IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED: ~~YES~~/NO

CASE NO: 2020/19360

In the matter between:-

TRANSACTIONAL CAPITAL BUSINESS SOLUTIONS (PTY) LTD	**APPLICANT**
and	
MT NKABZ HOLDINGS AND INVESTMENT (PTY) LTD	**FIRST RESPONDENT**
MALEBOGO ONALENNA SEDIKO NKABITI	**SECOND RESPONDENT**
TLADI ZACHARIA NKABITI	**THIRD RESPONDENT**

JUDGMENT

MAZIBUKO AJ

Introduction

1. The applicant seeks monetary judgment for R 1 349 906.90 and interest on the amount against the respondents jointly and severally. Further, the immovable property owned by the second and third respondents be declared specially executable, and the reserve price be set at R900 000.00. If the reserve price is not attained, the applicant will approach the court to reconsider the reserve price.

2. In November 2019, the applicant made the loan amount of R1 3350 000.00 available to the first respondent. A written term loan agreement (hereinafter "the agreement") was concluded between the parties.

3. In terms of the agreement, the first respondent would make monthly repayments of approximately R34 000. In the event of default by the first respondent, it would be obliged to repay the total outstanding amount, accrued interest thereon, and other costs to the applicant, whether or not the amount was then due for payment.

4. The first respondent is in the transportation of goods business. It obtained a loan from the applicant to purchase a truck to expand its business.

5. The second and third respondents bound themselves in writing as guarantors in favour of the applicant in terms of the agreement concluded between the applicant and the first respondent.

Background facts

6. On 24 April 2020, the second respondent dispatched an email to the applicant requesting payment relief for May and June 2020. After that, for July to October 2020, they would pay an increased amount of R50 495.55, causing the first respondent to catch up with the arrears. Such a request was not granted.

7. The first respondent did not pay the instalments in May 2020, June 2020, August 2020, January 2021 and April 2021, when they became due and payable.

8. On 3 July 2020, the applicant's attorneys sent a letter of demand to the first respondent demanding the total loan amount, the accrued interest thereon, and outstanding fees amounting to R1 349 906.90, and that same was immediately due and payable.

9. The applicant stated, in its affidavit, that the first respondent did not have the necessary funds to make payment of the arrear monthly instalments or the total outstanding loan amount.

10. The respondents resist the application and, in relation to part A, the monetary judgment, aver that:

10.1. The certificate of balance is outdated as it is dated 30 June 2020 and reflects an outstanding amount of R1 349 906.90. After 30 June 2020, payments were made which do not reflect on the certificate submitted by the applicant.

10.2. The first respondent relies on supervening impossibility due to the Covid-19 pandemic. They stated that they could not perform in terms of the agreement due to decreased income caused by the National Lockdown due to the Covid-19 pandemic and that it was temporarily excused from their obligations in terms of the agreement.

11. In relation to Part B, declaring the property of the second and third respondents specially executable. In their defence, the second and third respondents stated that:

11.1. The property is their primary home, where they live with their minor children. There would be an infringement of their rights to access adequate housing if an order declaring their property specially executable is granted.

11.2. The first respondent is continuing to satisfy the debt and has made substantial payments to satisfy the debt.

11.3. The property valuations report relied on by the applicant date back to 2019 and is in contrast to the one of the municipality, which is R1 130 000.

Common cause

12. The first respondent was in arrears for five months; May, June and August 2020, as well as January and April 2021. They have been making substantial payments to cover the arrears.

13. The first respondent requested by email that it be granted a two-month payment holiday. The applicant refused to grant same.

14. The applicant made no attempts to assist the first respondent in regularising the loan repayments.

Issue

15. Whether the first respondent made out a case in its defence of the impossibility of complying with the agreement? Whether there are grounds to declare the primary residence of the respondents, especially executable.

Law and Discussion

16. Rule 32(2)(b)[1] prescribes:

"(b) The plaintiff shall, in the affidavit referred to in subrule (2)(a) verify the cause of action and the amount, if any, claimed, and identify any point of law relied upon and the facts upon which the plaintiff's claim is based, and explain briefly why the defence as pleaded does not raise any issue for trial."

Rule 32(3)(b)[2] provides: *"The defendant resisting Summary Judgment application may: satisfy the court by affidavit (which shall be delivered five days before the day on which the application is to be heard) or with the leave of the*

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[1] *Uniform Rules of Court, Act 59 of 1959*

[2] Uniform Rules no 1 supra

court by oral evidence of such defendant or any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

17. In **Jili v Firstrand Bank Ltd**,[3] Willis JA held*:*

"It is indeed trite that a court has a discretion as to whether to grant or refuse an application for summary judgment. …… It is a different matter where the liability of the defendant is undisputed: the discretion should not be exercised against a plaintiff so as to deprive it of the relief to which it is entitled Where it is clear from the defendant's affidavit resisting summary judgment that the defence which has been advanced carries no reasonable possibility of succeeding in the trial action, a discretion should not be exercised against granting summary judgment. The discretion should also not be exercised against a Plaintiff on the basis of mere conjecture or speculation."

The monetary judgment

18. The respondent contended that the certificate of balance does not reflect the correct amount of its indebtedness as it is dated 30 June 2020, when the account was in arrears. The applicant did not dispute that the respondent made substantial payments after their letter of demand in July 2020.

19. Though, in its affidavit, the applicant averred that the respondent had no necessary funds to make payment of the arrear monthly instalments or the full outstanding loan amount. It could not dispute that the first respondent has been making payments, even substantial amounts, towards the loan agreement. There is no reason for this court not to accept that payments to the applicant in relation to the loan agreement have been made, and the first respondent continues to make same.

20. In its affidavit responding to the respondent's further affidavit (filed on 24 October 2022), a day before the hearing of this application, the applicant contended that these payments referred to by the first respondent were made after it had cancelled the agreement. It averred that it cancelled the agreement when it invoked the acceleration clause by demanding the full loan amount from the first respondent after the breach.

21. The applicant is entitled to invoke the acceleration clause when there is a breach. However, it also has an obligation to make attempts to assist the first respondent in regularising the loan repayments before it takes action by issuing a summons or even cancelling the loan agreement.

22. Turning to the impossibility of performance defence, the agreement concluded between the plaintiff and the defendant did not contain a force majeure clause, and therefore the common law applies.

23. Supervising impossibility occurs when the performance of contractual obligations becomes objectively impossible due to unforeseeable and unavoidable events that are not the fault of any party to the contract.

24. In **Matshazi v Mezepoli Melrose Arch (Pty) Ltd and another, Nyoni v Mezepoli Nicolway (Pty) Ltd and another**[4], it was held: "*If the provision is (not made contractually by way of a force majeure clause, a party will only rely on the stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement. Performance is not excused in all cases of force majeure. In M v Snow Crystal, the Supreme Court of Appeal (per Scott J A) said, "As a general rule, impossibility of performance brought about by vis major or casus fortuitous will excuse performance of a contract. But will not always do so. In each case, it is the circumstances of the case and the nature of the impossibility involved by the defendant to see whether the general rule ought in the particular*

[3] (763/13) [2014] ZASCA 183 (26 November 2014)

circumstances of the case to be applied" The rule will not avail a defendant if the impossibility

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[4] (2021) 42 ILJ 600 (GJ) 609 para 33

is self-created, nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant."

25. In **Barkhuizen v Napier**[5], it was stated: *"For instance, common law does not require people to do that, which is impossible. This principle is expressed in the maxim lex non cogit ad impossibilia – no one should be compelled to perform or comply with that which is impossible. This maxim derives from the principles of justice and equity, which underlie the common law. Over the years, the maxim has become entrenched in our law and has been applied to avoid time bar provisions in statutes."*

26. In the matter of **Transnet Ltd v The MV Snow Crystal**[6], it was said:
"*This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by vis major or casus fortuitus will excuse performance of a contract. But it will not always do so. In each case, it is necessary to 'look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant."*

27. In **World Leisure Holidays (Pty) Ltd v Georges,**[7], the court dealt with temporary impossibility. It stated that: *The temporary impossibility of*

performance does not, of itself, bring a contract to an immediate end. The respondent's alternative claim accordingly raises the question of when a creditor is entitled to treat a contract as being at an end whilst performance is

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[5] 2007(5)SA 323, CC para 75

[6] 2008(4) SA 111 SCA, para 28

[7] (2002)(5) SA at 532F-534G

temporarily impossible. The answer is that he is only entitled to do so where the foundation of the contract has been destroyed; or where all performance is already, or would inevitably become, impossible, or where part of the performance has become, or would inevitably be, impossible and he is not bound to accept the remaining performance."

28. In their answering affidavit, the first respondent averred that it experienced financial difficulties due to the Covid-19 pandemic as it could not earn an income due to the lockdown regulations, which restricted the operation of its business. The first respondent acknowledged the temporary impossibility caused by the Covid-19 pandemic. That does not consequentially bring the contract to an end, nor does it suggest the first respondent will not be able to honour its obligations in the future. It was not the case of the first respondent that it would never be able to fulfil its obligations according to the agreement.

29. The applicant was entitled to cancel the agreement after complying with Section 129[8], which provides: "*(1) If the consumer is in default under a credit agreement, the credit provider- (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date."*

30. The evidence is that, seeing that the first respondent was in default, the applicant cancelled the agreement and demanded the total amount. Avoiding to be seen as interfering with the parties' agreement and implementation

thereof, I find it premature for the applicant to cancel the loan agreement and demand the full amount from the first respondent. Though the first respondent had already indicated earlier its difficulty in meeting its contractual obligations for May and June 2020. No facts were placed before the court suggesting that

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[8] of the National Credit Act, Act 34 of 2005

the contract's foundation had been destroyed at the time of the letter of demand. The applicant had not complied with section 129 of the National Credit Act. In fact, it was the respondent who, out of their own volition, indicated that they would have financial difficulties meeting their contractual obligations in May and June 2020.

31. I am in contrast with the submission that the applicant had no obligation to negotiate anything with the respondent, as stated in its affidavit. A contract is a negotiated living document between parties from different ends with different situations at different times. The reasonable contracting parties would be expected to acclimatise the terms and conditions of their contracts depending on the nature of the contract. In my respectful view, it is so, though the applicant is entitled to refuse to restructure the debt.

32. A restructuring of the terms of a loan agreement will involve a variation of the existing loan agreement. Where one party is unwilling to amend the agreement, which it is entitled to, the defaulting party can always seek alternative ways of dealing with its situation as it presents itself. However, a party may not outrightly refuse to engage and negotiate. The engagement does not mean the other party must accept or be subjected to the terms of that negotiation. It still has its discretion to exercise.

33. The applicant requested a two-month payment holiday, and the applicant refused. I find no fault with the applicant as it was within its rights. It exercised its discretion as entitled. However, the evidence is that the first respondent subsequently made payments towards the loan agreement. The applicant had failed to verify the amount owing as it presented an outdated certificate of

balance dated June 2020, even when it was aware this issue was in dispute. Further, it did not dispute that there were payments made and continually made by the first respondent in terms of the loan agreement. Therefore, find no grounds to grant the application for an order for monetary judgment in favour of the applicant where payments of the arrear amounts have been made, and the first respondent continues to make payments regarding the loan agreement. Therefore, on this ground, the application falls to fail.

Executability of the immovable property

34. I now deal with the applicant's relief sought to declare specially executable the immovable property owned by the second and third respondents. It is the applicant's case that it is just and equitable that the second and third respondents' property be declared executable due to the following:

"*34.1. The second and third respondents agreed to be sureties.*

34.2. It was an express and suspensive term that the applicant would be entitled to apply for an order that the immovable property be declared executable without first executing against the movable assets of the respondents.

34.3. The applicant has reason to believe that the second and third respondents have insufficient movable assets to satisfy the judgment.

34.4. The immovable property was not acquired by means of a state subsidy.

34.5. The applicant implemented various steps to rehabilitate the arrear accounts. Several telephonic discussions were held with the respondents to negotiate and attempt to agree to a payment plan to rehabilitate the accounts.

34.6. The applicant is unaware of the respondents' financial position, whether the first respondent was trading and whether the second and

third respondents were employed and/or had a source of income to pay off the debt to the applicant. However, at the time of the conclusion of the agreement, the respondents possessed sufficient funds to pay the monthly instalments.

34.7. The applicant's interest in having the said property declared specially executable outweighs their interest in keeping the property.

34.8. No other reasonable way of obtaining payment of the outstanding debt owing, other than by selling the property in execution. Such a sale would not be grossly disproportionate and unjust.

34.9. Should the court not grant the order, the applicant would be unable to recover the judgment debt owing to it, and the outstanding amount due would escalate indefinitely."

35. In their answering affidavit, the second and third respondents averred that

35.1. Realising the effects of the Covid-19 pandemic, it requested to be excused from making monthly payments for two months, and the applicant refused.

35.2. The said property is used for residential purposes and is a primary residence for their family.

35.3. The arrears are being paid, and they will continue to make monthly payments until the debt is paid.

35.4. The trucks could be sold to meet the debt owed to the applicant.

35.5. The applicant implemented no steps to rehabilitate the arrear account. Instead, the respondents were the ones who requested a two-months payment holiday and suggested a payment plan. They referred to

correspondence exchanged between the parties marked C to E of the answering affidavit.

35.6. The valuation report was hearsay as it displayed no author, no date of the evaluation, and no indication of who, where and how the information was sourced.

36. The provisions of Rule 46[9] guide the execution of immovable property.

Rule 46(1)(a) provides: "*Subject to the provisions of rule 46A, no writ of execution against the immovable property of any judgment debtor shall be issued unless—*

(i) a return has been made of any process issued against the movable property of the judgment debtor from which it appears that the said person has insufficient movable property to satisfy the writ; or

(ii) such immovable property has been declared to be specially executable by the court or where judgment is granted by the registrar under rule 31(5)."

37. Rule 46A(1) "*This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.*

(2)(a) A court considering an application under this rule must —

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(c) …….

(3) "*Every notice of application to declare residential immovable property executable shall be—*

(5) Every application shall be supported by the following documents, where applicable, evidencing:

[9] Uniform Rules of Court, No 1, supra

(a) the market value of the immovable property;

b) the local authority valuation of the immovable property;

(c) the amounts owing on mortgage bonds registered over the immovable property;

(d) the amount owing to the local authority as rates and other dues;

(e) the amounts owing to a body corporate as levies; and

(f) any other factor which may be necessary to enable the court to give effect to subrule (8):

Provided that the court may call for any other document which it considers necessary.

(8) A court considering an application under this rule may —

(a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale of any condition which it may consider appropriate;

(b) order the furnishing by —

(i) a municipality of rates due to it by the judgment debtor; or

(ii) a body corporate of levies due to it by the judgment debtor.

(c) on good cause shown, condone —

(i) failure to provide any document referred to in subrule (5); or

(ii) delivery of an affidavit outside the period prescribed in the subrule

(d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;

(e) set a reserve price;

(f) postpone the application on such terms as it may consider appropriate;

(g) refuse the application if it has no merit."

38. The certificate of balance is dated 30 June 2020. In *casu,* the plaintiff bears the onus to, on a balance of probabilities, prove that the certificate of balance reflects the account's actual position in question in terms of the amount outstanding and the arrears thereof as well as all payments made by the respondents.

39. The valuation reports are dated October 2019, before the conclusion of the agreement and before the account fell into arrears. The content of the certificate of balance and the valuation report is thus primary evidence. If its veracity cannot be tested or guaranteed, then the court is not permitted to use same to adjudicate the matter.

40. In the matter of **Rautini v Passenger Rail Agency of South Africa,**[10] the Supreme Court of Appeal addressed the issue of reliance on the contents of discovered documents. The finding was that *"the inclusion of all discovered documents are what they purport to be" is not unlawful. In fact, it serves a legitimate purpose: it allows the documents to be discovered as real evidence. However, parties should be vigilant and lead the evidence of the authors of those documents if they intend to rely on the contents of the documents."*

41. The content of the certificate of balance and the valuation reports amounted to hearsay evidence and remained as such. The said evidence cannot be considered as the valuation report was hearsay as it displayed no author and no indication of where and how the information was sourced. Based on the nature of the proceedings in this instance, the evidence is inadmissible.

42. The certificate of balance was also dated 30 June 2020. No current or recent certificate was presented before the court reflecting the amounts owing on the loan agreement.

43. The applicant could not submit whether there were any levies, rates and taxes

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[10] *(853/2020)(2021) ZASCA 158*

outstanding on the property. However, same is estimated to be about R8 700 per annum.

44. The applicant, in this regard, has not complied with Rule 46A(1)(5)[11] of the Uniform rules. To the extent that there is no basis for this court to set a reserve price of R 900 000.00. The evaluation reports attached to the applicant's affidavit are dated 2019, before the agreement was concluded. They are also non-compliant with the rules as no affidavit was deposed by the valuer confirming the contents.

45. In the matter of **Jaftha v Schoeman; Van Rooyen v Stoltz[12],** the Constitutional Court held that*: "in deciding whether or not to declare the primary residence of*

natural persons, specially executable, it gave the following examples, in summary, as circumstances to consider, whether:

(a) The rules of the court had been complied with.

(b) There are other reasonable ways in which the judgment debt can be paid.

(c) There is disproportionality between the execution and other possible means to exact payment of the judgment debt.

(d) The circumstances in which the judgment debt was incurred.

(e) Attempts made by the judgment debtor to pay off the debt.

(f) The financial position of the judgment debt.

(g) The amount of the judgment debt.

(h) The judgment debtor is employed or has a source of income to pay off the debt.

(i) Any other factors relevant to the particular case."

46. The evidence is the second and third respondents agreed that a mortgage bond would be registered over the immovable property to provide security to the applicant for the due fulfilment of the obligations of the first respondent in terms of the agreement, as well as obligations in terms of their guarantees.

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[11] Uniform rules of court no 9, supra

[12] 2005 (2) SA 140 CC, para 55 to 59

47. In **Standard Bank v Mokebe and related cases**[13], it was held: "*The reasoning behind the amendments to rule 46A and the need for judicial oversight are to protect the constitutional rights guaranteed in s 26 and to inter alia ensure a person is not evicted from their home without an order of the court and after consideration of all of the circumstances relevant to a particular case. Thus, our courts require full disclosure of all relevant facts as this can impact the court's discretion on whether or not to grant the execution".*

48. The second and third respondents submitted, through their counsel, that the said property is their primary residence together with their three children. If the order to declare the property executable is granted, their rights to access adequate housing would be infringed.

49. Further, the arrears are being paid, and they are continuing to make monthly payments. The debt was incurred when the second and third respondents expanded the first respondent's goods transportation business by purchasing a truck. The trucks could be sold to meet the debt owed to the applicant, which will be an alternative means by the first and second respondents of satisfying the debt owed to the applicant other than the execution against the respondents' primary residence, which is shared with minor children.

50. The evidence is that the respondents make substantial efforts to pay off the arrears and the debt by making significant amounts towards the debt.

51. Regarding the inability of the first respondent to make payments towards arrears and the total debt owing to the applicant. It can be accepted that the first respondent has a source of income which puts it in a position to make payments towards the debt in question. Even where the first respondent was not in a financial position to make payments in terms of the loan agreement. The evidence is the loan amount was sought to extend the transportation business and used to purchase a truck which could still be sold to pay the loan

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[13] 2018(6) SA 492(GJ) para 12

amount.

52. Where there are other movable properties, for instance, the said truck, the primary residence should be the last to be considered in execution. However, it was availed as surety by the second and third respondents. This is so because it is the primary home of the second and third respondents, together with their children, and there seem to be other means of satisfying the debt. Therefore, the applicant's request for the execution of the said immovable property cannot succeed, as it is not justified for the aforementioned reasons.

53. In an unreported matter of **Standard Bank of South Africa Limited v Young and Another,**[14] it was said: "*Regard being had to these interpretative iterations, I find that for the reasons that appear hereunder, that the Legislature could only have intended that strict compliance is required in these rules, in so far as practically possible given the far-reaching and dire consequences of granting an Order declaring a person's residential property executable and subject to being sold in execution.*

[23] Sub-rule 8 sets out what a court is empowered to do when it considers an application in terms of the provisions of rule 46A. These include refusing an application if it has no merit and making any other appropriate order."

54. Absent the valuation report, relevant certificate of balance, and the outstanding amounts owed to the municipality relating to levies, rates and other services, there is no basis for setting the reserve price.

55. With the backdrop that a court shall not authorise execution against immovable property, which is the primary residence of a judgment debtor, unless the court, having considered all relevant factors, considers that execution against such property is warranted. The application for execution against the second and third respondents' immovable property, which is the primary residence, cannot succeed. When this court considers the aforementioned reasons, such

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[14] D8880/2021(2022)ZAKZDHC 30(4 August 2022), para 22-23

execution is not warranted.

56. In the result, the following order is made.

Order:

1. The application for monetary judgment for R 1 349 906.90 and interest on the amount against the respondents jointly and severally is dismissed.
2. The application seeking an order to declare the second and third respondents' immovable property specially executable is dismissed.
3. The application for an order setting a reserve price at R900 000.00. is dismissed
4. The applicant is to pay the costs of this application.

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N. MAZIBUKO

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email and uploaded to Case Lines.

Representation

For the applicant:	Adv E Smit
Instructed by:	BDP Attorneys
For the respondent:	Adv JW Kloek
Instructed by:	Swanepoel Attorneys
Hearing date:	25 October 2022
Delivery date:	*16 January 2023*