

**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF**  
**APPEAL**

**From:** The Registrar, Supreme Court of Appeal

**Date:** 20 April 2023

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*Cohen N O & Others v D[...] (Case no 368/2022) [2023] ZASCA 56 (20 April 2023)*

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Today the Supreme Court of Appeal (SCA) handed down judgment upholding an appeal against the decision of the Western Cape Division of the High Court, Cape Town (the high court).

The issues before the SCA were whether summary judgment should have been granted in circumstances where the respondent had failed to comply with the peremptory requirements of rule 32(2)(b) by advancing a case which was not pleaded and was thus unverified; and whether summary judgment was granted on a case that materially differed from that which was pleaded in the respondent's particulars of claim and that which the respondent advanced in her affidavit in support of her application for summary judgment.

The appellants are trustees of a trading trust which has 23 beneficiaries made up of the trustees, their wives, their children and their various family trusts. The respondent is the ex-wife of one of the trustees and was a beneficiary by virtue of her marriage until its dissolution in February 2019. During the 2014 and 2015 tax years, the trustees resolved to apply the net income of certain capital gains to the 23 beneficiaries of the Trust, which resulted in allocations of monies being made to the beneficiaries. Two amounts totalling R6 329 939 were allocated to the respondent. The sum of R184 179 657 allocated to all the beneficiaries, including the allocation to the respondent, was reflected as a vested liability in the 2017 Annual Financial Statements of the Trust. Because she had not been paid the amount allocated to her, the appellant issued summons against the trust in July 2021 for payment of the amount of R6 329 939. The matter was defended on the basis that up until the vesting date, which had not yet occurred, the trust deed gave the trustees an unfettered discretion to as to when actual payment should be made.

After the trust filed its plea, the respondent applied for summary judgment. The respondent's plea was premised on an amended trust deed dated 11 May 2015. It only became apparent to both parties during the hearing of the summary judgment application that it was not the amended trust deed that was applicable, but rather the original trust deed dated 13 June 2006. The high court found this to be of 'no particular moment' and granted summary judgment in favour of the respondent for an alternative amount, which was later varied to reduce the amount claimed by the respondent by

deducting the tax already paid by the Trust on the respondent's behalf, in respect of her allocations. The high court granted leave to appeal to the SCA on the basis that an important issue was raised, ie whether 'a court seized with summary judgment may consider the common cause facts that are at variance with the pleadings.'

The SCA found that it was common cause that the incorrect trust deed was relied on in the particulars of claim. The respondent therefore verified a defective cause of action. Given the errors contained in the particulars of claim, the respondent was neither able to correctly verify the cause of action nor the facts upon which she relied. The SCA cautioned that the defect in the particulars of claim was not merely some technical defect. The reliance on the incorrect trust deed went to the heart of the respondent's claim.

The SCA found that whether under the old rule 32 or the amended rule 32, what has not changed is that a defendant, to successfully oppose a summary judgment application, has to disclose a *bona fide* defence. The SCA held that the high court failed to consider the test to be applied when deciding whether to grant summary judgment, which is whether the facts put up by the trustees raised a triable issue and a sustainable defence in the law, deserving of their day in court. The SCA further held that the trustees had met this threshold and summary judgment should have accordingly been refused.

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