



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

**CASE NO: 45011/2021**

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

19/05/23

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**Date**

**ML TWALA**

In the matter between:

**POTPALE INVESTMENT (RF) (PTY)**

**LIMITED (Reg No: 2011/118165/07)**

**PLAINTIFF/APPLICANT**

**And**

**MBULAWA**

**DEFENDANT/RESPONDENT**

**NTOMBETHEMBA**

**ALICE**

Neutral Citation: *POTPALE INVESTMENT (RF) (PTY)LIMITED* (Reg No: 2011/118165/07) v *MBULAWA NTOMBETHEMBA ALICE* (Case No: 45011/2021) [2023] ZAGPJHC 520 (19 May 2023)

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## JUDGMENT

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**Delivered:** This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 19<sup>th</sup> of May 2023.

**Summary:** *Application for summary Judgment— the doctrine of supervening impossibility of performance—defendant has no bona fide defence against the claim of the plaintiff—summary judgment granted—the defendant is liable to pay the plaintiff the taxed attorney and client costs.*

### TWALA J

[1] Before this Court is an application for summary judgment wherein the plaintiff seeks an order against the defendant in the following terms:

1. confirmation of the termination of the agreement;

2. return of the 2019 Toyota Quantum 2.5 D-4D Sesfikile 16s with engine number 2KDB005476 and chassis number AHTSS22P107104 936 to the plaintiff forthwith;
3. attorney and client costs to be taxed.

[2] The defendant filed its affidavit in opposition to the summary judgment. The defendant raised a point in limine of the time frames within which to launch the application for summary judgment. However, at the commencement of the hearing of this case, the defendant did not persist with its point in limine and I do not intend to detain myself in that regard.

[3] The facts foundational to this case are mostly common cause and are as follows: On the 19<sup>th</sup> of August 2019 the plaintiff and the defendant concluded a written credit agreement whereby the defendant bought a motor vehicle described as a Toyota Quantum. It was a term of agreement that the defendant would pay monthly instalment of R15 901.16 until the whole capital debt with the finance charges and interest is paid in full. Furthermore, it was a term of the agreement that the plaintiff will remain with ownership of the goods until the whole debt is paid in full or settled.

[4] It was a further term of the agreement that should the defendant fail to pay any instalment on due date or breach any of the terms of the agreement, the plaintiff shall, without prejudice to any of its rights, cancel the agreement and repossess the vehicle. It is undisputed that the defendant has fallen into arrears with its instalments as a result its account was as at the 18<sup>th</sup> of August 2021 in arrears in the sum R141 929.19. During May 2021 the defendant applied to have herself declared over-indebted. However, the parties failed to reach any agreement – hence the plaintiff gave its notice to terminate the

debt review process in terms of section 86(10) of the National Credit Act, 34 of 2005 (“the Act”).

- [5] It is submitted by counsel for the defendant that, although the defendant has fallen into arrears with her account with the plaintiff, instead of paying the full instalment of R15 901.16 she is paying R9 000 per month due to the problems created by the COVID-19 pandemic. She will in due course settle her arrears. It was contended further that, the plaintiff terminated the debt review process unilaterally whilst the other financial institution accepted the arrangement reached in the process.
- [6] It is a well-established principle of our law that if performance of a contract has become impossible through no fault of the party concerned, the obligations under the contract are generally extinguished, or suspended, (if the impossibility is only temporal) under the doctrine of supervening impossibility of performance. However, the doctrine is not absolute and may be overridden by the terms of the agreement and is not available where the impossibility of performance is self-created. Furthermore, the impossibility of performance must be the direct and immediate cause of the failure on the defendant to pay the instalments.
- [7] Dealing with the issue of the supervening impossibility as a result of the Covid-19 hard lockdown, in *Freestone Investments Proprietary Limited v Remake Consultants CC and Another (2020/29927) [2021] ZAGPJHC 150* the Court stated the following:
- “Paragraph 27: even when approached from this nuanced perspective, the first defendant cannot legally justify its failure to make payment of rentals and other charges for the protracted period of March to October 2020. Whatever restrictions there may have been

*that prevented the plaintiff and the first defendant from performing they are respective obligations for the period of their hard lockdown until 30 April 2020, those restrictions did not persist until October 2020. From 1 May 2020, the lockdown regulations were progressively eased. Any supervening impossibility of performance did not enjoy for the entire period corresponding to the first defendant's non-payment of rentals.”*

[8] I do not agree with the defendant that the Covid-19 lockdown made it impossible for her to perform her obligations in terms of the agreement when the lockdown was progressively eased from the 30<sup>th</sup> of April 2020 and the taxis were allowed to transport passengers although not loading to its full capacity. Further on during 2020 the taxis were allowed to operate and load the passengers to their full capacity. It is now more than two years since the hard lockdown has been eased and the taxi business has been open to run in its full capacity. The ineluctable conclusion is therefore that the impossibility of performance was temporal and thereafter everything else went back to normal and the defendant should have been able to perform in terms of the agreement.

[9] It is trite that for a defendant to succeed in resisting an application for summary judgment, it must demonstrate that it has a bona fide defence to the claim of the plaintiff. Although the defendant does not have to establish such a defence as it would normally in a plea, but it must place certain facts before the Court which demonstrate that such defence may succeed in the trial that might ensue.

[10] In *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)*, the Court stated the following:

*“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. In the Maharaj case at 425 G-426E, Corbett JA, was keen to ensure first, an examination of whether here has been sufficient disclosure by the defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of the defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.”*

[11] I do not understand the defendant to be disputing that it is indebted to the plaintiff and that it is in breach of the terms of the agreement in that it has fallen into arrears with her instalments. What the defendant testified in her affidavit is that she fell into arrears with her instalments due to circumstances beyond her control. As explained above, the defendant in resisting summary judgment it must demonstrate to the satisfaction of the Court that it has a bona fide defence which when established will resist the claim of the plaintiff at the ensuing trial. However, in this case the defendant has failed to establish any bona defence against the claim of the plaintiff. It is my respectful view therefore that the plaintiff has established an

unassailable claim against the defendant and is therefore entitled to the relief it seeks in terms of the notice of motion.

[12] In the circumstances, I make the following order:

1. The agreement between the parties is hereby terminated.
2. The defendant is to return the 2019 Toyota Quantum 2.5 D-4D Sesfikile 16s with engine number 2KDB005476 and chassis number AHTSS22P107104 936 to the plaintiff forthwith.
3. The defendant is liable to pay the plaintiff the taxed attorney and client costs.

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**TWALA M L**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION**

**Date of Hearing: 15<sup>th</sup> of May 2023**

**Date of Judgment:** 19<sup>th</sup> of May 2023

**For the Plaintiff:** Advocate R Stevenson

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