REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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

Date: ***26th July 2023*** Signature:

CASE NO: 33128/2021

DATE: 26th JULY 2023

In the matter between:

ABSA HOME LOAN GUARANTEE CO (RF) (PTY) LIMITED First Plaintiff

ABSA BANK LIMITED Second Plaintiff

and

MOODLEY, DEESHAN First Defendant

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Second Defendant

Neutral Citation: *Absa Home Loan Guarantee Co (RF) and Another v Moodley and Another (33128/2021)* **[2023] ZAGPJHC ---** (26 July 2023)

Coram: Adams J

Heard: 24 May 2023

Delivered: 26 July 2023 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 26 July 2023.

Summary: Civil procedure – application for postponement of opposed summary judgment application – applicable legal principles – court has a discretion to grant or refuse postponement – postponement not in the interest of justice – action has a long and a tedious history – no prejudice to defendant as application could and should be decided on the papers in the application for summary judgment – postponement application refused –

Application for summary judgment – defences raised by defendant – bad in law – section 29 of the National Credit Act – not receiving statements of account – impossibility of performance due to unemployment – none of these valid defences, nor *bona fide* – summary judgment granted in favour of plaintiffs.

ORDER

Summary judgment is granted in favour of the first and the second plaintiffs against the first defendant for: -

(1) Payment of the sum of R1 781 490.73 (One Million, Seven Hundred and Eighty-One Thousand, Four Hundred and Ninety Rand and Seventy-Three Cents);

(2) Payment of interest on the aforesaid amount of R1 781 490.73 at the rate of 8.30% per annum from 4 June 2021 to date of payment, both dates inclusive;

(3) The following immovable property of the first defendant be and is hereby declared specially executable:

Erf 357 Quellerina Extension 1 Township,
Registration Division I.Q, Province of Gauteng;
Measuring 1782 (One Thousand Seven Hundred and Eighty-Two) Square Metres;
Held by Deed of Transfer Number: T9976/2019,
Subject to The Conditions Therein Contained.

(4) The Registrar of this Court be and is hereby authorised and directed to issue a writ of execution in respect of and against the immovable property referred to above, in order to give effect to the order granted in terms of prayer 1 above;

(5) The immovable property described in paragraph 3 above shall be sold at a public sale in execution, subject to a reserve price of R1 300 000 at the sale in execution.

(6) A copy of this order is to be served on the first defendant as soon as is practicable after the order is granted.

(7) The first defendant is advised that the provisions of section 129(3) and (4) of the National Credit Act 34 of 2005 ('the NCA'), apply to the judgment granted in favour of the first and the second plaintiffs. The first defendant may prevent the sale of the property described above, if he pays to the first plaintiff and/or the second plaintiff all of the arrear amounts owing by him to the first plaintiff and/or second plaintiff together with all enforcement costs, default charges, prior to the property being sold in execution.

(8) The arrear amounts and enforcement costs referred to in paragraph 7 above may be obtained from the first plaintiff and/or the second plaintiff. The first defendant is advised that the arrear amount is not the full amount of the Judgment debt, but the amount owing by the first defendant to the first plaintiff and/or second plaintiff, without reference to the accelerated amount.

(9) The first defendant shall pay the costs of this application and the main action on the attorney and client scale.

JUDGMENT

Adams J:

[1] I shall refer to the parties as referred to in the main action, in which the first and the second plaintiffs seek, as against the first defendant, a monetary

judgement, as well as an order declaring specially executable the first defendant's immovable property. I shall refer to the first defendant as 'the defendant', as the second defendant played no role in these proceedings. The plaintiffs' cause of action is based on a written mortgage loan agreement ('the loan agreement') concluded on or about 25 February 2019 between the second plaintiff and the defendant, in terms of and pursuant to which the second plaintiff lent and advanced, as a homeloan, to defendant the total sum of R1 628 230 ('the principal debt'). The principal debt was to be repaid by the defendant to the second plaintiff in 240 monthly instalments of R18 011.50 per month, to be adjusted from time to time according to the variable interest rate.

[2] The first plaintiff issued a guarantee in favour of the second plaintiff in respect of the due payment by the defendant of any and all amounts payable by him to the second plaintiff and the defendant indemnified the first plaintiff against any claim by the second plaintiff under the said guarantee. In terms of the said guarantee, first plaintiff agreed to pay the amount owing in terms of the loan agreement in the event of a default by the defendant. In terms of the loan agreement, a mortgage bond was registered in favour of the first plaintiff for an amount of R1 700 000, and an additional sum of R340 000, over the defendant's immovable property, namely Erf 357, Quellerina Extension 1 Township, Registration Division I Q, Guateng Province; measuring 1782 square meters; held by Deed of Transfer number 19976/2019 ('the defendant's property').

[3] It is not in dispute that the defendant is in breach of the loan agreement in that he failed to make payment of the monthly instalments as provided for in the said agreement. As and at the date of the institution of the main action during June 2021, the arrear instalments stood at R217 979.65, hence the summons issued by the plaintiffs against the defendant.

[4] Before me is an application for summary judgment by the first and the second plaintiffs against the defendant for payment of the full amount outstanding balance on the loan agreement, as well as for an order declaring specially executable the defendant's property. This application is opposed by

the defendant, who, for the duration of the matter, has represented himself and made submissions in person.

[5] In his plea, the sum total of the defendant's defence is that he did not receive notice of demand as alleged by the plaintiffs in their particulars of claim. Had he received such demand, so it is alleged by the defendant, he would have consulted a debt counsellor with a view to remedy the situation. There is no merit in this defence, which in effect amounts to an assertion by the defendant that the plaintiffs have not complied with the provisions of s 129 of the National Credit Act[1] ('the NCA').

[6] In that regard it is common cause that during 2020 the plaintiffs transmitted to the defendant default notices at his *domicilium citandi et executandi* address, as well as to the mortgage property address by way of registered post. In terms of the so-called 'track and trace' reports, notifications were sent on the 6 October 2020 and 17 November 2020 respectively to the defendant from the relevant post offices to come and collect the letters, which the defendant clearly failed to do.

[7] As was held by the Constitutional Court in *Kubyana v Standard Bank of South Africa Ltd*[2]*,* all that a credit provider is required to prove as regards compliance with s 129 of the NCA is that: (1) The s 129 notice was sent by registered mail to the correct branch of the post office, which could be deduced from the track-and-trace report and the credit agreement; (2) The post office issued a notification to the consumer that a registered item was available for collection; (3) The notification reached the consumer, which could be inferred from the post office sending the notification to the consumer's postal address; and (4) A reasonable consumer would have collected the s 129 notice and engaged with its contents, which could be inferred if the credit provider had proven (1) – (3). This authority, in my view, spells the end of the defendant's objection on the basis of the plaintiffs' supposed non-compliance with s 129. The point is simply that defendant does not offer any reasonable explanation as to why he failed to collect the default notices sent by the plaintiffs, except to

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1 National Credit Act, Act 34 of 2005;

2 *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC);

simply state that he never received any notifications. In this regard, it is instructive that the notices were addressed to the defendant at addresses that were chosen by him as per the loan agreement, the indemnity agreement and the mortgage bond.

[8] In his written heads of argument in opposition to the application for summary judgment, the defendant raised further issues and disputes equally devoid of any merit and which do not assist the defendant in any way in resisting the said application. So, for example, he takes issue with the service of one or more of the processes in the action, contending (presumably) that the sheriff's return is defective as it supposedly contains false information. I do not accept any of these contentions. They are of no assistance to the defendant as he does not even begin to demonstrate how he was prejudiced by these alleged irregular steps. By all accounts, the defendant received notice of the action instituted against him – he did, after all, enter an appearance to defend.

[9] The defendant also alludes to the fact the plaintiffs and their legal representatives refuse to negotiate a settlement with a view to finding a solution for the dispute. No proposal was ever forthcoming from the plaintiffs, so the defendant contends, to negotiate a payment structure. This is not a defence to the claim by the plaintiffs. The simple fact of the matter is that the defendant, at the time of the institution of the legal proceedings *in casu*, was in breach on the loan agreement and presently remains in default, despite the summons having been issued against him as far back as 2021. The plaintiffs are fully within their rights to call up the loan and to insist on the relief sought in the application for summary judgment.

[10] In sum, the further defences raised by the defendant in his plea and in his affidavit resisting summary judgment are that: (1) From a certain point in time, he did not receive any statements from the plaintiffs, setting out the amounts in arrears on his bond account and the total outstanding balance; (2) The defendant also claims that he was unable to perform his obligations in terms of the loan agreement because has been unemployed since March 2020 as a result *inter alia* of the Covid-19 pandemic; and (3) That it would not be just

and equitable to foreclose on the property because, so the defendant alleges, same is occupied by a senior citizen (his mother) and his three minor children.

[11] As contended by Mr Peter, who appeared on behalf of the plaintiffs, these further defences are without merit. Firstly, the fact that a debtor does not receive statements of account can never be a valid defence to a claim based on his failure to effect payment of his monthly instalments in settlement of the loan amount. The simple fact of the matter is that he is in breach of the loan agreement in that, as and at the date of the application for summary judgment, he was in arrears with his monthly instalments to the tune of about R264 000. This entitles the plaintiffs, without more, to call up the loan and to obtain an order for payment of the whole amount outstanding.

[12] Secondly, the unemployment of the defendant does not excuse the performance of his obligations under the mortgage loan agreement. In *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & Others*[3], it was held that if provision is not made contractually by way of a *force majeure* clause, a party will only be able to rely on the very 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 the present matter, the agreement does not make provision for 'force majeure'. The impossibility relied upon has not been created by the agreement itself. Over and above that, the defence is not pleaded with any particularity but is raised in vague and unsubstantiated terms precluding any objective assessment to be made by the Court.

[13] In *Scoin Trading (Pty) Ltd v Bernstein NO* [4], Pillay AJA had this to say about supervening impossibility of performance:

'The law does not regard mere personal incapability to perform as constituting impossibility.'

[14] Also, in *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* [5], this Court (per Flemming DJP) held thus:

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[3] *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & Others* [2007] JOL 21043 (O); (4621/99) [2002] ZAFSHC 2 (28 March 2002);

[4] *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) at para 22;

[5] *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W) at 198D-E;

‘Impossibility is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.’

[15] On the basis of these authorities, I conclude that, on the facts in the matter, the defendant has not established a *bona fide* defence based on impossibility of performance. The impossibility on which the respondent relies, if it exists at all, is specific to himself because of the change in his financial position and it is not, as is required by law, absolute. The obligation to render performance even during lockdown can, in general, be performed. The defendant’s personal incapability does not render the contract void. In the circumstances, the above defence must also fail.

[16] And lastly, as regards, the occupation of the property by the defendant’s mother and minor children, it is so, as contended by the plaintiffs, that this is not an eviction application and those considerations are not of any moment.

[17] Accordingly, in my view, the defendant’s plea and affidavit resisting summary judgment do not disclose a *bona fide* defence to the plaintiffs’ claims. The defences are, in their own terms, factually and legally unsustainable. They also do not raise any triable issues. The defendant has accordingly failed to satisfy the requirements set out by Uniform Rule of Court 32(3)(b) and the plaintiffs are entitled to summary judgment against the defendant. Summary judgment should therefore be granted in favour of the plaintiffs against the defendant.

[18] There is one other issue which requires my attention and that relates to an application for a postponement by the defendant prior to the date on which the application for summary judgment was scheduled to be heard. The defendant’s request for the postponement was electronically communicated to the Court in the days leading up to the hearing date. On 24 May 2023, after having considered the correspondence from the defendant and after having heard Mr Peter, I issued the following order, indicating at the same time that my reasons for same would be incorporated into my judgment on the summary judgment application: -

‘(1) The first defendant’s application for a postponement of the application for summary judgment be and is hereby dismissed with costs on the scale as between attorney and client.

(2) The first and second plaintiffs’ application for summary judgment be and is hereby postponed *sine die* for the Court’s written Judgment, which is reserved, and which is to be handed down electronically in due course on a date and time to be advised to the parties.

[19] My reasons for the said order are set out in the paragraphs which follow.

[20] The application for summary judgment had initially been set down for hearing in the opposed Motion Court on Monday, 22 May 2023. As per the updated Opposed Motion Court roll for that week, which was published about a week before, the matter had been re-allocated for hearing on Tuesday, 23 May 2023 at 11:30.

[21] On 17 May 2023 a Ms Pillay addressed the following email on behalf of the defendant to the court (without copying in the legal representatives of the plaintiffs):

‘Dear Honourable Judge Adams,

Dated: 17 May 2023

I write to you on behalf of my brother, Deeshan Moodley, who is the respondent on the case ABSA // Moodley – 2021/33128.

Allocated Date: 22 May 2023.

He is also copied in the email.

Deeshan is unable to write an email himself as he is unwell and under medication to help him deal with the pain. He has requested that I assist as I have been helping him from the onset.

Humble Request: To please assist with postponing / dismissing the hearing of 22 May 2023

Primary Reason: Deeshan is currently representing himself at the moment, however, he is in agonising pain. Furthermore, he is in a somewhat state of duress from the case. He is recovering from … … …

I implore mercy on him and pray that you please assist with postponing / dismissing this case until he recovers. He is physically incapable of going through with this hearing on the said date for reasons stated above.

… … …

With Respect and Kindness,

Nimu Pillay (Sister) on behalf of Deeshan Moodley.’

[22] On Tuesday, 23 May 2023, when the matter was called, the defendant predictably was not present. It was indicated to Mr Peter, who appeared on

behalf of the plaintiffs, that my *prima facie* view was that the application for a postponement should not be granted as the matter, being an application for summary judgment, could simply be decided on the papers. I therefore directed that the application stood down to the following day, being Wednesday, 24 May 2023, at 10:00, to afford the plaintiffs' legal representatives an opportunity to communicate to the defendant my aforesaid *prima facie* view. This was done by the plaintiffs' attorneys in an email to the defendant and his sister at 15:31 on the same day.

[23] At 17:56 the defendant's sister responded to these advices by email. The request for a postponement was persisted with. Additionally, an avalanche of attacks was unleashed by the defendant on the plaintiffs' attorneys, whilst, at the same time raising a myriad of irrelevant issues. It is, in my view, apposite to cite the relevant of portions of the electronic communication from the defendant as it gives a clear indication of the unreasonably aggressive and argumentative approach adopted by the defendant in the litigation *in casu*. The defendant seemingly believes that the best form of defence is an attack, especially in circumstances where, as already indicated, there is no defence. The e-mail from the defendant, in the relevant part, reads as follows: -

'Dear Sirs / Madams,

Notice: Subject Line.

Please note that as per case lines the matter was enrolled for the 22 May 2023. Ms Gladys Dlamini stipulated the 23 May 2023 during her replies. Change of dates were never forthcoming and it was by chance that respondent and myself (I am assisting him) were made aware.

RE: Below, Respondent wishes to be civil and direct. There is a defence. Please read with understanding. We are all aware of the discrepancies and loading of documents from yourselves, especially heads of argument, etc. Respondent has not requested that the firm complete documents on behalf of him. *Respondent, (Calling a spade a spade, Plaintiff desperate for a win and attorneys want costs.) The cover up, remember the wrong documents for the wrong person on section or rule 46a, Victoria. Please note scrambling of data – *CaseLines* staff closed the case and placed incorrect documents. The respondent is under the belief that he is NOT GUILTY. NOTE the wrong valuation reports; the respondent begging for bank statements was posted. The respondent is showing good faith. And thank you for the average VAL report from *Windeed* really assists, as the respondent has no figures. No bank statements, No legal counsel, in post op recovery, etc, etc

As below responses. Will upload to *CaseLines*. – please forward to all.

Absa – If Help u sell is a product of Absa, it is basically bringing the property back into the Absa stable with a win-win situation.

Respondent is currently unwell and a simple request of postponement was made in order to have a fair hearing. It has come to our attention that the 07 August 2023 is the allocated date on *CaseLines*. In light of this and your email below there is yet more confusion and inaccurate data being processed.

Through the course of the months there were many developments as well as discrepancies found. Incorrect legal practice as well as prejudice may have been apparent

If the respondent's presence does not matter, then it is assumed that:

(1) His medical condition is not valid according to the plaintiff and if this is the case then he is happy to be examined by plaintiff's specialist to confirm his condition at plaintiff's costs???

(2) Secondly, the Respondent is not allowed a fair hearing???

In conclusion the respondent is yet again requesting a postponement until his recovery in order for his defence to be heard and would sincerely appreciate his basic human right to be heard.

Thanking you

Mrs Nimu Pillay (On behalf of respondent).'

[24] That brings me back to my reasons for refusing the defendant's application for a postponement of the application.

[25] As indicated by the learned Authors of *Erasmus: Superior Court Practice – Volume 2: Uniform Rules and Appendices*, the court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter. (*National Police Service Union v Minister of Safety and Security*[6]). That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.

[26] An applicant for a postponement seeks an indulgence and he or she must show good and strong reasons. An application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised.

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6 *National Police Service Union v Minister of Safety and Security* 2000 (4) SA 1110 (CC) at 1112E;

[27] Applying these principles *in casu*, I am of the view it would not have been in the interest of justice to postpone the application only because of the unavailability of the defendant, who is unrepresented in these proceedings. As already alluded to above, the application could and should have been decided on the papers. Submissions made by any of the parties during the hearing of the application for summary judgment would not have changed that fact in the matter, which suggest that the defendant does not have a valid defence to the plaintiffs' claims. No purpose would have been served by hearing oral submissions from the defendant, in addition to what he had said in his plea, in his affidavit resisting summary judgment and in his written heads of argument filed off record.

[28] As was held by the SCA in *Take and Save Trading CC and Others v Standard Bank Of SA Ltd* [7], judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that any abuse is curbed by, in suitable cases, refusing a postponement. The point, to be reiterated, is that no purpose would have been served by postponing the application, thus postponing the inevitable. Moreover, the matter has had a long and a tedious history, with the summons having been issued on 14 July 2021 and the application for summary judgment having been launched as far back as 20 September 2021. What is more is that, as demonstrated *supra*, the prospects of successfully resisting the application for summary judgment were slim to non-existent, which is another reason why the application for a postponement was refused.

[29] It was for all of these reasons that the application for a postponement was refused.

[30] In the circumstances, summary judgment should be granted in favour of the plaintiffs against the defendant.

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[7] *Take and Save Trading CC and Others v Standard Bank Of SA Ltd* 2004 (4) SA 1 (SCA);

Costs

[47] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*[8].

[48] I can think of no reason why I should deviate from this general rule. The defendant should therefore pay the first and second plaintiffs' costs of the application for summary judgment as well as their costs of the main action. Such costs should be on the scale as between attorney and client as provided for in the written loan agreement and the other contractual instruments governing the relationship between the parties.

Order

[49] In the result, summary judgment is granted in favour of the first and the second plaintiffs against the defendant for: -

(1) Payment of the sum of R1 781 490.73 (One Million, Seven Hundred and Eighty-One Thousand, Four Hundred and Ninety Rand and Seventy-Three Cents);

(2) Payment of interest on the aforesaid amount of R1 781 490.73 at the rate of 8.30% per annum from 4 June 2021 to date of payment, both dates inclusive;

(3) The following immovable property of the first defendant be and is hereby declared specially executable:

Erf 357 Quellerina Extension 1 Township,
Registration Division I.Q, Province of Gauteng;
Measuring 1782 (One Thousand Seven Hundred and Eighty-Two) Square Metres;
Held by Deed of Transfer Number: T9976/2019,
Subject to The Conditions Therein Contained.

(4) The Registrar of this Court be and is hereby authorised and directed to issue a writ of execution in respect of and against the immovable property

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[8] *Myers v Abramson*,1951(3) SA 438 (C) at 455

referred to above, in order to give effect to the order granted in terms of prayer 1 above;

(5) The immovable property described in paragraph 3 above shall be sold at a public sale in execution, subject to a reserve price of R1 300 000 at the sale in execution.

(6) A copy of this order is to be served on the first defendant as soon as is practicable after the order is granted.

(7) The first defendant is advised that the provisions of section 129(3) and (4) of the National Credit Act 34 of 2005 ('the NCA'), apply to the judgment granted in favour of the first and the second plaintiffs. The first defendant may prevent the sale of the property described above, if he pays to the first plaintiff and/or the second plaintiff all of the arrear amounts owing by him to the first plaintiff and/or second plaintiff together with all enforcement costs, default charges, prior to the property being sold in execution.

(8) The arrear amounts and enforcement costs referred to in paragraph 7 above may be obtained from the first plaintiff and/or the second plaintiff. The first defendant is advised that the arrear amount is not the full amount of the Judgment debt, but the amount owing by the first defendant to the first plaintiff and/or second plaintiff, without reference to the accelerated amount.

(9) The first defendant shall pay the costs of this application and the main action on the attorney and client scale.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	24th May 2023.
JUDGMENT DATE:	26th July 2023 – judgment handed down electronically
FOR THE FIRST AND SECOND PLAINTIFFS:	Advocate Leon Peter
INSTRUCTED BY:	Lowndes Dlamini Attorneys, Sandton
FOR THE FIRST DEFENDANT:	In Person (Did not appear at the hearing of the application on 24 May 2023).
INSTRUCTED BY:	In Person