

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**REPUBLIC OF SOUTH AFRICA**



**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

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DATE

In the two matters between:

**Case No: 2022-059460**

**Capitec Bank Limited**

**Applicant**

and

**Allan Montague Culverwell**

**Respondent**

**Case No: 2022-059522**

**Capitec Bank Limited**

**Applicant**

and

**Bernice Elizabeth Culverwell**

**First Respondent**

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**JUDGMENT**

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**STRYDOM, J**

[1] This is the judgment in the two above mentioned matters. The applicant in the first matter is Capitec Bank Limited, hereinafter referred to as the applicant, and the respondent is Mr Culverwell.

[2] In the second matter the applicant seeks an order against Mrs Culverwell and Mr Culverwell. The case of the applicant against Mr and Mrs Culverwell are on all fours, with minor differences relating, *inter alia*, on the extent of the amounts claimed. Accordingly, the parties agreed that these two matters should be heard simultaneously, and that one judgment should be delivered by this court. This is what this court intends doing.

[3] The court will in this judgment first deal with the application where relief is sought against Mr Culverwell and thereafter in the second application where relief is sought against Mrs Culverwell and Mr Culverwell.

**The claim against Mr Culverwell**

[4] The applicant seeks an order for payment against Mr Culverwell in respect of the following credit facilities –

- a) The sum of R302,641.68 in respect of an overdraft facility conducted under account No. 110001980;

- b) An amount of R286,896.98 in respect of a credit card facility with account No. 464478000002734;
- c) An amount of R55,320.43 in respect of a credit card facility made available by the applicant to Mr Gabriel Molefe Mokgoro (Mr Mokgoro) with account No. [...] in respect of which Mr Culverwell signed a deed of suretyship in favour of the applicant.

[5] In addition the applicant seeks an order declaring the following immovable property owned by Mr Culverwell specially executable –

Portion 151 (of 80) of the Farm Lot 2 No. 1673, Registration Division FU, Province of KwaZulu-Natal, measuring 1203m<sup>2</sup> and held by Deed of Transfer T10692/1987 (“the immovable property”)

### **The applicant’s case**

- [6] On 9 June 2015, the applicant granted an overdraft facility of R250,000 to Mr Culverwell in terms of a written overdraft facility agreement.
- [7] I do not intend to repeat in this judgment all the material terms of the overdraft facility agreement, suffice to point out that in terms of the overdraft facility agreement Mr Culverwell, *inter alia*, undertook that any excess on the overdraft facility, without prior arrangement with the applicant, shall be construed as a breach of the agreement which entitled the applicant to cancel the agreement. Mr Culverwell had to pay his regular income into the account in relation to which the overdraft facility was granted. Mr Culverwell agreed that a written certificate signed by a manager whose appointment need not be proved, will upon production, constitute sufficient proof of the content thereof in any legal

proceedings. The applicant was entitled to call up the overdraft facility on demand.

[8] The applicant avers that it has duly complied with its obligations in terms of the overdraft facility agreement but that Mr Culverwell breached the overdraft facility agreement as he allowed the limit of R250 000 to be exceeded.

[9] The applicant, in compliance with the National Credit Act 34 of 2005 ("NCA") and in terms of the agreement, drew the default to the attention of Mr Culverwell. Subsequent thereto, Mr Culverwell failed to remedy the breach and is currently indebted to the applicant in the sum of R302,641.68.

[10] As far as the credit card facility granted to Mr Culverwell is concerned, on the same date when the overdraft facility was signed, the applicant and Mr Culverwell conducted a written agreement in terms whereof the applicant agreed to open a credit card account for and on behalf of Mr Culverwell.

[11] The material terms of the credit card agreement were, *inter alia*, that:

a) The outstanding debt in respect of the credit card would be repaid in monthly instalments of no less than 10% of the balance outstanding on the card account from time to time.

b) The extent of the indebtedness of Mr Culverwell could at any time be determined and proved by a written certificate purporting to have been signed by a manager of the applicant, whose capacity and authority need not to be proven.

- [12] Mr Culverwell breached the terms of the credit card agreement and failed to make payment of the minimum amounts required as and when they became due, resulting in Mr Culverwell exceeding the credit card maximum limit of R250,000.
- [13] The applicant drew the breach to the attention of Mr Culverwell as required by the credit card agreement, but Mr Culverwell failed to remedy his breach and is currently indebted to the applicant in an amount of R286,895.98.
- [14] Also on 9 June 2015, the applicant entered into a written agreement with Mr Mokgoko (“the principal debtor”) in terms whereof the applicant agreed to open a credit card account for and on behalf of the principal debtor.
- [15] The applicant was unable to annex a copy of the signed written agreement as applicant alleged that the document has been misplaced, lost or inadvertently destroyed. The applicant attached an unsigned copy of this agreement to its papers, the material terms of which are –
- a) A credit card account would be opened in the name of the principal debtor to a maximum limit of R50,000;
  - b) The outstanding debt in respect of the credit card would be repaid in monthly instalments of no less than 10% outstanding on the balance of the card from time to time;
  - c) The balance outstanding could be proven by a written certificate purporting to have been signed by a manager of the applicant, whose capacity and authority need not to be proven.

- [16] In breach of the terms of the credit card agreement, the principal debtor failed to pay the minimum payments required as and when they became due, resulting in the principal debtor exceeding his maximum limit.
- [17] Despite a notice to remedy the breach, the principal debtor has failed to do so and is presently indebted to the applicant in the amount of R55,320.43.
- [18] On 17 December 2015, Mr Culverwell bound himself jointly and severally as surety and co-principal debtor with the principal debtor *in solidum* for the due and punctual payment of all amounts which may then or at any time thereafter become owing from whatever cause arising and for the due performance of every other obligation which the principal debtor may be bound to perform in favour of the applicant.
- [19] In terms of the Deed of Suretyship, Mr Culverwell agreed that the amount claimable under the suretyship would be limited to R50,000, that he would pay the applicant's legal costs and that a certificate signed by a manager of the applicant shall constitute *prima facie* proof of the facts stated.
- [20] As security for the due payment of all amounts in respect of the credit facilities, Mr Culverwell declared to bind specially the immovable property as a first mortgage bond in favour of the applicant.
- [21] The property is not the primary residence of Mr Culverwell.
- [22] In terms of section 129(1)(a) of the NCA, the applicant brought the breach of the agreement to the attention of Mr Culverwell but he remained in default of his obligations in terms of the various facilities.

[23] Due to Mr Culverwell's continued default, the applicant elected to cancel the various facility agreements and informed Mr Culverwell in writing by way of termination letters.

### **Mr Culverwell's case and findings**

[24] During argument, the thrust of Mr Culverwell's defence which crystallised is premised on the averment that the various credit agreements and the terms and conditions attached thereto were not properly signed and accordingly, the applicant has failed to prove these agreements. Although further defences were raised, these were not seriously persisted with, the court will nevertheless briefly deal with these further defences.

[25] It was emphasised that the accounts, which were opened pursuant to the facilities provided, being the subject matter of the application, have always been part of, and paid from, the commercial account of Eldacc (Pty) Ltd ("Eldacc"). Eldacc took a commercial loan from the applicant, and part of this was to provide the facilities mentioned hereinabove. These facilities were authorised by the applicant based on the rental agreements entered into between Eldacc and other Culverwell companies and, principally, the rental agreements with Transit Freight Forwarding ("Transit") as lessee. 83% of the Culverwell companies' rental income derive from Transit. Indirectly payment of the facilities was dependant on receipt of payments from Transit to Eldacc. As a result of the Covid pandemic, Transit ran into financial difficulties and was unable to pay its rental income. This had a knock-on effect which made it impossible for Eldacc to pay the various facilities mentioned in this application.

[26] It was argued that this supervening event rendered performance in terms of the facility agreements impossible and such event was not foreseeable according to Mr Culverwell.

[27] This defence has no merit whatsoever. Quite correctly, in my view, counsel for Mr Culverwell did not pursue this defence with any vigour. It is certainly foreseeable that a tenant may run into financial difficulty and stop paying rental. This is a regular occurrence in business and a foreseeable risk.

[28] Inability to be able to repay a debt because of financial constraints does not in this case create a supervening impossibility, either partial or temporary. Mr Culverwell's defence is based on Eldacc's subjective impossibility to perform his obligations to repay the facilities.

[29] Objective impossibility is a requirement of the very stringent provisions of the common law doctrine of supervening impossibility of performance.

[30] In *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Limited*,<sup>1</sup> this court held that:

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

[31] This is because:

“Deteriorations of that nature are foreseeable in the business world at the time when the contract is concluded.”

[32] In conducting the business of rentals, it can hardly be argued by Mr Culverwell that it could not have foreseen breach by its major tenant.

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<sup>1</sup> 2000 (4) SA 191 (W) at para 9.3.1.



[33] Performance must be absolutely or objectively impossible. Mere personal incapacity to perform (or subjective impossibility) does not render performance impossible.<sup>2</sup> This is what Eldacc experienced, because its tenant defaulted. The fact that Eldacc does not have money to pay its dues, or that it may be uneconomical or unaffordable, does not amount to objective impossibility.

[34] In *Scoin Trading (Pty) Ltd v Bernstein NO*,<sup>3</sup> the SCA held that the law “*does not regard mere personal incapacity to perform as constituting impossibility*”.

[35] Moreover, Mr Culverwell cannot rely on this supervening impossibility of performance because it arose after Eldacc had fallen in *mora*.<sup>4</sup> It follows that reliance on the doctrines of initial and supervening impossibility is misplaced.

[36] The defence of a temporary impossibility also holds no water. It cannot be expected of the applicant to accept a reduced performance and await full performance which is certainly not guaranteed. Mr Culverwell failed to inform this court that Eldacc has been placed in liquidation and that payment from this entity would not be forthcoming.

[37] Further, it cannot be said that this application was premature as the applicant acted within its contractual terms to terminate the facility agreements and to call up the full outstanding amounts.

[38] Moreover, an apart from anything else, the contractual responsibility was on Mr Culverwell, and not Eldacc, to make payments to applicant in terms of the facility agreements. He failed to do so in breach of his obligations.

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<sup>2</sup> *Quinella Trading (Pty) Ltd v Minister of Rural Development* 2010 (4) SA 308 (LCC) at paras 27 - 29

<sup>3</sup> 2011 (2) SA 118 (SCA) at para 22

<sup>4</sup> *Tweedi v Park Travel Agency (Pty) Ltd t/a Park Tours* 1998 (4) SA 802 (W)

[39] This leaves for consideration the defence that the overdraft facility and credit card agreements terms and conditions were not signed.

[40] The court must distinguish between the facilities made available to Mr Culverwell personally and the credit card facilities made available to Mr Mokgoko in terms of which Mr Culverwell bound himself jointly and severally as surety and co-principal debtor with the principal debtor *in solidum* for the due and punctual payment of all amounts due on this card.

[41] The applicant provided Mr Culverwell with a pre-agreement statement which incorporated a quotation and loan/overdraft facility agreement. This document was provided to Mr Culverwell in terms of section 92 of the NCA.

[42] It is stipulated in this document as follows:

“The bank hereby provides to the borrower the following Pre-Agreement Statement and Quotation, which, once it has been accepted by the Borrower, will be the agreement between the Bank and the Borrower.”

[43] The terms are then set out in the written quotation, including the amounts payable and interest rate applicable.

[44] In Part G of this document, there is an acknowledgement in the following terms:

“I/We, the Borrower hereby acknowledges receipt of the aforementioned Pre-Agreement Statement and Quotation setting out the intermediate / large loan and overdraft facility terms and conditions.”

[45] This acknowledgement is signed by Mr Culverwell on 9 June 2015.

- [46] Below Mr Culverwell's signature appears an acceptance of the quotation wherein Mr Culverwell accepted the quotation and agreed to the terms and conditions attached to the documents. It was further stated that a copy of the terms and conditions has been handed to Mr Culverwell. He signed the acceptance.
- [47] Attached to the overdraft facility quotation / agreement are the terms and conditions which Mr Culverwell accepted was provided to him. The fact that the terms and conditions were not separately signed by Mr Culverwell do not render these terms and conditions not applicable as he signed for its receipt.
- [48] The same situation presented itself as far as the credit card agreement is concerned. The Pre-Agreement Statement and Quotation was provided which was later signed by Mr Culverwell which included the terms and conditions.
- [49] The court finds that Mr Culverwell duly signed the overdraft facility agreement and credit card facility agreement. These agreements were fully implemented and Mr Culverwell made use of the facilities to its full extent
- [50] The only unsigned document is the credit card agreement granted to Mr Mokgoko. The applicant averred that it could not find the original signed agreement and that it was either misplaced, lost or inadvertently destroyed. The question is whether the secondary evidence of the unsigned agreement could be relied upon for a finding, on a balance of probabilities, that Mr Mokgoko entered into this credit card agreement? It is not Mr Mokgoko who is held liable in terms of this credit card agreement, but Mr Culverwell in his capacity as surety.

[51] On 17 December 2015, Mr Culverwell signed as surety in terms of which he agreed that the applicant provided to him the attached Pre-Agreement Statement and Quotation which the applicant provided to Mr Mokgoko. Mr Culverwell through his signature acknowledged receipt of the Pre-Agreement Statement and Quotation, as well as the surety agreement. Mr Mokgoko used the credit card to the maximum of the credit provided.

[52] In such circumstances the court is of the view that it has been proven on a balance of probabilities that a signed copy of Mr Mokgoko's credit card agreement in fact existed and that the unsigned copy is in similar terms as the signed copy. This credit card facility agreement has been proven by the applicant.

[53] Mr Culverwell could not raise any valid defence against the balance certificate issued by the applicant showing the indebtedness in relation to the various facilities and, consequently, the applicant would be entitled to judgment according to the amounts mentioned therein.

[54] No defence was raised why the mortgaged property should not be declared specially executable. This property is not the primary residence of Mr Culverwell and the court is not going to set a reserve price.

[55] Accordingly, the applicant will be entitled to judgment in terms of the notice of motion.

### **The matter against Mrs Culverwell**

[56] In this application, the applicant seeks an order against Mr and Mrs Culverwell for judgment of a monetary amount which is due, owing and payable in respect

of credit facilities bearing account number 1100001999 (current account with overdraft facility) and a credit card account number 46447800402742 in the collective amount of R583,503.46.

[57] The same immovable property provided security for this indebtedness. Mr Culverwell stood surety for the repayment of the facilities by Mrs Culverwell. The deed of suretyship was properly signed by Mr Culverwell. The current account with the facility agreement and the credit card facility agreement were duly signed by Mrs Culverwell and she acknowledged receipt of the terms and conditions.

[58] Consequently, all agreements relied upon by the applicant have been duly signed by Mrs Culverwell. She signed accepting these agreements and for receipt of the terms and conditions. Her defence that the terms and conditions documents should have been separately signed should fail.

[59] The other defences raised by Mrs Culverwell are the same as the defences raised by Mr Culverwell and have no merit.

[60] No valid defence was raised against the certificate of balance issued by the applicant and the amounts contained therein should be accepted. Ms Culverwell, and Mr Culverwell as surety for the indebtedness of Mrs Culverwell, should be held liable in terms of the agreements signed.

[61] The immovable property over which a mortgage bond was registered should be declared specially executable.

[62] Consequently, the applicant would be entitled to an order in this matter in terms of the notice of motion.

**The order**

[63] In the two matters before this court, the court was provided with two draft orders. The court is satisfied that the orders should be made according to these orders, which will be attached to this judgment.

[64] The court makes the following orders in relation to the two applications before court:

The draft orders marked X1 and X2, respectively, in relation to case numbers 2022-059460 and 2022-059522, are hereby made orders of this court.

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**R STRYDOM**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, JOHANNESBURG**

Heard on: 19 March 2024  
Delivered on: 27 March 2024

Appearances:  
For the Applicant: Adv. F. Bezuidenhout  
Instructed by: Jay Mthobi Inc

For the Respondents: Adv. J. Hartman

Instructed by:

Pagel Schulenburg Inc