



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 790/2024

In the matter between:

EBRAHIM PATEL

APPELLANT

and

SOUTH AFRICAN SECURITISATION

PROGRAMME (RF) LIMITED

FIRST RESPONDENT

SASFIN BANK LIMITED

SECOND RESPONDENT

SUNLYN (PTY) LIMITED

THIRD RESPONDENT

MARIA ELIZABETH KILFOIL

FOURTH RESPONDENT

RICHARD HENRY KILFOIL

FIFTH RESPONDENT

Neutral citation: *Patel v South African Securitisation Programme (RF) Limited and Others* (790/2024) [2025] ZASCA 186 (8 December 2025)

Coram: HUGHES, GOOSEN, and KGOELE JJA

Heard: 6 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 8 December 2025.

Summary: Claim against sureties – whether plaintiff bound by terms of pleaded case – principal debtor liquidated prior to alleged cancellation of agreement with principal debtor – cancellation not communicated to principal debtor or liquidators – whether plaintiff is entitled to rely upon deemed termination of the lease agreement in terms of s 37 of Insolvency Act 24 of 1936 – effect of statutory provision upon basis of claim not fully ventilated at trial – liability upon pleaded case not established – appeal upheld with costs.

ORDER

On appeal from: Mpumalanga Division of the High Court, Middelburg (Phahlamohlaka AJ, sitting as court of first instance):

- 1 The appeal is upheld with costs.
- 2 The high court's order in relation to Mr Ebrahim Patel, the second defendant, is set aside and is replaced with the following:

‘The plaintiff's action against the second defendant is dismissed with costs.’

JUDGMENT

Goosen JA (Hughes and Kgoele JJA concurring)

[1] A central issue in this appeal is whether a claim against the guarantors of a principal debtor's payment obligations which was not pleaded, should be countenanced on appeal. The appeal lies against an order of the Mpumalanga Division of the High Court, Middelburg (the high court), which found for the plaintiffs (the first to third respondents) upon their pleaded case. The high court granted an order confirming the cancellation of an agreement between the first to third respondents and the principal debtor, Ezindaleni Power Solutions CC (Ezindaleni), which was not a party to the action. It ordered Mr Ebrahim Patel, the appellant (Mr Patel), and Mr Richard Henry Kilfoil and Mrs Maria Elizabeth Kilfoil (the fourth and fifth respondents / Mr and Mrs Kilfoil) to pay an amount of R448

615 plus interest pursuant to guarantee agreements they entered in favour of the plaintiffs. The appeal is with the leave of the high court.

[2] On 9 May 2019, Ezindaleni entered into a Master Rental Agreement (the rental agreement) with Centrafin (Pty) Ltd (Centrafin). In terms of the rental agreement, Ezindaleni leased certain office equipment, including telephone systems, from Centrafin. Ezindaleni was required to pay a monthly rental fee to Centrafin. At all relevant times, Mr Patel and the fourth and fifth respondents were members of Ezindaleni. When the rental agreement was concluded, the three members of the close corporation entered into a guarantee-agreement (the guarantee-agreement) which was incorporated in the rental agreement. In terms of the guarantee-agreement, they guaranteed due compliance by Ezindaleni of its obligations in terms of the rental agreement. They also undertook to be liable as co-principal debtors in favour of Centrafin of Ezindaleni's payment obligations.

[3] Before turning to the relevant facts, it is necessary to briefly explain who the parties are to the case before us. The particulars of claim set out a series of cession agreements that preceded, and followed, the conclusion of the rental agreement. None of these agreements, and the consequential standing of the plaintiff or plaintiffs (more about this in a moment), were disputed. It is therefore unnecessary to set these out, other than in summary format.

[4] Centrafin is in the business of acquiring office equipment from suppliers that it in turn leases to users, such as Ezindaleni. Centrafin had concluded a 'main cession agreement' with an entity named Sunlyn Investments (Pty) Ltd (Sunlyn Investments) which allowed it to offer to it such rental agreements for purchase. Sunlyn Investments underwent two name changes over time and in its present identity is

Sunlyn (Pty) Ltd (Sunlyn), the third respondent. Sunlyn acquired Centrafin's rights and obligations arising from the rental agreement concluded with Ezindaleni. In due course these were ceded to Sasfin Bank Limited (Sasfin) as part of a financing arrangement. Still later, Sasfin (the second respondent) ceded all its rights, title, and interest in the rental agreement to South African Securitisation Programme (RF) Pty Ltd (SA Securitisation), the first respondent.

[5] In due course, and upon an alleged default by Ezindaleni of its obligations to pay monthly rental fees, SA Securitisation, Sasfin and Sunlyn instituted action against the appellant and the fourth and fifth respondents as guarantors. It is not apparent from the papers, nor indeed from the evidence led at trial, why it was thought necessary for each of these entities to sue the guarantors. The relief sought was framed in favour of these parties in the alternative. Whatever the reason might have been for proceeding in this fashion, there was always only one plaintiff entitled to pursue a cause of action based upon the rental agreement and the guarantee-agreement which had been concluded with the guarantors, namely SA Securitisation. I shall deal with the matter on that basis.

[6] Mr Patel, as indicated, was a member of Ezindaleni and one of three guarantors. He was cited as the second defendant in the high court. Mr and Mrs Kilfoil, who were also members of Ezindaleni, were cited as first and third defendants, respectively. I shall refer to the three guarantors as the defendants when dealing with the proceedings in the high court. The order of the high court lies against the defendants jointly and severally. However, only Mr Patel applied for and obtained leave to appeal against the order. Mr and Mrs Kilfoil were, however, cited as fourth and fifth respondents in the appeal, based on an interest that they may have in the outcome of the appeal.

The pleaded claim

[7] On 5 February 2021, SA Securitisation issued summons against the defendants out of the high court. After setting out the details of the successive cessions, it pleaded as follows:

‘15. In material breach of its obligations in terms of the [rental agreement], [Ezindaleni] has failed to effect payment of monthly instalments and is currently in arrears in an amount of R94 990.00 as at 10 December 2020. A copy of the Accelerated Claim Statement reflecting the future rentals is annexed hereto marked annexure ‘C’.

16. The parties agreed that [if Ezindaleni] defaults in punctual payment of any monies as they fall due in terms of the agreement, [SA Securitisation] ... is entitled to immediately terminate the agreement, take possession of the goods, retain all amounts already paid by [Ezindaleni] and claim all outstanding rentals and as agreed pre-estimated liquidated damages, the aggregate of the rentals which would have been payable had the agreement continued until expiry by the effluxion of time.

17. Pursuant to the provisions of the agreement, [SA Securitisation] ... cancelled the agreement, alternatively hereby cancels same.’

[8] SA Securitisation attached a certificate of balance, which incorporated the outstanding rentals and the value of the accelerated claim in substantiation of the quantum of its claim. It alleged demand and a failure to pay and proceeded to frame its claim against the defendants as follows:

‘23. On or about 9 May 2019, the first, second and third defendants bound themselves in writing, jointly and severally as guarantors and co-principal debtors with [Ezindaleni] for the due fulfilment by [Ezindaleni] of [its] obligations. A written copy of the Guarantee ... is contained within [the rental agreement]. [SA Securitisation] pray[s] that the terms thereof be incorporated herein by reference.

...

27. Accordingly, by virtue of the Guarantee the [defendants] are also liable to [SA Securitisation] ... in the amount for which [Ezindaleni] is liable, which amount is at present due, owing, and payable to [SA Securitisation]...’

[9] The defendants filed a single plea. In it they raised several issues. These included an objection that the contract documents were copies rather than originals and they disputed the capacity of the person who furnished the certificate of balance. The principal defence, however, concerned the alleged cancellation of the rental agreement. They pleaded that cancellation had not occurred and that the act of cancellation was, in terms of the rental agreement, a prerequisite for a claim for accelerated payments and pre-estimated liquidated damages. In the alternative, and in the event that it was found that cancellation had occurred, it was alleged that the accelerated payments constituted a penalty within the meaning of the Conventional Penalties Act 15 of 1962 (Conventional Penalties Act); that it is disproportionate to the prejudice suffered by SA Securitisation and that it ought to be reduced to the extent the court considers equitable.

Proceedings before the high court

[10] The matter proceeded to trial upon these issues. It appears from the record that the only substantive question before the high court concerned the principal defence, namely whether the agreement had been cancelled and the alternative challenge based upon the Conventional Penalties Act. SA Securitisation called one witness, Ms Rorisang Moloji (Ms Moloji), a legal coordinator employed by Sasfin. She explained that Sasfin undertakes the administration of contracts for SA Securitisation and facilitates the collection of monies due in terms of such contracts.

[11] Ms Moloji's evidence in chief served to narrow the cancellation question still further. She accepted that the claim for payment of what was due was based upon clause 8.3 of the rental agreement. She also accepted that SA Securitisation was only entitled to claim payment of the accelerated rental payments in terms of the clause if it cancelled the agreement. She stated that SA Securitisation had elected to cancel

the agreement but had not given notice of the cancellation other than by service of the summons upon the defendants. The crystallised issue, therefore, was whether service of the summons commencing action against the defendants constituted service upon Ezindaleni and thus effected cancellation of the rental agreement.

[12] During cross-examination in relation to service of the summons, Ms Moloi conceded, unsurprisingly, that Ezindaleni was not a party to the proceedings. She accepted that the service of the summons upon each of the defendants had not occurred at the *domicilium* address which Ezindaleni had selected in the rental agreement for service of all notices and any legal process. In attempting to overcome this difficulty, Ms Moloi contended that each of the defendants was a member of Ezindaleni and, therefore, proper service on Ezindaleni had in fact occurred.

[13] It is in this context that the unpleaded basis of the claim had its genesis. Ms Moloi was asked whether she was aware that Ezindaleni was in liquidation and that liquidators had been appointed to take charge of its affairs. The purpose of the question was to highlight the fact that the members could no longer act on behalf of the corporation or represent it. Ms Moloi readily acknowledged that she was aware that Ezindaleni was in liquidation. Indeed, she explained, it was liquidated in the middle of 2020. When this occurred, a letter had been addressed to the liquidators enquiring whether they would elect, in terms of s 37 of the Insolvency Act 24 of 1936 (Insolvency Act), to continue with the rental agreement. She stated that no reply had been received and despite the passage of months, the liquidators made no such choice.

[14] The high court found that service of the summons upon the defendants constituted cancellation of the agreement, in line with SA Securitisation's election

to cancel the agreement. It reached this conclusion despite finding that the rental agreement stipulated that service of notices was to take place at the nominated *domicilium* address of Ezindaleni. The high court reasoned that since the liquidation did not terminate the membership of the members, service on them was sufficient and, therefore, that cancellation was effective.

[15] Regarding the operation of s 37 of the Insolvency Act, the high court accepted that the evidence established that the liquidators had not elected to continue with the agreement and that it was therefore deemed to have been terminated. This, the high court considered, was an additional basis to conclude that the defendants, as guarantors, were liable to SA Securitisation.

The issue before this Court

[16] Mr Patel persisted with the principal challenge against the finding that the rental agreement had been cancelled in terms of the agreement, contending on this basis that the claim for payment of accelerated future rentals was not available to SA Securitisation. Mr Patel did not pursue the alternative challenge based upon the Conventional Penalties Act.

[17] SA Securitisation, however, altered its position on appeal. It abandoned any reliance upon an alleged cancellation of the rental agreement by SA Securitisation, thus eschewing reliance upon the findings and reasoning of the high court. Instead, it pinned its colours to the mast provided by the operation of s 37 of the Insolvency Act. It contended that since the operation of the section was introduced by the defendants during cross-examination, the uncontroverted evidence of Ms Moloï established that the liquidators had not elected to continue with the rental agreement. The agreement was therefore deemed to have been terminated. Considering this

termination, so it was contended, SA Securitisation was entitled to payment of that which would have been due by Ezindaleni. Accordingly, the order awarding payment of the amount claimed to be due by Ezindaleni is correct and ought not to be set aside, notwithstanding the incorrect basis found by the high court.

[18] SA Securitisation added an alternative argument. It submitted that if it was found that the agreement was not cancelled, and the evidence regarding the liquidator's election was not accepted, then the consequence would be that the rental agreement was still extant, and SA Securitisation would be entitled to base its claim upon clause 8.2 of the rental agreement. In that clause, SA Securitisation could elect to keep the agreement in operation despite Ezindaleni's default and claim an amount which would be equivalent to that which it did claim.

[19] Mr Patel objected to both approaches set out above. In relation to s 37, it was argued that the section provides for statutory termination in the event of the principal debtor becoming insolvent. If SA Securitisation wished to rely upon that section for its cause of action, it was required to plead it so that Mr Patel could meet the case on that basis. Regarding reliance upon clause 8.2 of the rental agreement, a similar stance was adopted. This, it was said, amounted to reliance upon different facts and upon a different calculation of the alleged indebtedness, none of which was fully or properly ventilated before the trial court.

Evaluation

[20] SA Securitisation's abandonment of support for the reasoning and findings of the high court was wise. Not only is the reasoning internally contradictory, but it is also unsustainable both on the facts and the law. The act of cancellation of the rental agreement was never communicated to the controlling mind of the corporation,

namely the liquidator.¹ It was SA Securitisation's case that proper and effective cancellation of the agreement was a prerequisite for a claim for payment of pre-estimated liquidated damages as provided by clause 8.3 of the rental agreement. Its claim against the defendants was premised upon such pre-estimated liquidated damages being due and payable and, accordingly, that they were liable for that amount.

[21] The circumstances in which a court will permit a party to rely upon a cause or issue which has not been pleaded are well established. It is a matter that falls within the court's discretion. That discretion will be exercised in favour of allowing such reliance if the court is satisfied that the issue has been fully and properly canvassed so that the party against whom it would apply would suffer no prejudice.² A party is otherwise bound by its pleaded case.³

[22] Counsel focused their submissions on the question whether the evidence established that, by reason of s 37(3), the rental agreement was deemed to be terminated. The focus was misdirected. Ms Moloji's evidence, supported by that of Mrs Kilfoil, was that Ezindaleni had been liquidated in or about June or July 2020. Liquidators were appointed shortly thereafter and there had been correspondence addressed to the liquidators enquiring about their intention with reference to s 37. Ms Moloji's evidence was that no reply was received and that the liquidators had not elected to continue with the rental agreement. Although there was some controversy at the trial about the failure to discover this correspondence, it is difficult to understand what might have been relevant in that regard. Far from being against the

¹ *Miller and Miller v Dickinson* 1971 (3) SA 581 (A) at 587H-588A; *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294F-I.

² *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA); 2009 JDR 1218 (SCA) para 11 – 12.

³ *Molusi and Others v Voges NO and Others* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) para 28.

defendants' case, the evidence given by Ms Moloi was destructive of SA Securitisation's case as pleaded.

[23] If we accept, as we must, that the liquidators did not elect to continue with the rental agreement, then SA Securitisation could not, many months after the lapse of the three-month period provided by s 37(2) of the Insolvency Act, purport to cancel the agreement. It had already been terminated by law. Ms Moloi, on her own evidence, was aware of this fact. The high court failed to appreciate the consequence of its finding that the agreement was deemed to have been terminated in terms of s 37(2), when it confirmed the cancellation of the agreement by SA Securitisation. It strikes me as bizarre that SA Securitisation's claim was not premised on the fact that Ezindaleni had been liquidated, as specifically provided by clause 8 of the rental agreement. Instead, it was formulated without reference to the liquidation of Ezindaleni.

[24] The central issue, before this Court, is not whether the fact of Ezindaleni's liquidation and the consequential deemed termination of the agreement was properly ventilated at the trial. It is whether it can be said that the claim advanced by SA Securitisation could, on the evidence, be sustained based on the deemed termination of the rental agreement. As an aside, there was some argument that s 37 might not apply because of the language in s 339 of the Companies Act 61 of 1973. For reasons that will become apparent it is not a question upon which a definitive answer is required.

[25] Section 37 of the Insolvency Act reads as follows:

'(1) A lease entered into by any person as lessee shall not be determined by the sequestration of his estate, but the trustee of his insolvent estate may determine the lease by notice in writing to the

lessor: Provided that the lessor may claim from the estate, compensation for any loss he may have sustained by reason of the non-performance of the terms of such lease.

(2) If the trustee does not, within three months of his appointment notify the lessor that he desires to continue the lease on behalf of the estate, he shall be deemed to have determined the lease at the end of such three months.

(3) The rent due under any such lease, from the date of the sequestration of the estate of the lessee to the determination or the cession thereof by the trustee, shall be included in the costs of sequestration.’

[26] In *Ellerine Brothers (Pty) Ltd v McCarthy Ltd*⁴ this Court said the following with regard the operation and effect of the section.

‘...The provisions of s 37(1) to (3) are substantially no different from the common-law position sketched earlier, and do not otherwise confer any rights and obligations on the lessor or the liquidator which are inconsistent with the position under common law. The insolvency of the lessee therefore does not terminate the lease. The liquidator may, however, elect not to continue the lease in which event s 37(1) authorises him to determine it. Should he decide to do so, s 37(1) requires the liquidator to notify the lessor of his decision in writing. At common law, the liquidator has to give reasonable notice of his intention to continue the contract, otherwise the other party may treat the contract as at an end. Section 37(2), however, requires the liquidator to notify the lessor of his desire to continue the lease within three months, failing which he shall be deemed to have determined the lease. Although the liquidator’s authority to determine the lease is derived from s 37(1), it is consistent with the election of the liquidator at common law not to perform uncompleted contracts where it may not be to the benefit of the concursus. The proviso to that subsection in turn preserves the lessor’s right to claim compensation flowing from the liquidator’s decision to prematurely terminate the lease.’ (Footnotes omitted.)

[27] Section 37(2) plainly entitles a lessor to claim compensation for any loss that may have been suffered by reason of early termination of the lease agreement *by the liquidator*. That claim lies against the estate of the liquidated entity. It was suggested,

⁴ *Ellerine Brothers (Pty) Ltd v McCarthy Limited* [2014] ZASCA 46; 2014 (4) SA 22 (SCA) para 14.

in argument, that the proviso permits a claim that is no different to that permitted by clause 8.3 of the rental agreement. However, we are concerned here with the accessory liability of the guarantors. Only that which is due and payable by the principal debtor can be claimed from the guarantors. The act of cancellation by SA Securitisation, in terms of clause 8 (and specifically 8.3), determines what is then due and payable by Ezindaleni, which might then be claimed from the guarantors.

[28] Here there was no such cancellation event. There was rather a deemed termination of the agreement by the liquidator. If, as SA Securitisation accepted, cancellation of the agreement by it was a pre-requisite for the claim of agreed pre-estimated damages, then such a claim cannot be sustained upon a termination other than by SA Securitisation. The claim would not be premised upon clause 8.3 (nor upon 8.2 which involves an election not to cancel and to enforce the agreement, an option not available in the context of liquidation). Even if it is accepted that the effect of a termination of the rental agreement by the liquidator, whether by notice or by operation of the deeming provision, constitutes a repudiation of the agreement entitling the lessor to cancel and claim its contractual damages such a case would need to be pleaded and the facts established in evidence, to sustain its accessory claim against a surety or guarantor. There is no evidence to sustain such case. Furthermore, the quantification of the amount the lessor would be entitled to claim from the guarantors would have to occur with reference to termination of the rental agreement by the liquidators. There is no basis upon which that exercise can now be undertaken.

[29] It is accordingly not, as SA Securitisation would have it, that we are here faced with the liquidation of Ezindaleni which has resulted in the early termination of the lease agreement, and for that reason SA Securitisation is entitled to claim from the

guarantors what it would have been able to claim had it cancelled the agreement. The purpose of requiring the parties to set out their case in the pleadings is to allow the other party to know what case it must meet and to answer that case appropriately. In this instance, the operation of s 37 raises issues which have not been addressed at all on the record before us. This is therefore not the sort of case where we can accept that those issues are fully ventilated and that no prejudice would flow from adjudicating the matter upon the newly advanced basis. It follows that the appeal must succeed.

[30] I return to the point that the appeal is only prosecuted by Mr Patel. The order of the high court was made against all three of the defendants. Since the order operates separately against each of the defendants we cannot interfere with those orders. Only the order of the high court against Mr Patel, as second defendant, can be set aside.

[31] In the result, the following order is made:

- 1 The appeal is upheld with costs.
- 2 The high court's order in relation to Mr Ebrahim Patel, the second defendant, is set aside and is replaced with the following:

'The plaintiff's action against the second defendant is dismissed with costs.'

G GOOSEN
JUDGE OF APPEAL

Appearances

For the appellant: R De Leeuw

Instructed by: Schabort Potgieter Attorneys Inc, Middelburg
Symington De Kok Attorneys, Bloemfontein

For the first to third

Respondents: E Fasser

Instructed by: Wright, Rose-Innes Incorporated, Middelburg
Phatshoane Henney Attorneys, Bloemfontein.