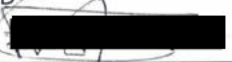




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: A2024-078436

(1)	REPORTABLE: <input checked="" type="checkbox"/>
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/>
(3)	REVISED <input type="checkbox"/>
15/09/2025	
DATE	SIGNATURE

In the matter between:

GARY SHAUN FINE

Appellant

And

NEDBANK LIMITED

Respondent

JUDGMENT

MOTHA J

- (1) Before us is an appeal against the summary judgment handed down on 18 April 2024 by the Magistrate's Court for the District of Johannesburg Central. The facts of this matter are uncomplicated. In brief, the respondent asserted that the

appellant applied for a credit card on 11 December 2020, which was approved, and an agreement was signed on 28 December 2020. The appellant retorted that he left South Africa for Israel in July 2019 and returned when his mother was admitted to a geriatric facility called Pioneer in August 2021. He, therefore, maintained that the signature on the documents was not his and that he did not receive or use the credit card linked to the account. He submitted that an unknown fraudster stole his personal documents and passed them off as his own.

The law

- (2) The law on summary judgment is trite. However, for the sake of completeness, reference to the *locus classicus* on this subject, *Maharaj v Barclays National Bank Ltd*,¹ is indispensable. The court held:

“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 that 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 inquires into is: (a) whether the defendant has ‘fully’ disclose 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.”²

¹ 1976 (1) SA 418 (A)

² *Supra* para 426A

- (3) Furthermore, it is worth reiterating the purpose of summary judgment as outlined in the case of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*³.

“The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. 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.”⁴

- (4) Finally, even where a party falls short of the requirement in terms of Rule 32(3), it bears to mention that in *Tesven CC and Another v South African Bank of Athens*⁵ the court held:

“That is not the end of the matter because, as was pointed out in Maharaj’s case at 425 H (see also *Arend and Another v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) at 304 F - 305 H), the court still has a discretion in such a case to refuse summary judgment. In Arend’s case and the cases quoted in it, it is stated that the discretion may be exercised in a defendant’s favour if there is doubt as to whether the plaintiff’s case is unanswerable and there is a reasonable possibility that the defendant’s defence is a good one.”⁶

- (5) With the law and the purpose of summary judgment elucidated, the next port of call is the role of a court of appeal, and this, too, is trite. The appeal court’s role is circumscribed. When discussing the topic of postponement, the court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home*

³ 2009(5)SA1(SCA)

⁴ Supra para 32.

⁵ 312/97, 523/97 [1999] ZASCA 75; [1999] 4 All SA 396 (A); 2000 (1) SA 268 (SCA) (28 September 1999).

⁶ Supra para 26.

*Affairs and Others*⁷ had an occasion to look at the role of a court of appeal and held:

"A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles"⁸

- (6) Faced with the application for summary judgment, the court *a quo* spelt out the guiding principles:

"...A defendant is not required to show that its defence is likely to prevail. If a defendant can show that it has a legally cognisable defence on the face of it, and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant."⁹

Misdirections

- (7) In arriving at its decision, the court *a quo* placed a premium on two issues, namely:

1. The contradictions spotted between the appellant's plea and the affidavit resisting the summary judgment
2. The huge repayments made to the bank.

⁷ (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999)

⁸ *Supra* para 11.

⁹ Paragraph 32 of the Judgment.

- (8) On both counts, the court *a quo* erred and misdirected itself. First, the court *a quo* held at paragraph 33:

“The respondent in his affidavit resisting summary judgment contradicts his plea as to the date upon which he left the country for Israel.”

- (9) Nothing could be further from the truth. In the plea, the defendant needs only to plead *facta probanda*, as delineated in the matter of *McKenzie v Farmers' Co-operative Meat Industries Ltd.*¹⁰ The role of *facta probanda* role is, however, different in applications, as the affidavits contain both the *facta probanda* and *facta probatia*. To this end, I refer to the matter of *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others*¹¹. Hence, there is no contradiction between the plea and the appellant's affidavit resisting summary judgment.

- (10) The fact that in the plea he stated that: “The Defendant avers that, in or about 2020, Defendant spent an extended period of time in the State of Israel,” is not in any way contradictory to what he said in the affidavit resisting summary judgment, where he stated: “In or about July 2019, I left South Africa to live in Israel.” Viewed in context, the two statements are complementary.

- (11) To me, the key timeframes are 11 December 2020, when the application was made and approved, and August 2021, when the Defendant returned to South Africa. By that time, the card had been delivered, and financial transactions totaling R164 489.46 had occurred.

- (12) Second, in his Judgment, the Learned Magistrate misdirected himself by incorrectly interpreting the bank statements from which he made his findings. Relying on Annexes “G1” to “G31” of the amended particulars of claim, the Learned Magistrate incorrectly saw “large payments having been made,” and,

¹⁰ 1922 AD 16 at 23

¹¹ (171/06) [2007] ZASCA 153; [2007] SCA 153 (RSA); 2008 (2) SA 184 (SCA) (28 November 2007)

consequently, placed stock in these non-existent payments. To prevent short-changing the court *a quo*, paragraph 34 requires full referencing:

“The amended particulars of claim have attachments Annexures G1-G312 which are statements of account from the applicant 30 that they averred was provided to the respondents, **From the statements of account, it is clear that payments were made towards the outstanding amount. This is rather odd in light of the fact that the respondent alleged that a fraudster stole his identity**, if one is to accept this version on the face of it, one has to accept that the alleged fraudster, also for most part kept the account up to date by making large payments on 10 November 2021 of R 169,311,87; 11 December 2021 of R71 834,45 and on 11 January 2022 of R174, 458,36 as well as other payments as the above statement of accounts. **The court finds this highly improbable.**” (My own emphasis)

(13) Suffice to say, the court *a quo* got it horribly wrong. All the large payments of R169 311,87, R71 834,45 and R174 458,36 were opening balances reflected on the statement. Upon a closer reading of the bank statements it is apparent that all attempts to debit an automatic payment against the nominated “transaction” account (“A P O payment”), were dishonoured, without exception.

<i>Minimum payment due</i>		<i>R174,458.36</i>
<i>Statement balance:</i>		<i>R174,458.36</i>
<i>Credit limit:</i>		<i>R0.00</i>
• <i>Summary of account</i>		
<i>Previous balance</i>		<i>R171,834.45</i>
<i>Account debits</i>		<i>R10,623.91</i>
<i>Account credits</i>		<i>R8,000.00 CR</i>
<i>Statement balance</i>		<i>R174,458.36</i>

• **Account transaction details**

Date	Reference number	Description	Debits	Credits
11/10/2021		A P O Payment - Thank You		R8,000.00
14/10/2021		Apo Reversal - Debit Account Frozen	R8,000.00	
05/10/2021		Legal Costs *	R39.42	
16/10/2021		Finance Charge	R2,400.45	
* Subject to VAT at 15%			Total	R10,439.87
				R8,000.00

• **Account transaction details**

Date	Reference number	Description	Debits	Credits
10/11/2021		A P O Payment - Thank You		R8,000.00
13/11/2021		Apo Reversal - Debit Account Frozen	R8,000.00	
09/11/2021		Legal Costs *	R6.05	
16/11/2021		Finance Charge	R2,516.53	
* Subject to VAT at 15%			Total	R10,522.58
				R8,000.00

10

Account transaction details

Date	Reference number	Description	Debits	Credits
11/12/2021		A P O Payment - Thank You		R8,000.00
15/12/2021		Apo Reversal - Debit Account Frozen	R8,000.00	
14/12/2021		Legal Costs *	R33.37	
17/12/2021		Finance Charge	R2,590.54	
* Subject to VAT at 15%			Total	R10,623.91
				R8,000.00

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(14) On the issue of probabilities and improbabilities, the court in *National Director of Public Prosecutions v Zuma*¹² held:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities.”¹³

¹² (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) ; 2009 (1) SACR 361 (SCA) ; 2009 (4) BCLR 393 (SCA) ; [2009] 2 All SA 243 (SCA) (12 January 2009)

¹³ Supra para 26.

(15) The caution sounded many moons ago in *Breiteinbach v Fiat S.A. (Edms.) Bpk*¹⁴ still rings true: "It is, however, even more important to guard against injustice to the defendant, who is called upon at short notice without the benefit of further particulars, discovery or cross examination, to satisfy the court in terms of sub-rule (3) (b)."¹⁵

(16) The appellant pertinently raised the issue of identity theft, which is a triable issue, in our view. He vehemently denied having applied for a credit card or signed the agreement. Indeed, all the transactions occurred when he was outside the country. Accordingly, a court must ensure that a defendant with triable issues is not shut out. We are persuaded that the appellant has a *bona fide* defence to the action.

Costs

(17) The award of costs is within the discretion of the court. With that background, this court is of the view that the appeal and summary judgment costs should be costs in the cause.

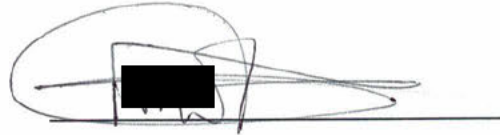
Order

1. The appeal is upheld, and the order of the court *a quo* is replaced with the following:

- (a) The application for summary judgment is refused, costs to be costs in the cause.
- (b) The defendant is granted leave to defend the action.
- (c) The costs of the appeal are to be costs in the cause.

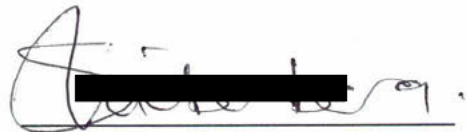
¹⁴ 1976(2)226[TPD]

¹⁵ *Supra* para 227D



MP MOTH A
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree



SARITA LIEBENBERG
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION JOHANNESBURG

APPEARANCES:

Date of Hearing: 04 September 2025

Date of Judgment: 15 September 2025

For Applicant: Adv D Goodenough
(Heads drawn by Adv SS Cohen)

Instructed by Charles Mendelow Attorneys

For Respondents: Adv Nxumalo
Instructed by: Smit Jones & Pratt Incorporated