR
(REG NUMBER: 2006/015410/23) — **1ST RESPONDENT**

THUYNSMA; FREDERICK, JOHANNES
(ID NUMBER: […]) — **2ND RESPONDENT**

DU TOIT; WILLEM, SCHALK, BURGER — **3RD RESPONDENT**

(ID NUMBER: […])

THOMAS; OCKERT DANIEL **4TH RESPONDENT**
(ID NUMBER: […])

JUDGMENT

OLIVIER AJ

INTRODUCTION:

1. The Applicant approaches this Court with an application for summary judgment (herein after referred to as "*the Application*") in terms whereof the Applicant *inter alia* seeks:

    1.1 Confirmation of the termination of a Master Rental Agreement;

    1.2 Return/delivery of certain specified equipment;

    1.3 Payment in the amounts of R 39 516,65 (Thirty-Nine Thousand, Five Hundred and Sixteen Rand, Sixty-Five Cent), R 45 657,32 (Forty-Five Thousand, Six Hundred and Fifty-Seven Rand, Thirty-Two Cent) and R 116 038,75 (One Hundred and Sixteen Thousand and Thirty-Eight Rand, Seventy-Five Cent) respectively;

    1.4 Interest on the afore-said amounts; and

    1.5 Costs on a scale as between Attorney and Client.

2. The Application is opposed.

BACKGROUND:

3. The Applicant (as Plaintiff) issued Combined Summons against the 1st to the 4th Respondents out of this Court under the above case number on or about 23 February 2022.

4. The action was defended on 18 March 2022 and the 1st, 3rd and 4th Respondents (as 1st, 3rd and 4th Defendants) filed their Plea in the matter on 29 April 2022.

   I will henceforth refer to the 1st, 3rd and 4th Respondents jointly as "*the Respondents*".

   It should be mentioned, for the sake of completeness, that the Attorneys who appeared on behalf of all of the Respondents at the time of the filing of the Notice of Intention to Defend, withdrew as Attorneys of record for the 2nd Respondent on 21 April 2022.

   There was no appearance on behalf of the 2nd Respondent in the Application and a Plea was also not filed on behalf of the 2nd Respondent.

5. Subsequent to the filing of the Plea on behalf of the Respondents, the Applicant lodged the Application on 19 May 2022 which was supported by an Affidavit deposed to by the Litigation Manager of Sasfin Bank Limited.

6. Said Deponent alleged that Sasfin Bank Limited administers and manages all rental agreements that are/were ceded, sold and transferred to the Applicant

and that Sasfin Bank Limited is also responsible for the administrative and litigious functions in relation to the enforcement of such ceded and transferred rental agreements.[1]

7. Said Deponent to the Applicant's Supporting Affidavit in the Application (herein after only referred to as "*the Supporting Affidavit*") furthermore *inter alia* stated:

7.1 That he had read the records, documents and accounts pertaining to the action between the parties including the Applicant's Particulars of Claim and the annexures thereto;

7.2 That the facts set out in the Supporting Affidavit are within his personal knowledge; and

7.3 That he can swear positively to the facts set out in the Applicant's Particulars of Claim and that he furthermore verifies the parties, the causes of action and the amounts claimed by the Applicant.

8. Although the Respondents initially disputed the fact that the above Deponent to the Supporting Affidavit did in fact have all records relating to the transaction under his control, Mr. Olivier who appeared on behalf of the Respondents did not take this issue any further during argument and I was ultimately not required to rule on the issue.

9. The Respondents filed their Opposing Affidavit ("*the Opposing Affidavit*") in the Application on 21 June 2022 and the Application ultimately served before Lever J on 21 October 2022 who ordered that:

"*1. The First, Third and Fourth Respondents ("Respondents") are granted leave to defend the action provided that:*

[1] This allegation and the standing of the Applicant in the matter were not seriously disputed.

1.1 by no later than close of business 21 November 2022, the Respondents give security to the Applicant in terms of Rule 32(3)(a) of the Uniform Rules of Court as follows:

2. ***In respect of Claim A:***

2.1 Payment of ***R 39 516,55*** *plus interest at 4% above prime from 24 August 2021 to 21 November 2022 into the Respondents Attorneys Trust Account and provide proof of payment to the Applicant's Attorneys.*

2.2 The amount of R 10 000,00 as an initial contribution towards the legal costs of the Applicant, not derogating from the Applicant's entitlement to the recovery of its taxed costs at the finalisation of the action, in an amount to be determined by the taxing registrar;

3. ***In respect of Claim B:***

3.1 Payment of ***R 45 65732***[2] *plus interest at 6% above prime from 24 August 2021 to 21 November 2022 into the Respondents Attorneys Trust Account and provide proof of payment to the Applicant's Attorneys;*

3.2 The amount of R 10 000,00 as an initial contribution towards the legal costs of the Applicant, not derogating from the Applicant's entitlement to the recovery of its taxed costs at the finalisation of the action, in an amount to be determined by the taxing registrar;

4. ***In respect of Claim C:***

[2] This amount seems to be a typing error and should be R 45 657,32.

*4.1 Payment of **R 116 038,75** plus interest at 6% above prime from 24 August 2021 to 21 November 2022 into the Respondents Attorneys Trust Account and provide proof of payment to the Applicant's Attorneys.*

4.2 The amount of R 10 000,00 as an initial contribution towards the legal costs of the Applicant, not derogating from the Applicant's entitlement to the recovery of its taxed costs at the finalisation of the action, in an amount to be determined by the taxing registrar;

5. The Applicant may re-enrol its Application for Summary Judgment, duly supplemented in the event of the Respondents non-compliance with the order as set out herein above in par 1.1 to par. 4.2." (My underlining).

I will henceforth refer to the above order by Lever J as "*the October 2022 Order*".

10. It should be stated that it was confirmed by both Mr. Botha (who appeared for the Applicant) as well as by Mr. Olivier that the October 2022 Order was based on a Draft Order that was prepared on behalf of the respective parties and that the merits of the Application was not argued before Lever J at the time.

11. It appeared from a Supplementary Affidavit deposed to by one Lelanie Jonker on 25 January 2023 that the Respondents failed to adhere to the above order despite being requested to do so[3] and on 17 May 2023, the Applicant duly re-enrolled this Application for Summary Judgment for argument on 25 August 2023, seeking the relief set out in paragraphs 1.1 to 1.5 *supra*.

12. The Application consequently served before me on 25 August 2023 for argument and determination.

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[3] This was in fact common cause between the parties.

THE POINT *IN LIMINE*:

13. At the commencement of the proceedings on 25 August 2023, Mr. Botha requested me to consider a point *in limine* which boiled down to the question whether the Respondents, under the circumstances, could have the Application reconsidered on the basis of ***Rule 32(3)(b)*** of the Uniform Rules of Court (herein after referred to as "*the Rules*").

14. Mr. Botha, during his argument of the point *in limine*, referred me to the matter of ***Kgatle v Metcash Trading Ltd***[4] where the Full-Bench of the Transvaal Provincial Division *inter alia* had to decide whether an order granted by Boruchowitz J in the Court *a quo*, which order was to a great extent similar to the October 2022 Order, was appealable.

In the Court *a quo* in the ***Kgatle*** matter, Burochowitz J ordered that[5]:

"*1. Summary judgment is refused.*

2. Leave to defend is granted to the defendant subject to the condition that the defendant … furnish the plaintiff with security to the satisfaction of the Registrar …

3. In the event that the defendant fails to furnish the security aforesaid summary judgment shall be entered against the defendant …" (My omissions and underlining).

15. Mr. Botha's arguments in this regard, as I understood them to be, were:

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4 2004 (6) SA 410 (TPD).

5 See **Kgatle**, *supra* at 414 B-E.

15.1 That this Court cannot correct, alter or supplement the October 2022 Order by virtue of the fact that the Court, subsequent to the October 2022 Order, became *functus officio*;

15.2 That the Respondents should not be allowed to vacillate between the provisions of ***Rule 32(3)(a)*** and ***Rule 32(3)(b)*** of the Rules;

15.3 That upon the issuing of the October 2022 Order, the matter became *res iudicata* and that the Rules do not contemplate hearing any application for summary judgment on multiple occasions;

15.4 That the October 2022 Order is in fact appealable, that the Respondents should have appealed same, but that the time for doing so had lapsed; and

15.5 That the October 2022 Order contemplated a re-enrolment of the Application in the event of non-compliance by the Respondents, but that it did not contemplate a reconsideration of the Application afresh.

16. Mr. Botha urged me to, when considering the point *in limine*, take cognizance only of the words used in the October 2022 Order and to not concern myself with the intention of the parties.

17. Mr. Botha furthermore emphasized the fact that the Respondents gave no explanation for their failure to provide security as they were ordered to do and stated that the Application should in fact be determined on an “unopposed basis” as a result of the lack of such explanation.

18. Mr. Olivier on behalf of the Respondents simply argued that the October 2022 Order was not a final order, alternatively was not final in its effect and therefore not appealable.

It was argued that the October 2022 Order was, on the face of it, an order in terms whereof the Application as a whole may be re-enrolled in the event of the Respondents not providing security and that the provision of security was in fact an option available to the Respondents in order to stave off summary judgment being granted against them.

19. Mr. Olivier finally emphasized the fact that the Application was opposed and that the merits thereof have not been argued and considered.

20. Mr. Olivier, when requested to do so, could not tender a responsible explanation as to why the Respondents did not provide the required security in terms of the October 2022 Order, but urged me to consider that the lack of such explanation should not be the determining factor and that the words used in the said October 2022 Order should in fact be decisive.

21. It is common cause that in order for a judgment or order to be appealable, such judgment/order should be a final judgment/order, it should be definitive of the rights of the parties and it should have the effect of disposing of a substantial portion of the relief sought by the Plaintiff in the action (in this case the Applicant).[6]

22. After perusing specifically the ***Kgatle*** matter, I find said matter to be distinguishable from the current matter, the primary distinction being the fact that Boruchowitz J specifically refused summary judgment and further specifically ordered that in the event of the Defendant not complying with the condition of providing security, summary judgment shall be entered against the Defendant.

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[6] See *inter alia* **Marsay v Dilley** [1992] 2 All SA 327 (SCA) at 332 and **Zweni v Minister of Law & Order** [1993] 1 All SA 365 (A) at 368.

23. Further to the above, the learned Swart J stated in ***Kgatle*** as follows[7]:

" *If the Court* a quo *had simply refused summary judgment, that would, of course, not have been appealable but the very effect of the appeal before us is due to the fact that* <u>*the order went further and as a matter of fact provided the basis on which summary judgment was in fact entered*</u>." (My underlining).

24. I understand the above quote from Swart J to mean that the order by Boruchowitz J clearly states that in the event of the condition not being met, there would be no further consideration of the summary judgment application and that summary judgment would automatically follow the failure to meet the condition to provide security.

25. The October 2022 Order by Lever J, in my view, clearly does not have the same effect if the condition to provide security was not met by the Respondents, as this order clearly envisage a hearing of the Application under such circumstances if the Applicants elects to re-enrol the Application. Lever J also did not dismiss the summary judgment application, contrary to what Boruchowitz J did in the **Kgatle** matter.

26. I consequently find that the October 2022 Order is at the very least not final in its effect, nor is it definitive of the rights of the parties and that it is therefore not appealable.

27. I find that the October 2022 Order clearly envisages a hearing of the whole of the Application in the circumstances and the point *in limine* raised by the Applicant therefore stands to be dismissed.

<u>CONDONATION</u>:

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[7] At 416 C-E.

28. In the Opposing Affidavit, the Respondents ask for the late-filing of said Opposing Affidavit to be condoned.

29. It is common cause that in terms of the provisions of the amended ***Rule 32*** of the Rules, a Respondent in an Application for Summary Judgment is supposed to file his/her Answering Affidavit at least 5 (five) days before the application is to be heard.[8]

30. At the time, the Application was set down for hearing on 24 June 2022 and seeing that the Opposing Affidavit was filed on 21 June 2022, it was filed in effect 3 (three) days late since it had to be filed on 17 June 2022 in terms of the amended ***Rule 32*** of the Rules.

31. It is however common cause that the hearing of the Application did not proceed on 24 June 2022 and that it was postponed at least twice before the order that was granted by Lever J on 21 October 2022 (the October 2022 Order).

32. Although one might question the diligence of the Attorneys for the Respondents for not being aware of the amended provisions of ***Rule 32*** as to the time periods for filing an Answering Affidavit, I find that the late-filing of the Opposing Affidavit in these circumstances could not have prejudiced the Applicant because both parties have had sufficient opportunity to peruse and consider each other's versions, to ventilate the issues, to file proper Heads of Argument in the matter and to properly prepare for the argument of the matter.

33. I consequently condone the late filing of the Opposing Affidavit in the Application.

THE QUESTION OF A *BONA FIDE* DEFENCE:

[8] See **Rule 32(3)(b)** of the Rules.

34. In its claim against the Respondents, the Applicant in essence relies on the following:

34.1 A Master Rental Agreement entered into between the 1st Respondent and a Trust called The Rental Company Trust (herein after "*RCT*") which was concluded on or about 28 July 2016 ("*the 1st Master Rental Agreement*");

34.2 A Master Rental Agreement entered into between the 1st Respondent and a company called CRS Corporate Rental Solutions (Pty) Ltd (herein after "*CRS*") which was concluded on or about 21 May 2018 ("*the 2nd Master Rental Agreement*");

34.3 A Master Rental Agreement entered into between the 1st Respondent and CRS on or about 21 June 2018 ("*the 3rd Master Rental Agreement*");

34.4 Guarantees signed by the 2nd, 3rd and 4th Respondents in favour of RCT on or about 25 July 2016;

34.5 A Guarantee signed by the 2nd, 3rd and 4th Respondents in favour of CRS on or about 3 April 2018; and

34.6 Various Cession and Sale and Transfer Agreements in terms whereof the 1st, 2nd and 3rd Master Rental Agreements were either ceded or sold and transferred to eventually the Applicant.

35. Although the Respondents initially questioned the Applicant's *locus standi* in the matter, this point was abandoned by Mr. Olivier at the beginning of his argument on behalf of the Respondents and I was consequently not required to determine the issue regarding the Applicant's standing in the matter.

36. The Applicant alleges that the 1st Respondent had failed to adhere to the terms of the 1st, 2nd and 3rd Master Rental Agreements in that the 1st Respondent did not make the required rental payments in terms of the said agreements and that the 1st Respondent is consequently indebted towards the Applicant in the amount of R 39 516,65 plus interest and costs[9], the amount of R 45 657,32 plus interest and costs[10] as well as the amount of R 116 038,75 plus interest and costs.[11]

37. Further to the above and as was mentioned herein above, the Applicant also moves for the cancellation of the 1st Master Rental Agreement as well as for the delivery of certain specified goods.

    The 2nd, 3rd and 4th Respondents are held liable by the Applicant by virtue of the guarantees signed by them.

38. Various defences were raised on behalf of the Respondents in their Plea as well as in the Opposing Affidavit which are not going to be repeated herein for fear of prolixity.

39. Mr. Olivier however indicated at the start of his arguments on behalf of the Respondents that he will persist with the following defences which may, for purposes hereof be summarized as follows:

    39.1 That the rentals in as far as the 1st Master Rental Agreement had in fact been paid by the Respondents;

    39.2 That the guarantees that were signed by the 2nd, 3rd and 4th Respondents were invalid;

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9 Claim A.
10 Claim B.
11 Claim C.

39.3 That the 1st, 2nd and 3rd Master Rental Agreements were in fact simulated agreements as it was represented to the Respondents, by an agent of the Applicant, that the Respondents would become the owners of the equipment subsequent to payment of the rental amounts;

39.4 That the 2nd and 3rd Master Rental Agreements were validly cancelled by the Respondents;

39.5 That the provisions of the National Credit Act[12] were applicable to the 1st, 2nd and 3rd Master Rental Agreements and that the Applicant had failed to adhere to the terms of the said Act;

39.6 That certain misrepresentations were made to the Respondents in respect of the equipment being fit and proper for the purpose for which it was purchased as well as in respect of the service of the equipment; and

39.7 That the Applicant is not entitled to the rentals claimed.

40. I was referred to various authorities in respect of the issue of summary judgment as well as ***Rule 32*** of the Rules, most of which are well-known and are in fact trite and I do not deem it necessary to deal with all of the authorities referred to in any sort of detail.

41. It is trite that a Defendant should, in his Answering Affidavit in summary judgment proceedings, fully disclose the nature and grounds of his defence and the material facts upon which it is founded and this defence should at the very least be *bona fide* and good in law[13] and not inherently and seriously unconvincing.[14]

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12 Act 34 of 2005.
13 See **Maharaj v Barclays National Bank Ltd** 1976(1) SA 418 (A) at page 426.
14 See **Breitenbach v Fiat SA (Edms) Bpk** 1976(2) SA 226 (T) at page 228.

A Defendant's defence should be set out in such a way and with such particularity and completeness that the Court would be able to determine whether a *bona fide* defence is disclosed.[15]

42. It has also been held "*… that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim … if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of bona fides.*"[16] (My omissions)

43. The Courts have also held that it is not expected of a Defendant to formulate his opposition to the Plaintiff's claim with the precision of a Plea and that the Court should also not consider it by the standards of pleadings.[17]

44. The above matters were however all decided prior to the amendment to ***Rule 32*** which came into effect in July 2019, the most notable amendment being the fact that in terms of the provisions of the Rule post-amendment, summary judgment proceedings are instituted subsequent to the filing of a Plea as opposed to the institution of summary judgment proceedings subsequent to the giving of notice to defend in terms of the Rule pre-amendment.

The fact is therefore that as a result of the amendment to the Rule, a Court considering summary judgment, now also has the Plea in front of it at the time and the question is how this affects the way in which a Court should approach the consideration of an application for summary judgment post-amendment the Rule.

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15 See **Maharaj**, *supra*.
16 **Breitenbach**, *supra*.
17 See *inter alia* the matters of **Estate Potgieter v Elliott** 1945 (1) SA 1084 at 1087, **Fashion Centre & Ano v Jasat** [1960] 3 All SA 154 (N) at 156 and **Maharaj**, *supra*.

45. It warrants mention though that it was held recently that, despite the amendment to ***Rule 32*** of the Rules, what is required from a Defendant in the Answering Affidavit in summary judgment proceedings, has remained essentially the same and "*… that the test remains what it always was: has the defendant disclosed a* bona fide *(ie an apparently genuinely advanced, as distinct from sham) defence? There is no indication in the amended rule that the method of determining that has changed.*"[18]

The principles as laid down in *inter alia* the matters of ***Maharaj*** and ***Breitenbach*** therefore still finds application.

46. I agree with both Mr. Botha and Mr. Olivier to the extent that the fact that the Plea is available at the stage when the Court considers an application for summary judgment, places the Court in a better position to make an informed decision as the Court has more information at its disposal.

47. In ***Tumileng Trading CC***[19] the learned Binns-Ward J considered the above question and specifically the principle that a Defendant's Answering Affidavit should not be examined by the standards of pleading and came to the conclusion that although more may be expected of a Defendant now than previously, it does not mean that the intention behind the amendment was to make the procedure more "*draconian or drastic*" than it used to be.[20]

Binns-Ward J then concludes that "*Had such a signal change been intended, it seems unlikely that subrule 32(3) would have been left substantively in the same form that it used to have. I would have expected any change in what was required of the defendant's opposing affidavit to be accompanied by the introduction of other changes to bring our procedure more in line with that in jurisdictions in which the courts are able to give directions that enable the*

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18 See **Tumileng Trading CC v National Security and Fire (Pty) Ltd** 2020 (6) SA 624 (WCC) at paragraph [13].

19 *Supra*.

20 **Tumileng Trading CC**, *supra* at paragraph [26].

genuineness of the advanced defences to be further explored before summary judgment is granted or refused …"[21]

48. I understand the above to simply mean that both the Plea and the Answering Affidavit should be considered by the Court when determining an application for summary judgment, but that the primary focus should still be on the content of the Answering Affidavit and on whether same pass muster when weighed up against the requirements laid down in primarily ***Maharaj*** and ***Breitenbach*** and when considering that summary judgment proceedings is no longer seen as being extraordinary.[22]

49. It is furthermore not necessary for me to evaluate the merits of the defences raised by the Respondents[23], but to merely consider whether these defences (or in fact only one of them), if proven at trial, would be good in law.

Any doubt as to whether the Plaintiff's case is indeed unanswerable should in any event accrue to the Defendants.[24]

50. In this regard, I view the Respondent's contentions in respect of the alleged simulated agreements as well as the alleged misrepresentation during the conclusion of the Agreements to pass muster in the sense that, if proven at trial, same might constitute a complete defence to the claim by the Plaintiff.

This can however only be decided by a trial court having heard evidence on this issue and having investigated all of the facts surrounding the conclusion of the Agreements.[25]

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[21] *Supra* at paragraph [27].

[22] **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture** [2009] 3 All SA 407 (SCA) at 415.

[23] **Eclipse Systems & Another v He & She Investments (Pty) Ltd; Tyremac Tyres & Tubes & Another v He & She Investments (Pty) Ltd** [2020] ZAWCHC 96 (SAFLII Reference) at paragraph [63].

[24] **Gilinsky & Another v Superb Launderers and Dry Cleaners (Pty) Ltd** [1978] 2 All SA 353 (C) at page 357.

[25] See in general the matter of **District Bank Ltd v Hoosain & Others**

51. In view of the above, I deem it unnecessary to deal with the remainder of the defences raised by the Respondents.

ORDER:

52. In view of the above, I make the following order:

52.1 The point *in limine* raised on behalf of the Applicant at the hearing of this matter on 25 August 2023 is dismissed;

52.2 The Respondent's late filing of its Answering Affidavit in this application is condoned;

52.3 The application for summary judgment is refused;

52.4 Leave is afforded to the Defendants/Respondents to proceed with the defence of the action under the above case number;

52.5 Further pleadings/papers in the afore-said action are to be filed according to the provisions of the Uniform Rules of Court; and

52.6 The costs of this application, which costs include the costs occasioned by the raising of the point *in limine* by the Plaintiff/Applicant as well as the costs occasioned by the Defendant's/Respondent's condonation application, are to be costs in the cause.

[1984] 2 All SA 521 (C) at specifically page 527.

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A.D OLIVIER

ACTING JUDGE

Northern Cape Division, Kimberley

For APPLICANT	:	Adv. J.G. Botha o.i.o ODBB Attorneys **SANDTON** c/o Roux, Welgemoed & Du Plooy **KIMBERLEY**
For 1ST, 3RD & 4TH RESPONDENTS	:	Adv. J.L. Olivier o.i.o Becker, Bergh & More **UPINGTON** c/o Haarhoffs Inc. **KIMBERLEY**
For 2ND RESPONDENT	:	No Appearance