IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024-004956

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

05/05/2025 [redacted]
DATE SIGNATURE

In the matter between

WESBANK a division of FIRSTRAND BANK LIMITED Applicant / Plaintiff

and

BLACKATUNITY PROPRIETARY LIMITED First Respondent / Defendant

RUDO MUDZINGWA Second Respondent / Defendant

JUDGMENT

PEARSE AJ:

AN OVERVIEW

1. This application for summary judgment has its roots in an action relating to the alleged conclusion and subsequent cancellation of an instalment sale agreement in respect of a vehicle. The applicant seeks rectification of the agreement and repossession of the vehicle with ancillary relief. Challenges to the validity of the agreement and a related deed of suretyship were raised but ultimately abandoned by the respondents, who persist with rectification and cancellation defences.

2. For reasons set out in this judgment, I do not find merit in either part of the rectification defence. Nor do I find it necessary to determine a first part of the cancellation defence, which concerns the provisions of the National Credit Act 34 of 2005 (**the NCA**). In my view, it suffices for purposes of refusing summary judgment that a second part of the cancellation defence, which asserts that the applicant was obliged but failed to give contractual notice of breach before any notice of cancellation, is not without substance and could find favour with a trial court. In the circumstances, I consider that the respondents should not be deprived of an opportunity to conduct that defence to the claim. The costs of this application should follow the outcome of the action.

THE AGREEMENT AND THE SURETYSHIP

3. On 17 June 2021 the applicant and the first respondent (represented by the second respondent) entered into an electronic instalment sale agreement (**the agreement**) in respect of a 2019 Iveco Trakker AT440T44TH SR HI LAND LR T/T C/C truck with engine number F38EE681EA111255909 and chassis number AANE2NSM00K001298 (**the vehicle**).[1] The agreement's "*cost of credit schedule instalment sale agreement outside the NCA*" (**the credit schedule**) reflects the total cash price of the vehicle as R1,061,484.50 plus interest charges aggregating R137,730.32. The agreement was to have a 49-month term commencing on 17 June 2021 and expiring on 16 July 2025. A "*payment schedule*" annexed to the agreement reflects that a monthly payment of R20,423.68 was to be made by the first respondent to the applicant on the first day of each month of the term.

4. On the same day (17 June 2021) the second respondent signed a suretyship in favour of the applicant (**the suretyship**) providing that:

> "*1.* *I/We will be bound by all admissions or acknowledgements made by the Debtor [the first respondent]. I/We, the undersigned, hereby declare that I/We bind myself/ourselves jointly and severally, as surety and as co-principal debtor for the punctual payment of all sums due or to become due to FirstRand Bank Limited (the Bank) by [the first*

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[1] The applicant seeks to rectify the agreement to reflect the vehicle's engine number as F3BEE681EA111255909, being the engine number recorded on its certificate of registration.

respondent] in terms of or arising out of or incidental to the Agreement stated above up to a value of the R1,001,484.50.

...

17. The surety/ies or co-principal debtor/s shall be liable for all legal costs, on an attorney own client scale."

5. It appears from a delivery receipt annexed to the particulars of claim referred to in paragraph 11 below that on 18 June 2021 the second respondent acknowledged delivery of the vehicle on behalf of the first respondent.

6. Annexed to the particulars of claim is a statement of the first respondent's account with the applicant (**the account statement**). It reflects that, throughout the period June 2021 to November 2023, instalments were paid by monthly debit orders, with the result that the account was restored to a nil balance in each month. It seems that an instalment of R27,524.76 went unpaid on 07 November 2023. Two further instalments fell due on 01 December 2023 and 01 January 2024 without further debit orders being effected, a state of affairs that is not explained on the papers. With interest and related charges, the statement reflects a balance due by the first respondent to the applicant of R83,811.58 on 01 January 2024. A payment of R40,000.00 on 05 January 2024 reduced that indebtedness to R43,811.58.

7. In the affidavit resisting summary judgment referred to in paragraph 17 below the respondents allege that, in terms of the agreement, "*the bank was required to debit our account for which we have consented and their payment would be debited as*

long as there is credit in the account" (para 23) and that a double instalment in a sum of R40,000.00 was debited from the first respondent's account on 05 January 2024 (para 9e). In their submission, that payment precluded the applicant from purporting to cancel the agreement in the same month.

8. It is not in dispute between the parties that the applicant did not notify the respondents of any breach of the agreement, whether as contemplated in sections 129 and 130 of the NCA or at all.

9. On 17 January 2024, however, the applicant's attorneys of record wrote to the first respondent by registered mail recording their instructions that "*you have caused the abovementioned account to fall substantially in arrears in the amount of R43,811.58 and that the outstanding balance amounts to R559,850.74*" and advising that "*our client hereby cancels the agreement with yourself with immediate effect.*"

10. On the same day a letter was sent to the second respondent by registered mail informing her of the applicant's cancellation of the agreement "*due to your liability towards our client*" under the suretyship and adding that "*[o]ur client will now exercise all and any of their rights in law.*"

THE LITIGATION

The Action

11. The applicant issued summons against the respondents on 22 January 2024, in which the particulars of claim:

11.1. pleads the agreement and the suretyship;

11.2. avers that the applicant handed copies of the agreement and a document titled "*pre-agreement statement for a instalment sale agreement outside the NCA: terms and conditions for this instalment sale agreement*" (**the term sheet**) to the first respondent on or about 17 June 2021;

11.3. avers that the vehicle was duly delivered to the first respondent;

11.4. alleges that the first respondent breached the agreement by failing to maintain the monthly repayments and was in arrears in the sum of R43,811.58 by 18 January 2024, as reflected in the account statement. The statement also reflects that, as at 05 January 2024, the first respondent owed the applicant a balance of R559,850.74;

11.5. contends that the provisions of the NCA are not applicable to the agreement in that the first respondent is a juristic person with an annual

turnover in excess of R1,000,000 as per section 7(1) read with section 4(1)(a)(i) of the NCA and the suretyship is a credit guarantee as envisaged in section 4(2)(c) read with section 8(5) of the NCA;

11.6. pleads that the applicant has cancelled the agreement;

11.7. contends for a rectification of the agreement to correct the vehicle's engine number; and

11.8. seeks an order against the respondents rectifying the agreement as aforesaid, directing the respondents to return the vehicle to the applicant, claiming damages equal to the difference between the value of the vehicle and the outstanding balance due by the respondents to the applicant and seeking payment of interest at an agreed rate and of costs of suit on the attorney and client scale.

12. Annexed to the particulars of claim is the term sheet said by the applicant to form part of and to set out the terms and conditions of the agreement. Clause 11.1 provides as follows:

> "*If you fail to comply with any of the terms and conditions of this Agreement (all of which you agree are material), or fail to pay any amounts due to the Seller, or commit an Insolvency Event or an Event of Default, or you have made misleading statements to the Seller at any time, or you allow any judgement, that has been taken against you to remain unpaid for more than seven days, or if you use the Goods in contravention of the law, or if you, being a juristic person undergo a*

restructure, then the Seller will have the right (without affecting any of its other rights) To:

11.1.1 Claim from you the amount which the Seller would have been paid had you fulfilled all your obligations under this Agreement. To this end, the Seller will be entitled to cancel the Agreement, to take the Goods back, sell the Goods, keep all instalments you have made and claim any balance (if any) from you as damages; or

11.1.2 Claim immediate payment of the full amount that the Seller could claim in terms of the Agreement, as if it was then due by you."

13. The summons was served on the second respondent on 02 February 2024 and on the first respondent on 22 February 2024.

14. The respondents gave notice of their intention to defend the action on 27 February 2024 and delivered their plea to the claim on 08 April 2024. As appears from the plea, which is not a model of consistency in its approach to the validity or otherwise of the agreement and the suretyship, the respondents:

14.1. admit the conclusion of the agreement, including that it was "*executed by means of an electronic signature as envisaged in section 13 read with section 1 of the Electronic Communications and Transactions Act 25 of 2002*" (**the ECTA**), but deny that the copy of the agreement annexed to the particulars of claim is a true copy of the agreement, for reasons including that it is not signed by the applicant or the first respondent and any purported "*electronic signature*" is not compliant with the ECTA;

14.2. note the pleaded terms and conditions of the agreement but deny that it required payment by the first respondent to the applicant of "*49 instalments of R20,423.68 on the same day of each successive month*";

14.3. deny that the suretyship was signed by the second respondent, inasmuch as his "*purported signature is [not] a valid and binding electronic signature as per the relevant Act*";

14.4. do not dispute receiving copies of the agreement and the term sheet, disputing only whether the latter "*has any legal value*";

14.5. note the delivery of the vehicle to the first respondent;

14.6. deny the first respondent's breach of the agreement on the basis that there exists no valid agreement between the parties;

14.7. deny the pleaded non-application of the NCA to the agreement and the suretyship and plead that, if a valid agreement is found to exist, the applicant's purported cancellation of the agreement "*was pre mature and unlawful in that it had failed to comply with the National Credit Act 34 of 2005, specifically section 129 and 130 of said Act*";

14.8. deny the applicant's cancellation of the agreement on the basis that there existed no valid agreement between the parties;

14.9. note the inaccurate recordal of the vehicle's engine number but dispute its rectification on the basis that "*the agreement contains a non-variation clause which ensures that the document cannot be varied until and unless it had been signed by both parties*"; and

14.10. pray that, "*should the court find that an agreement did exist, it should be void ab initio due to the various mistakes pleaded by the [applicant]*" and that the applicant's "*claim be dismissed with costs*".

This Application

15. On 29 April 2024 the applicant initiated this application for summary judgment against the respondents. The application was delivered within the 15-day period stipulated in rule 32(2)(a) of the Uniform Rules of Court.

16. An affidavit delivered in support of the application is deposed to by Sithabile Mpanza, who identifies herself as the applicant's Manager: Commercial Credit Recoveries. As appears therefrom, the applicant verifies its causes of action against the respondents by:

16.1. addressing the first respondent's electronic signature of the agreement by referencing the judgments in *Firstrand Bank Ltd t/a Wesbank v Molamuagae* [2018] ZAGPPHC 762 and *Toyota Financial Services (South Africa) Ltd v Waste Partners Investment (Pty) Ltd* 2022 JDR 2824 (GJ) and

explaining that its software system generates a "*high-water mark*" confirmation of signature once a borrower such as the first respondent accepts the terms and conditions of the applicant;

16.2. contending that the consensus that the first respondent would make payment to the applicant of 49 instalments of R20,423.68 is recorded in the payment schedule;

16.3. rejecting the denial that the suretyship was signed by the second respondent and pointing out that it bears his name, identity number and signature in manuscript;

16.4. averring that the term sheet forms part of the agreement concluded between the parties;

16.5. noting that it is not disputed that the vehicle was delivered pursuant to the agreement and that the respondents purported to perform in terms thereof and explaining why, in the applicant's submission, the respondents' plea discloses no valid and substantial defence to the applicant's claim;

16.6. summarising the facts and points of law of relevance to each cause of action. The deponent confirms that, as at 11 April 2024, the first respondent was in arrears with its monthly payments to the applicant in an

amount of R136,611.14, as reflected in a certificate of balance annexed to the affidavit;

16.7. submitting that the agreement constitutes "*a large agreement*" for purposes of the NCA, inasmuch as "*[t]he principal debt in terms of this Instalment Agreement is R1,061,484.50, which means this agreement constitutes a large agreement and in terms of section 4(1)(b) of the NCA, large agreements fall outside of the NCA which means that [sections 129 and 130 of] the NCA does not apply and therefore the Defendants' defence ought to fail*";

16.8. submitting that cancellation letters were validly sent by registered mail by the applicant to the chosen *domicilium* address of each of the respondents;

16.9. explaining that the applicant seeks not to vary the terms or conditions of the agreement but simply to rectify its memorial by correcting the description of the vehicle; and thus

16.10. submitting that the respondents' plea is otherwise no more than a bare denial of their liability as pleaded in the applicant's particulars of claim and praying for "*summary judgment, against the First and Second Defendants jointly and severally, the one paying for the other to be absolved, in terms of the application for summary judgment to which this affidavit is attached.*"

17. The respondents delivered an affidavit opposing this application on 11 June 2024. Its deponent is the second respondent, who describes herself as a member of the first respondent. Speaking for both respondents, Ms Mudzingwa:

17.1. avers that, of the 49 instalments contemplated in the agreement, 31 instalments were paid by the second respondent to the applicant. Although the first respondent's account was not debited by the applicant in December 2023, a double debit was effected in January 2024, meaning that, as at the date of the affidavit, a sum of R913,323.87 had been paid by the first respondent to the applicant;

17.2. disputes the applicant's contention that the NCA is inapplicable to the agreement on account of its being a large agreement as contemplated in the statute. In particular, the respondents submit that they should have been but were not notified in accordance with its provisions of the applicant's intention to cancel the agreement. Had it done so, Ms Mudzingwa avers, the respondents would have been able to explore "*the available options … within the prescribed timeframes in order to bring the account [up] to date and ensure the eventual satisfaction of its obligations under the credit facility*";

17.3. raises, as a "*preliminary point of law*", the submission that the applicant's non-compliance with sections 129 and 130 of the NCA invalidates its

purported cancellation of the agreement, which remains of force and effect and entitles the first respondent to continue to possess the vehicle;

17.4. contends that the second respondent, a natural person, is entitled to protection under the NCA in relation to the applicant's invocation of the suretyship;

17.5. submits that the issue of summons was premature and thus an invalid initiation of process (on the authority provided by *Nkata v Firstrand Bank Ltd* 2016 (4) SA 257 (CC) [62]-[65], [92]-[95]);

17.6. submits that, besides the pleaded allegation that the applicant cancelled the agreement, the summons contains no prayer for an order cancelling the agreement, with the result that the applicant is not entitled to repossess the vehicle;

17.7. contends, on the merits of this application, that the respondents raise a triable issue as to whether the applicant is entitled to repossess the vehicle in the circumstances of the case, including the injustice of seeking to do so when a sum of over R900,000.00 has already been paid by the first respondent to the applicant, which unilaterally elected no longer to debit monthly instalments from the first respondent's account; and

17.8. submits that the respondents would be deprived of the benefit of the *audi alteram partem* rule if summary judgment were to be granted and they were to be precluded from defending the claim at a trial in due course.

18. It may be observed that the defences outlined in paragraph 17 above are inconsistent with the respondents' (primary) version, as disclosed in their plea, that the agreement and the suretyship did not come into force or effect. In favour of the respondents, I read these defences as being in the alternative to their primary version. Humbulani Salani, who appeared for the applicant at the hearing, took no issue with that reading of the papers.

THE SUBMISSIONS

19. The applicant delivered written submissions on 09 July 2024. Understandably, the heads of argument devote attention to rebutting the respondents' challenges to the validity of the agreement and the suretyship. Ultimately, as noted in paragraphs 23 and 24 below, these defences were not persisted with on behalf of the respondents. What the heads of argument submit in respect of the rectification and cancellation defences is traversed in paragraphs 25 to 40 below. As I understand the argument, the cancellation defence has two component parts – that the applicant was obliged but failed to give contractual notice of breach before purporting to cancel the agreement and that the respondents should have been but were not notified under sections 129 and 130 of the NCA before any such

cancellation. For present purposes, it suffices to record the applicant's submissions that:

> "*3.5* *Whilst a defendant in summary judgment proceedings is not expected to set out his or her defence with the particularity required of a plea, however, the defendant must at least provide the court with facts which, if proved at trial would constitute a defence to the plaintiffs claim.*
>
> *3.6* *We submit that the defendant's affidavit opposing summary judgment application has not satisfied the requirements stated above and that this application for summary judgment ought to succeed with costs on attorney and client scale.*"

20. It appears that the respondents replaced their legal team shortly before the hearing of this application.

21. The respondents delivered written submissions on 28 April 2025, the day before the hearing of the application. The heads of argument reflect a significantly narrowed focus on grounds of opposition to the application, as may be gleaned from the following summary of the argument:

> "*2.13* *In the result therefore the Respondents persists that the Applicants:-*
>
> *(a)* *Are not entitled to impose a unilateral variation of the contract between them and the first respondent under the guise of a rectification which is opposed. This court cannot grant them that remedy under the provisions of Rue 32 (1).*

(b) *Are not entitled to re-take possession of the vehicle in question in circumstances where the contract has not been cancelled, alternatively, their purported unilateral cancellation is disputed and the cancellation is not confirmed by the court. The common law as set out above requires that cancellation or confirmation of cancellation must pre-cede an order for re-delivery.*

(c) *They are not entitled to proceed with this debt enforcement outside compliance with the provisions of Section 129 of the National Credit Act.*

...

25 *And for that reason [this application] is vexatious and deserves of punishment through a special order of punitive costs at the rate of attorney and own client."*

22. On the same day new counsel for the respondents, Isiah Mureriwa, uploaded on CaseLines a further practice note reformulating, in the following terms, the basis of opposition to this application:

"(1) *Applicant cannot, on the basis of a summary judgment, get an order for rectification amounting to amendment of the* ***merx****, obtain summary judgment. ...*

(2) *Applicant cannot be entitled to re-delivery of the* ***merx*** *in circumstances where the agreement on the basis of which the* ***merx*** *was delivered remained un-cancelled alternatively, where a unilateral cancellation is disputed and has not been confirmed by the court, further alternatively, where the 'cancelled' agreement is in respect of a* ***merx*** *which differs from the* ***merx*** *whose re-delivery is sought.*

(4) *Applicant was never entitled to cancellation of the agreement and or to commence debt enforcement absent compliance with the National Credit Act.*"

THE ISSUES IN DISPUTE

23. At the start of the hearing before this court Mr Salani advised that he did not intend to address challenges to the validity of the agreement and the suretyship and Mr Mureriwa confirmed that the respondents persist only with the rectification and cancellation defences.

24. In the light of this confirmation, I proceed on the assumption[2] that:

24.1. the agreement and the suretyship came into force and effect in accordance with their terms; and

24.2. the agreement comprises the credit schedule, the payment schedule and the term sheet.

The Rectification Defence

25. The first part of the rectification defence is that the proposed 'correction' of the vehicle's engine number would amount to a variation of the agreement that is

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2 I make no finding in this regard as the terms and conditions of the parties' contractual relationships may not be common cause at a trial in due course.

precluded by clause 14 of the term sheet, which provides that "*[t]his is the whole Agreement and no changes may be made to it unless these changes are in writing and signed by both you and the Seller or are voice logged by you and the seller.*"

26. However, a prayer for rectification seeks only to correct the written memorial of parties' consensus and does not vary the agreement itself.[3] So I do not consider this first part of the rectification defence to be a basis on which to refuse the application for summary judgment.

27. The rectification defence's second part is that rectification is incompetent in summary judgment proceedings as it is not (expressly) provided for in rule 32(1).

28. But a prayer for rectification is not an end in itself. It seeks to correct an erroneous recordal of consensus in a document relied on for a form of relief that is contemplated in rule 32(1).[4] Equally, therefore, I do not consider this second part of the rectification defence to be a basis on which to refuse the application for summary judgment.

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3 *PV v EV* (843/2018) ZASCA 76 (30 May 2019) [13]-[14]

4 *PCL Consulting (Pty) Ltd t/a Phillips Consulting SA v Tresso Trading 119 (Pty) Ltd* 2009 (4) SA 68 (SCA) [3]-[4]

The Cancellation Defence

Section 11.1 of Term Sheet

29. A first – and, in my view, sufficient – part of the cancellation defence concerns the proper interpretation of clause 11.1 of the term sheet. The clause begins by specifying the circumstances of breach by the first respondent that would entitle the applicant to exercise an election between two remedies. These circumstances include "*[i]f you [the first respondent] fail to comply with any of the terms and conditions of this Agreement (all of which you agree are material), or fail to pay any amounts due to the Seller [the applicant]*".

30. In such circumstances:

    30.1. The second remedy (under clause 11.1.2) is to "*[c]laim immediate payment of the full amount that the Seller could claim in terms of the Agreement, as if it was then due by you*". Mr Salani described this remedy as an acceleration of the total outstanding indebtedness under the agreement.

    30.2. The first remedy (under clause 11.1.1) is to "*[c]laim from you the amount which the Seller would have been paid had you fulfilled all your obligations under this agreement. To this end, the seller will be entitled to cancel the agreement, to take the Goods back, sell the Goods, keep all instalments*

you have made and claim any balance (if any) from you as damages". This remedy admits of competing interpretations.

31. Mr Salani interpreted the first remedy as a one-step right both to claim the arrears under the agreement and, without more, to cancel the agreement, repossess and dispose of the vehicle, retain all instalments already paid by the first respondent and claim any balance as damages.

32. An alternative interpretation, pressed by Mr Mureriwa, is that clause 11.1.1 confers a two-step right. In the first instance, the applicant may claim the arrears under the agreement and, if the demand is satisfied by the first respondent, the remedy would have served its purpose and no further consequence could follow. Absent settlement of the arrears, however, the applicant would then be entitled to cancel the agreement, repossess and dispose of the vehicle, retain all instalments already paid by the first respondent and claim any balance as damages. According to Mr Mureriwa, such an interpretation would require little if any departure from the common law and would inflict grave consequences on the debtor only in circumstances where it failed to comply with the creditor's demand for the remedying of any breach of the agreement.

33. As Mr Salani acknowledged, the one-step interpretation for which the applicant contends would entitle the creditor to cancel the agreement even in circumstances where there was immediate and complete compliance by the debtor with a demand to remedy a minor breach of the agreement.

34. It would not seem unreasonable of a court to expect that, if the creditor wished to contract for a right so exacting or unforgiving, its standard-form contractual documents should make the position plain. Yet clause 11.1 of the term sheet is open to a construction – the two-step interpretation for which the respondents contend – that would seem more fairly to safeguard the rights and interests of both parties to the agreement. Such a construction seems consistent with not only the purpose of an instalment sale agreement but also the contractual context in which the text of the breach clause falls to be considered.

35. The more stringent interpretation – one that would authorise cancellation, repossession and disposal by a creditor even for minor and immediately-remedied breach by a debtor that had otherwise made timeous payment of multiple instalments – would seem to be of dubious business sense.

36. I should make clear, however, that nothing in this judgment purports to reach any finding as to the proper interpretation of clause 11.1 of the term sheet or any other provision of the agreement. Those findings are better left to the determination of a trial court. But I am satisfied that the dispute between the parties as to the proper interpretation of clause 11.1 is a triable issue within the meaning of a *bona fide* defence as required by rule 32(3)(b), with the result that it would be undesirable for the litigation between the parties to end at this stage of summary judgment.

Sections 129 and 130 of NCA

37. A second part of the cancellation defence concerns the provisions of the NCA. In the submission of the respondents, they were entitled to but did not receive notification in terms of section 129 or 130 thereof and were thus not afforded their statutory rights to resolve the dispute or agree on a plan to address the arrears under the agreement, meaning that the action and the application are premature and invalid under law.

38. The response on behalf of the application is that the agreement constitutes a large agreement as contemplated in the NCA and did not require notification in terms of section 129 or 130 thereof.

39. There is a dispute on the papers whether the agreement meets applicable definitional criteria for purposes of the provisions of the NCA:

39.1. According to the applicant, the statute is not applicable to:

39.1.1. the agreement because it is:

39.1.1.1. a credit agreement in terms of which the first respondent is a juristic person whose asset value or annual turnover equals or exceeds a minister-determined threshold value of not more than

R1,000,000 (section 4(1)(a)(i) read with sections 4(2)(a) and 7(1)(a) of the NCA); and/or

39.1.1.2. a large agreement in terms of which the first respondent is a juristic person whose asset value or annual turnover is below a minister-determined threshold value of not more than R1,000,000 (section 4(1)(b) read with sections 4(2)(a) and 7(1)(a) of the NCA); or

39.1.2. the suretyship because the NCA applies to a credit guarantee only to the extent that it applies to a credit facility or transaction in respect of which the credit guarantee is granted (section 4(2)(c) read with section 8(5) of the NCA).

39.2. Both in their plea and in their affidavit resisting summary judgment the respondents deny the pleaded non-application of the NCA to the agreement and the suretyship, albeit without putting up facts in respect of the first respondent's asset value or annual turnover. This information lies squarely within the knowledge of the respondents and should, in my view, have been presented by them in an endeavour to demonstrate a *bona fide* defence as required by rule 32(3)(b). Were it necessary for me to make a finding in this regard, I would likely hold that the respondents' denials fall short of the obligation on a litigant seeking to resist summary judgment to

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

40. Be that as it may, in the light of the finding set out in paragraphs 29 to 36 above, it is unnecessary to reach any conclusion on whether this second part of the cancellation defence is a further basis on which to refuse the application for summary judgment.

THE ORDER

41. As regards costs, although Messrs Salani and Mureriwa both contended for an order on the contractual attorney-and-client scale in the event of success in the application, neither resisted my expressed inclination to permit the costs to be borne by the unsuccessful party in the action, when the allegations and submissions set out in the parties' pleadings and affidavits will be tested on trial.

42. In the circumstances, I grant an order in the following terms:

    42.1. This application for summary judgment is refused.

    42.2. The respondents are granted leave to defend the applicant's action.

    42.3. The costs of this application are to be costs in the action.

PEARSE AJ

This judgment is handed down by uploading it to CaseLines and emailing it to the parties or their legal representatives. The date of delivery of this judgment is 05 May 2025.

Counsel for Applicant:	Humbulani Salani
Instructed By:	Rossouws Lesie Inc
Counsel for First and Second Respondents:	Isiah Mureriwa
Instructed By:	Subrayan Naidoo Attorneys
Date of Hearing:	29 April 2025
Date of Judgment:	05 May 2025