REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: Yes / No
(2) OF INTEREST TO OTHER JUDGES: Yes / No

22/9/2022

DATE SIGNATURE

CASE NO: 2021/6604

In the matter between:

NEDBANK LIMITED	Plaintiff
and	
UPHUHLISO INVESTMENTS AND PROJECTS (PTY) LIMITED	First Defendant
MPELO NICOLUS SIKHWATHA	Second Defendant
BETHUEL ZAMI SIKHWATHA	Third Defendant
AYANDA MATTHEWS NTLABATHI	Fourth Defendant

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The plaintiff seeks summary judgment against the first defendant as principal debtor and against the second to fourth defendants as sureties arising from banking facilities afforded by the plaintiff bank to the first defendant.

2. The parties have usefully delineated in their joint practice note the four issues that are to be determined by the court, but it is important to acknowledge that these issues are to be determined in the context of summary judgment proceedings, under the amended Uniform Rule 32.

3. There is a marked divergence between the defences raised by the defendants in their affidavit resisting summary judgment and what is contained in their plea. It is necessary to first consider the pleadings, that is the plaintiff's particulars of claim and the defendants' plea. This will be followed by a consideration of legal principles applicable to determining summary judgment proceedings, particularly where there is a divergence between the plea and the affidavit resisting summary judgment in the defences raised. The four issues for determination can then be considered in the context of those pleadings and principles.

4. The plaintiff bank pleads the written banking facility letter ("the Agreement") concluded between it and the first defendant as principal debtor, which *inter alia* provides for the plaintiff affording the first defendant an overdraft facility as well as a medium-term loan facility in

the amount of R1.6 million repayable over 60 months, which was to be used to finance the purchase of a News Café in Maponya Mall in Soweto.

5. The plaintiff pleads certain of the terms applicable to the Agreement. In relation to the overdraft facility, these terms include that (i) the overdraft facilities were repayable on demand at the plaintiff's discretion in accordance with normal banking principles; (ii) that in addition to the interest rate that would ordinarily be applicable to the overdraft facility, should the overdraft facility be exceeded, penalty interest would be charged on the amount by which the first defendant had exceeded the overdraft facility (a penalty interest rate); and (iii) that a default interest rate was be charged in the event that the first defendant defaulted in respect of the overdraft facilities. The maximum penalty interest rate will be equal to the ruling repo rate plus 14% while the default interest rate would be determined by the plaintiff and would not exceed the maximum rate prescribed from time to time for credit facilities in the regulations promulgated in terms of the National Credit Act, 2005.

6. The plaintiff also pleads as a term of the Agreement that which would constitute events of default, and the consequences of an event of default, particularly the plaintiff's rights arising therefrom which included *inter alia* (i) to cancel, suspend, restrict and/or review the overdraft facility and all existing agreements immediately; and/or (ii) claim immediate repayment of all amounts owing to the plaintiff, all of which amounts would immediately become due and payable.

7. The plaintiff pleads in respect of its claim on the overdraft facility that it duly performed thereunder, that it made the facility available and that the first defendant breached the Agreement by exceeding the limit of the facility, alternatively by failing to meet its obligations in terms of the facility. The plaintiff then pleads that on 29 September 2020 it furnished a letter of demand to the first defendant calling upon the first defendant to make payment of the excess on the overdraft facility within 10 business days, failing which the Agreement would be cancelled and the full outstanding amount would become immediately due and payable. A copy of the demand is annexed to the particulars of claim, which does record that should the excess not be repaid (i.e. the amount by which the outstanding balance exceeded the overdraft limit) the Agreement would be cancelled and the full amount outstanding would become immediately due and payable.

8. The plaintiff continues in pleading its case on the overdraft facility that despite demand, the first defendant failed to make payment and that the full amount is now due, owing and payable. Notably the plaintiff does not allege in its particulars of claim in relation to the overdraft claim that it cancelled the Agreement or the overdraft facility.

9. The plaintiff then pleads the outstanding indebtedness under the overdraft facility, supported both by a detailed statement and a certificate of balance attached to the particulars of claim, which constitute *prima facie* proof of the indebtedness in terms of the Agreement.

10. In respect of the plaintiff's claim on the medium-term loan facility, the plaintiff similarly pleads that it made the loan available and that the first defendant breached the loan in failing to make regular payments, resulting in arrears. The plaintiff pleads that on 29 September 2020 it addressed a demand to the first defendant calling for payment of all arrears within seven days, failing which the Agreement would be cancelled and the full outstanding amount would become immediately due and payable. A copy of the demand is annexed to the particulars of claim, which does record that unless the arrears was paid, the Agreement would be cancelled, and the full outstanding amount would become due and payable immediately.

11. The plaintiff then expressly pleads that it did cancel the loan agreement (in contrast to its claim on the overdraft facility where it did not plead cancellation) and that the first defendant is accordingly indebted to the plaintiff in a specified amount, as supported by a certificate of balance. Although the plaintiff does not expressly plead that the amounts outstanding under the overdraft facility and medium-term loan facility respectively constitute the full outstanding indebtedness for each, this is clearly so from the pleadings as a whole, the demands attached and the certificates of balance. As appears below, the defendants do not contend otherwise than what is claimed is the full outstanding amount under each of the facilities.

12. To complete the summary of the particulars of claim, the plaintiff pleads the basis for the remaining defendants' liability as sureties and co-principal debtors under their respective suretyships. No defence specific to the sureties is raised. Should summary judgment be granted against the first defendant as the principal debtor, judgment against the remaining defendants as sureties is to follow.

13. The plaintiff pleads that the National Credit Act does not apply, which is clearly so as the first defendant is a juristic person which has entered into a large credit agreement.[1]

14. The defendants' plea does no more than:

    14.1. admit the citation of the parties and the jurisdiction of the court;

    14.2. admit the terms and conditions of the Agreement including those regulating the overdraft facility and medium-term loan facility insofar they accord with what is contained in the written agreements;

    14.3. deny the remaining averments in the particulars of claim (which would include the averments relating to the advancing of the facilities, the breaches, the demands, the cancellation of the medium-term loan, the extent of the indebtedness under each

[1] Section 4(1)(b) of the National Credit Act, 2005.

facility and that same is due, owing and payable). This is done by way of blanket denials that contain no detail other than in two respects.

15. Those two respects are that:

15.1. defendants need only repay the monies to the plaintiff if their business remained sufficiently profitable to enable them to do so, the Agreement containing an implied, alternatively tacit term that the defendants' restaurant business remained viable, profitable and performed optimally at all material times so as to make sufficient revenue streams to enable them to meet their obligations;

15.2. the outbreak of the Covid-19 pandemic with the consequential regulations promulgated under the Disaster Management Act, 2002 (such as those relating to social distancing and prohibiting alcohol sales) forced the defendants' restaurant business to close and cease trading since 27 March 2020, that this caused their failure to meet their obligations, and this constituted a manifestation of *vis major* or *causus fortuitous* that excused them from repaying the plaintiff.

16. The defendants neither took exception nor pleaded anything in their plea that the plaintiff had not made out a cause of action in relation to its claims or that its pleadings were otherwise deficient.

17. The Supreme Court of Appeal in *NPGS Protection and Security Services CC and Another v Firstrand Bank Limited* 2020 (1) SA 494 (SCA) reiterated in relation to summary judgment proceedings:

> *"[11] Rule 32(3) of the uniform rules requires an opposing affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor. To stave off summary judgment, a defendant cannot content him-or herself with bald denials, for example, that it is not clear how the amount claimed was made up. Something more is required. If a defendant disputes the amount claimed, he or she should say so and set out a factual basis for such denial. This could be done by giving examples of payments made by them which have not been credited to their account.*
>
> *…*
>
> *[14] Indeed, the court would be remiss in its duties if such defences, clearly devoid of any bona fides, stand in the way of plaintiffs who are entitled to relief. The ever increasing perception that bald averments and sketchy propositions are sufficient to stave off summary judgment is misplaced and not supported by the trite general principles developed over many decades by our courts. See, for example, the well-known judgment of this court in Maharaj v Barclays National Bank 1976 (1) SA 418 (A) where the proper approach for summary judgment is stated."*

18. Corbett JA in the oft-cited *Maharaj v Barclays National Bank* at 426A-E in dealing with what is required of a defendant seeking to persuade a court not to grant summary judgment by way of affidavit in terms of uniform rule 32(3)(b) as it then was (i.e. before its amendment with effect from 1 July 2019):

> *"Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully', as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while 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 to enable the Court to decide whether the affidavit discloses a bona fide defence. (See generally, Herb Dyers (Pty.) Ltd. v Mohamed and Another, 1965 (1) SA 31 (T); Caltex Oil (SA) Ltd. v. Webb and Another, 1965 (2) SA 914 (N); Arend and Another v. Astra Furnishers (Pty.) Ltd., supra at pp. 303 - 4; Shepstone v. Shepstone, 1974 (2) SA 462 (N)). <u>At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading</u>. (See Estate Potgieter v. Elliott, 1948 (1) SA 1084 (C) at p. 1087; Herb Dyers case, supra at p. 32.)"*

19. Rule 32(3) as it then read, before amendment, required that the affidavit by the defendant or of any other person who could swear positively to the fact that the defendant had a *bona fide* defence to the action, "*disclose*

fully the nature and grounds of the defence and the material facts relied upon therefor".

20. Notwithstanding the amendments to Rule 32 with effect from 1 July 2019, what is required in Rule 32(3)(b) of an affidavit remains the same, namely that "*such affidavit … shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor*".

21. What is required of a defendant under the amended rule can be no less than what was required of the defendant before. Rather, what is required of the defendant in a resisting affidavit is more than what was required previously as the defendant under the new rule must first have delivered a plea. As there is now a plea and unlike the position before the rule was amended and as described in *Maharaj* above,[2] it is now be open to the court to consider the defendant's defence with reference to the plea, and according to the standards of a plea.

22. The full court of this division in *Raumix Aggregates (Pty) Limited v Richter Sand CC and Another, and similar matters* 2020 (1) SA 623 (GJ) said in relation to the amended Rule 32:

> *"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. Once an application for summary judgment is brought, the*

[2] Particularly at 426E.

applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under s 34 of the Constitution."[3]

23. In assessing whether a genuine triable issue is raised, the extent of any divergence between the defendant's plea and its affidavit resisting summary judgment plays an important, and potentially decisive, role.

24. This division has already said this. Moorcroft AJ in the unreported judgment (but marked reportable) of *Vukile Property Fund Limited v True Ruby Trading 1002 (CC) trading as PostNet and Another*[4], after pointing out that summary judgment is now applied for after the delivery of a plea, said the following in relation to a defendant's failure to file a resisting affidavit which was consistent with his plea:

> *"[6] The plaintiff is required in his affidavit to explain why the defence as pleaded does not raise any issue for trial. The plaintiff can only comply with this requirement when it knows what the defences outlined by the defendant are. <u>It follows that the defendant may not raise defences in the affidavit resisting summary judgment that are not pleaded</u>. In the words of Van Loggerenberg:*
>
> > *'the nature and grounds of the defence and the material facts relied upon therefore in the affidavit should be in harmony with the allegations in the plea. In this regard*

[3] At para 16.

[4] Case No: 2020/9705, 21 May 2021.

the plea should comply with the provisions of rules 18(4) and 22(2).'

[7] In this context the Superior Courts Task Team of the Rules Board for Courts of Law in their report of 2016 recommending changes to Rule 32 said:

> *'The best way of addressing these shortcomings would seem to be to require the founding affidavit in support of summary judgment to be filed at a time when the defendant's defence to the action is apparent, by virtue of having been set out in the plea. This course is better than allowing a replying affidavit to be filed (as was suggested by a report prepared a few decades ago by the Galgut Commission). Merely including provision for a replying affidavit would not address the problems with the formulaic nature of the founding affidavit, and the speculation inevitably contained therein.*
>
> *In the event of a plaintiff applying for summary judgment after the delivery of a defendant's plea, 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; and should indeed be required to do so in order that the question of whether there is a bona fide defence which is capable of being sustained could be considered by the Court in a meaningful way.'*

[8] The defendant is therefore called upon to file a plea that sets out its defence, and in the summary judgment application to amplify the defence on affidavit to illustrate a bona fide defence to the action. In evaluating the plea and the affidavit the distinction between the facta probanda and

the fact probantia must be kept in mind – the affidavit should contain facta probantia whereas the plea should not.

[9] The new Rule is intended to level the playing field by requiring both the plaintiff and the defendant to commit to a version of the facts. Under the old rule, the defendant was required to put its defence up in an affidavit while the plaintiff was not similarly burdened. It also requires practitioners to draft particulars of claim and the plea with more care than before.

[10] A defendant is required to set out a defence with reasonable clarity and when the defence raised in the affidavit resisting summary judgment is inconsistent with the plea it cannot in the absence of an explanation for the inconsistency be said to be bona fide.

[11] The new rule, like the old, does not provide for a replying affidavit and this is so for understandable reasons. When the defendant raises issues in the affidavit that are not dealt with in the plea the plaintiff has no opportunity to respond.

[12] The practice of filing an affidavit resisting summary judgment that differs markedly from the plea and is to some extent totally unrelated to the plea, must therefore be deprecated.

[13] It has been held that a defendant is not precluded from amending its plea after an application for summary judgment is brought. The correct procedure then is for the application to amend the plea to be finalised first, and if the amendment were granted for the plaintiff to bring a fresh application for summary judgment in respect of the revised plea if so advised. Courts will have to guard against abuse of the process." (My emphasis).

25. Subsequently, in this division, Pretorius AJ in *Nogoduka-Ngumbela Consortium (Pty) Limited v Rage Distribution (Pty) Limited trading as Rage*[5] expressed agreement with Moorcroft AJ in *Vukile Property Fund* that a defendant raising defences in its resisting affidavit which were inconsistent with its plea cannot be *bona fide,* in the absence of a reasonable explanation. Pretorius AJ continued though that this does not mean that a defendant was not entitled in its resisting affidavit to elaborate on its plea and the defences pleaded and that the amendment to Rule 32 did not affect the rules regarding pleadings, particularly the difference between *facta probanda* and *facta probantia*. Pretorius AJ continued that the amendment to Rule 32 did not mean that a defendant now had to plead his defence in the plea with the same detail as is required in the resisting affidavit. While the resisting affidavit may require the *facta probantia,* it does not follow that the plea must. And so to this extent there may be a permissible divergence between the plea and the resisting affidavit.

26. With this I am in general agreement. The amendment to Rule 32 does not now require of a defendant to necessarily plead in its plea more than it otherwise would have had to plead before the amendment to Rule 32. But given the requirement of a resisting affidavit to disclose fully the nature and grounds of the defence and the material facts relied upon therefor, which is now to be delivered after the delivery of a plea, a court will more

[5] [2021] ZAGPJHC 568 (19 October 2021), para 7.

closely scrutinise a denial in a plea, as read with what is set out in a resisting affidavit to substantiate or flesh out that denial, to ascertain whether there is a triable issue that would justify leave to defend being granted. The plea, as read with the resisting affidavit, and due regard being had to any divergence between them, would have to be considered in assessing whether it constitutes bald averments and sketchy propositions insufficient to stave off summary judgment.[6]

27. By way of illustration, a denial by a defendant of the quantum or extent of an indebtedness without elaboration in a plea, which is then followed by elaboration in an affidavit resisting summary judgment as to why there is good reason to doubt the veracity of that quantum is understandable. An averment in a particulars of claim as to the extent of an indebtedness that is made up of numerous debits and credits over the course of many years, such as in respect of an overdraft facility consisting of advances, repayments, banking fees and interest charges, can understandably be the subject of a denial in the plea, putting the plaintiff to the proof. In such an instances, it probably would not be expected of a defendant ordinarily to give any detail in his plea of the basis for the denial. But then defendant is to elaborate on the factual basis for that denial in its resisting affidavit, such as by way of giving examples of over-charges or incorrect charges, if it seeks to rely on that challenge raising a triable issue to overcome summary judgment.

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[6] *NPGS Protection and Security Services supra* at para 14.

28. In contrast, where there is a blanket or cryptic denial in a plea in response to a wide range of averments in a particulars of claim, the defendant may find a court more resistant to its attempts in its resisting affidavit to test the boundaries of what that blanket or cryptic denial permissibly encompasses. A defendant testing the limits of what can permissibly be squeezed into such a denial may find itself having summary judgment granted against it on the basis that the challenge it subsequently seeks to make out in the affidavit resisting summary judgment was not foreshadowed in the plea, particularly in the court assessing *the bona fides* of the opposition.

29. Rule 32(2)(b) expressly requires of a plaintiff in its supporting affidavit for summary judgment to *'explain briefly why the defence as pleaded does not raise any issue for trial'*. Should a defendant be permitted under the aegis of a blanket or cryptic denial to advance a defence in its resisting affidavit that was not reasonably foreshadowed in its plea, it would impermissibly deprive the plaintiff in its supporting affidavit from '*explain[ing] briefly why the defence as pleaded does not raise any issue for trial'*

30. As stated by Moorcroft AJ in *Vukile Property Fund*[7], a defendant who realises that the defences raised in its resisting affidavit go beyond its plea should then seek to address that disconnect or deficiency by seeking to first amend its plea so that the plea, once amended, would align with its

[7] See also the discussion in *Erasmus Superior Court Practice* at D1-416B to 416C.

affidavit resisting summary judgment. Rule 32 does not deprive a defendant from at any stage amending his plea, including after summary judgment proceedings had been launched but before the hearing thereof.[8] But should the defendant leave the plea unamended, this may be demonstrative of a lack of good faith or of any serious intent on the part of the defendant to advance that defence as a triable issue at trial.

31. Under the amended rule, the scope for a defendant to raise bogus defences that it has no intention of seriously subjecting to trial should be considerably less in that a defendant first needs to ensure that its plea raises those defences as issues to be decided at trial. A defendant can no longer hold out at the summary judgment that it has defences with sufficient promise to constitute triable issues without those defences featuring in the plea. And those defences having been set out in the plea, the plaintiff is now expressly afforded the right under the amended rule to explain why those defences do not raise any issue for trial.

32. And so it would have been expected of the defendants in this instance in their resisting affidavit to concentrate on those grounds of challenge as were substantively raised in their plea, namely the existence of an implied or tacit term, it would appear, to the effect that if the first defendant's business was not viable, profitable or did not perform optimally it was excused from payment and whether the regulations under the Disaster Management Act following upon the Covid-19 pandemic constituted a *vis*

[8] *Belrex 95 CC v Barday* 2021 (3) SA 178 (WCC), para 30.

major or *casus fortuitous* excusing the defendants from performance under the banking facilities.

33. But what would feature predominantly in the resisting affidavit was something else, none of which was foreshadowed in the plea. Although there are averments in the resisting affidavit relating to the two substantive issues raised by the defendants in their plea, the defendants in arguing the summary judgment specifically recorded in the joint practice note that they did not pursue those defences but that instead four other grounds of opposition, not foreshadowed in the resisting affidavit, were to be advanced.

34. Having jettisoned the substantive issues raised by them in their plea, what the defendants were left with the bare denials pleaded in a blanket fashion in response to nearly all the averments in the plaintiff's particulars of claim.

35. Although the defendants recognised in their resisting affidavit that they may amend their plea at any stage of the proceedings before judgment,[9] they did not do so. The defendants argue that their entitlement to do so is sufficient to permit them to raise those unpleaded issues in the resisting affidavit for the first time. The defendants did not seek to amend their plea before the adjudication of these summary judgment proceedings, as required in *Vukile Property Fund*. The spectre looms large that these challenges raised as triable issues in the resisting affidavit may dissipate

[9] *Belrex* above para 30 at 186H.

should summary judgment be refused as they do not feature in the plea. And particularly problematically, the plaintiff has been impermissibly deprived of its right in rule 32(2)(b) to explain in its supporting affidavit, which precedes the resisting affidavit, why the defences that now feature do not raise any issue for trial.[10]

36. As stated by Moorcroft AJ, there must be an explanation by the defendant for the inconsistency between the plea and the resisting affidavit if the court is to find that the defendant is *bona fide* in defending the action.[11] The defendants in these proceedings do no more by way of explanation than stating that they will amend in due course because they had not been furnished by the plaintiff with legible copies of certain documents annexed to the particulars of claim and they had not had the funds to enable their legal representatives to do further work in the matter, including to raise further defences. But the plaintiff has since make available legible copies of the documents and the defendants' legal representatives have been placed in funds. The defendants should have by now amended their plea, as they were entitled to, [12] but they have not done so. The defendants

[10] *Belrex* above, at 188A/B.

[11] *Vukile Property Fund* above, para 10.

[12] *Belrex* above. In that matter, the defendant had delivered a notice of intention to amend, and the defences raised in his resisting affidavit were consistent with that intended amended pleading. The difficulty that presented itself in that matter was that the plaintiff has already delivered its application for summary judgment before the notice of intention to amend was delivered, and so the plaintiff had not had the opportunity in its supporting affidavit to explain why the defences as pleaded did not raise any issue for trial. The court's solution was that the amendment should first be considered, and if granted, then the plaintiff was granted leave to bring a fresh application for summary judgment on the amended plea. The present matter is distinguishable as the defendants have not filed any notice of intention to amend their plea.

also did not seek that the summary judgment proceedings be postponed to enable them to do so.

37. The defendants cannot now, impermissibly, advance defences in opposing summary judgment proceedings that were not raised in their plea. To permit them to do so, for the reasons describe above, would undermine the amended summary judgment procedure and prejudice the plaintiff who was entitled to deal with those defences in its supporting affidavit.

38. The first ground of opposition identified from the resisting affidavit is whether the maximum penalty interest rate charged by the plaintiff on the overdraft facility is a penalty for purposes of the Conventional Penalties Act, 1962,[13] and if so, whether the plaintiff's claim on overdraft for summary judgment is competent.

39. This defence is not raised at all in the plea. In the resisting affidavit, the defence is raised in a limited fashion, namely that the charging of penalty interest with default interest on the same indebtedness is a contravention of the Conventional Penalties Act. The defendants assert in their replying affidavit that the penalty interest is out of proportion to the prejudice

[13] [13] Section 1(1) of the Conventional Penalties Act provides that:

> "*A stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act be capable of being enforced in any competent court*."

suffered by the plaintiff, and is liable to be reduced in terms of the section 3 of the Act. This, the defendants assert, render the claim on overdraft not a claim "for a liquidated amount in money" and so beyond the scope of summary judgment in terms of Rule 32.

40. The law is settled that the debtor bears the onus of both alleging and proving that the penalty is out of proportion to the prejudice suffered by the creditor and that there is no need for the creditor to allege any prejudice in claiming the penalty, particularly in its particulars of claim.[14]

41. This defence cannot be permissibly squeezed into the ambit of the cryptic denials in the plea. As it is for the debtor to make and prove the averments relating to prejudice, the defendants' reliance on the alleged disproportionality of a penalty is a positive defence that needed to be pleaded by the defendants. As it has not been pleaded, it cannot be raised in the resisting affidavit.

42. In any event, the defendants have not adduced any evidence in their resisting affidavit that such penalty interest may be disproportionate to the prejudice suffered by the plaintiff. At most the defendants aver that it is the charging of penalty interest together with default interest on the same indebtedness that results in a disproportionate penalty. But as the defendants did not raise this in their plea, they have denied the plaintiff

[14] *Steinberg v Lazard* 2006 (5) SA 42 (SCA) at 45G.

the opportunity of explaining in their supporting affidavit why this may not be so.

43. Before the amendment of Rule 32, the authorities differed whether summary judgment in relation to a penalty was competent. Some authorities found that summary judgment proceedings were inappropriate for purposes of recovering a penalty.[15] In contrast, other decisions, particularly the more recent decisions of this division required that the defendant should quantify the actual reduction, or at least set out the facts from which it appears that the penalty is to be reduced.[16]

44. In light of the amendment of Rule 32 requiring that the resisting affidavit must now be delivered after the plea, it is not necessary for me to decide which of these line of cases to adopt. Unless a defendant at least pleads reliance upon the Conventional Penalties Act in the plea and then discloses fully the nature and grounds of that defence in his or her resisting affidavit as required in Rule 32(3)(b), particularly by raising facts that show that the penalty may be disproportionate to the prejudice suffered by the plaintiff, a court may find that a triable issue has not been raised. In my view, the defendants have done neither.

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[15] *Premier Finance Corporation (Pty) Limited v Steenkamp* 1974 (3) SA 141 (D) at 144B; *Peters v Janda NO* 1981 (2) SA 339 (Z) at 343F.

[16] *Premier Finance Corporation (Pty) Limited v Rotainers (Pty) Limited* 1975 (1) SA 79 (W) at 84A; *Citibank NA, South Africa Branch v Paul NO and Another* 2003 (4) SA 180 (D) at paras 21-24.

45. This is not to say that defendants were not entitled to challenge the penalty interest as a disproportionate penalty,[17] but rather that for them to have done so permissibly, they should have pleaded appropriately and set out sufficient facts in their resisting affidavit to demonstrate that the pleaded issue is triable.

46. The second issue that the parties have agreed arises for consideration is whether the plaintiff was entitled to cancel the Agreement and claim specific performance of the full outstanding balance owing under each of the overdraft facility and medium-term loan facility. The challenge, as I understand it, made by the defendants is that once the Agreement had been cancelled, the plaintiff was no longer entitled to specific performance in the form of claiming the full outstanding balance. The defendants' argument is that as a matter of law once an agreement is cancelled, there can no longer be a claim for specific performance, i.e. a claim for specific performance does not survive cancellation of the agreement, and as

[17] In *Slip Knot Investments 777 (Pty) Limited v Project Law Prop (Pty) Limited* 2011 JDR 0339 (GCJ), Willis J found that an increase in the rate of interest is not a penalty, particularly because, he reasoned, and taking cognisance that "*the commercial banks have, since time immemorial, charged a higher rate of interest once a debtor is in default. … Self-evidently, risk increases once a debtor is in default*". In *Structured Mezzanine Investments v Davids and others* 2010 (6) SA 622 (WCC) the court accepted that payment of default interest can constitute a penalty but found that a default rate of 1.5% per week was not disproportionate in that matter to the attendant risks involved in advancing or making available the capital required or the loss suffered as a result of non-payment (para 18). In *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C) the court found that default interest can constitute a penalty (para 25 to 30) and that it was in that matter disproportionate (para 31 and 32), and was to be reduced

claiming the full outstanding accelerated indebtedness is a species of specific performance, it cannot be claimed post-cancellation.

47. Allied to this, the defendants argue that what the plaintiff actually is claiming is a form of damages as it is post-cancellation, and so it cannot be claimed in summary judgment proceedings.

48. Again, this challenge is not foreshadowed in the plea.

49. The question arises whether it is open to the defendants to advance this challenge for the first time in their resisting affidavit. The defendants in their plea deny that the plaintiff terminated the medium-term loan agreement. It is inconsistent, and in fact in conflict, for the defendants to advance a defence in their resisting affidavit that is predicated on a cancellation which they have denied in their plea.

50. In any event, the argument lacks merit.

51. The argument, as posited by the defendants, is that there cannot simultaneously be a cancellation of an agreement and a claim for payment of the full outstanding balance because the claim for the full outstanding balance is a claim for specific performance. The defendants rely on *ABSA Bank Ltd v Mokebe* 2018 (6) SA 492 (GJ) where in paragraph 27 the full court said that a claim for the accelerated full outstanding balance is a claim seeking specific performance. Whatever the legal principle may be as to whether a claim for the full outstanding balance under a loan

agreement generally survives termination of the agreement, the parties are free to regulate what the position would be upon cancellation of the agreement. This is what the parties have done in the present instance. Clause 5.2 of the standard terms and conditions annexed to the Agreement expressly provides that in the event of default, which is not remedied within the period, if any, stipulated by the plaintiff, the plaintiff, without diminution of any rights that it may have, is entitled, at its sole discretion to *inter alia* "*cancel the Borrower's facilities and all existing agreements immediately*"[18] or "*claim immediate repayment of all amounts owing to Nedbank, all of which amounts will immediately become due and payable*"[19] or "*combine any of the above*".[20]

52. The plaintiff was therefore entitled to both cancel and claim immediate repayments of all amounts outstanding under the facilities as the Agreement expressly provides for that. The defendants argued that this contractual provision is impermissible in law. As was restated by Pretorius AJ in *Nogoduka-Ngumbela Consortium,*[21] "*[p]acta sunt servanda remains the basis of our contract law*[22] *and anything possible and honourable, provided it is not contrary to public policy, can be contractually agreed. Parties to a lease can therefore modify or even exclude common law, but*

[18] Clause 5.2.1.

[19] Clause 5.2.4.

[20] Clause 5.2.10.

[21] Above, para 50.

[22] Citing *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at 57, in turn cited with approval in *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* 2018 (1) SA 94 (C) at 44.

must do so expressly".[23] In the present instance the parties have expressly contractually provided for what rights the plaintiff may exercise in its discretion. The defendants have not advanced any basis, even belatedly in their resisting affidavit, why this contractual provision is against public policy or in any other respect unlawful or unenforceable.

53. The third challenge that the parties have agreed emerges from the resisting affidavit is whether the plaintiff was first required to notify the first defendant of its default and then, thereafter, exercise its contractual rights under the Agreement, and if so, whether this took place in the present instance. The precise contours of this argument remained somewhat elusive, the resisting affidavit and the defendants' counsel's heads of argument describing the challenge as that *inter alia* of a defective cause of action and as the plaintiff impermissibly "blowing hot and cold".

54. Again, this challenge features for the first time in the resisting affidavit and so suffers from the difficulties as already described.

55. As appears above, the plaintiff's pleaded case in respect of its claim on the overdraft facility is that consequent upon the first defendant breaching the Agreement by exceeding the limit of the overdraft facility, alternatively failing to meet its obligations in terms of the overdraft facility, the plaintiff made demand of the first defendant by warning the first defendant that if payment was not made of the excess within ten business days, the

[23] Citing *Nuclear Fuels Corporation of SA (Pty) Limited v Orda AG* 1996 (4) SA 1190 (A) at 1206B.

Agreement would be cancelled and the full amount would become immediately due and payable. The defendants in their resisting affidavit had not adduced any evidence that these averments are factually incorrect.

56. The plaintiff's claim on overdraft continues that despite the demand for payment, the first defendant did not make payment and therefore the full amount is due, owing and payable and is claimed in the summons.

57. The claim as pleaded does not rely upon cancellation to trigger the full indebtedness under the overdraft facility becoming due, owing and payable. No averment is made that the overdraft facility was cancelled. Cancellation does not form part of the plaintiff's pleaded cause of action on the overdraft facility.

58. The defendants do not contest in their resisting affidavit that an event of default occurred. Although the Agreement does not require that the plaintiff first give notice to remedy to the first defendant, the plaintiff nonetheless did so, and this notwithstanding payment was not made by the first defendant.

59. The Agreement expressly provides in clause 5.2.4 of the standard terms and conditions that in the event of default the plaintiff can claim immediate repayment of all amounts owing to it, all of which would have immediately become due and payable.

60. The plaintiff has pleaded a complete cause of action in relation to its claim on overdraft and it has satisfied whatever was required of it to recover the full outstanding amount on overdraft.

61. The defendants sought to make something of the notice to remedy attached to the summons specifically recording that should payment not be made, that the Agreement would be cancelled, and therefore, the defendants argue, the matter must be approached on the basis that the plaintiff had already committed to cancelling the Agreement and therefore it cannot now proceed on any other basis other than to cancel the Agreement. And, as appears from their earlier challenge, the defendants argue that upon cancellation only damages can be claimed.

62. I do not read the demand to have irrevocably committed the plaintiff to cancel the Agreement if payment was not made, but even so, the Agreement, as I have already found, expressly entitles the plaintiff to recover the full outstanding amount consequent upon cancellation.

63. In respect of its claim on the medium-term loan, the plaintiff expressly pleads that as a result of the first defendant's breach of the Agreement, it cancelled the medium term-loan agreement. The plaintiff pleaded cancellation of the term-loan agreement to enable it to recover all outstanding amounts consequent upon that termination. I have already found that it was unnecessary for the plaintiff to actually do so given the express term in the Agreement that it could upon default claim the full outstanding amount without cancelling the Agreement. Nonetheless,

proceeding on the basis that the plaintiff has pleaded cancellation of the term-loan agreement, and that this is to be of consequence in the formulation of its cause of action, I do not find that the plaintiff has failed to first take some necessary preparatory step before cancelling the Agreement. The defendants have not referred to any term in the Agreement that required the plaintiff to first furnish notice to remedy,[24] and insofar as the plaintiff has furnished notice of remedy, the first defendant did not remedy the breach within the 10-day period stipulated in the notice.

64. The plaintiff was entitled upon an event of default having occurred and not having been remedied in the period stipulated by the plaintiff in its notice, to cancel either or both the medium-term loan facility and/or the Agreement itself,[25] and claim the full balance outstanding.

65. In the circumstances, I find that this defence has no merit and does not raise a triable issue that precludes summary judgment from being granted.

66. The remaining ground raised by the defendants as crystallised in the joint practice note is whether issues of interpretation arise that cannot be determined at the summary judgment stage of proceedings. It is not clear

[24] Clause 5.2 of the standard terms and conditions does not oblige the plaintiff to give notice to remedy.

[25] Paragraph 24 of the particulars of claim refers to the plaintiff cancelling the term-loan agreement rather than the Agreement in its entirety, but in either event cancellation is expressly covered by clause 5.2.1 of the standard terms and conditions to the Agreement.

to me what issues of interpretation, presumably of the Agreement, arise which give rise to a triable issue that would preclude summary judgment being granted. To the extent that the clauses of the Agreement that require interpretation are those that have been referred to above, such as those providing for the plaintiff's rights consequent upon an event of default or those entitling the plaintiff to charge default interest as well as penalty interest, I have already dealt with these above, and why they do not raise a triable issue.

67. I have explained the defences advanced before me are not raised in the plea. Once those impermissibly raised defences are excluded, no triable issues are raised in the resisting affidavit and so summary judgment is to be granted against the defendants.

68. Nonetheless, recognising that the granting of summary judgment remains a discretionary remedy enabling the court to incline towards favouring a defendant,[26] I have in any event considered why the issues raised by the defendants do not raise triable issues.

69. To return to what was said by the full court in *Raumix Aggregates*, I do not find that the defendants have raised "*a genuine triable issue*" that is deserving of judicial resources at trial.[27] The defendants have failed to satisfy the court that they have a *bona fide* defence to the action (a legally

[26] *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA), para 10 and 11.

[27] Above, para 16.

cognisable defence on the face of it, that is genuine or *bona fide*)[28] and so summary judgment is to be granted.

70. The parties in their joint practice note expressly recorded that the defendants do not persist in their dispute relating to the amount of the indebtedness.

71. The defendants have not raised an issue in relation to the interest other than their failed reliance upon the Conventional Penalties Act, and so I will grant judgment for interest as prayed for in the application for summary judgment.

72. The plaintiff is naturally entitled to its costs on the attorney and client scale as expressly provided for in the Agreement.

73. Judgment is granted against the first, second, third and fourth defendants, jointly and severally, the one paying the other to be absolved for:

    73.1. R326 628.54.

    73.2. Interest thereon at the rate of 17% per annum from 20 January 2021 to date of final payment, both days included.

    73.3. R1 435 494.17.

[28] *Tumileng Trading CC v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC), para 13 at 632C/D.

73.4. Interest thereon at rate of 8.5% per annum from 20 January 2021 to date of final payment, both days included.

73.5. Costs on an attorney and client scale.

Gilbert AJ

Date of hearing:	19 July 2022
Date of judgment:	22 September 2022
Counsel for the Plaintiff:	L Acker
Instructed by:	Van Deventer Dlamini Inc
Counsel for the First to Fourth Defendants:	P Mbana
Instructed by:	Mdyesha Ndema Attorneys