

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2022/23066

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

DATE

SIGNATURE

In the matter between:

RIORDAN AND CO (PTY) LTD

Applicant

and

VTT HOLDINGS (PTY) LTD

First Respondent

FRANCIS VUSIMUZI NDLOVU

Second Respondent

JUDGMENT

SENYATSI, J

Introductions

- [1] This is an application for money judgment sought in terms of credit and the suretyship agreements (“the agreements”) concluded by the applicant and the respondents. There is no denial of existence of the agreements.

Background

- [2] The common fact are that the First Respondent (“VTT”) is a fuel gel manufacturer. On 15 February 2019 VTT, represented by the Second Respondent (“Mr Ndlovu”), completed and presented a credit application to the Applicant (“Riordan”) which incorporated the terms of the agreement (“the agreement”). In terms of this agreement, VTT applied to purchase goods from Riordan from time to time on credit. Riordan accepted VTT’s application.
- [3] The material terms of the agreement as contained in clause 10 of the agreement are as follows:-

“ 10.1. Unless otherwise agreed in writing, payment terms are strictly 30 (thirty) days net from the date of statement date. The Customer may not withhold or delay payment to the Company for any reason.

10.2. If the Customer defaults in making payment of any amount that has become due, owing and payable to the Company, then the full balance outstanding (whether due or not) will immediately become due and payable to the Company without notice to the Customer.

10.3. If the Customer should fail to object to any item appearing on the Company's statement within 10 days, the account shall be deemed to be in order and correct in all respects.

10.4. All overdue sums shall bear interest at the maximum interest allowed under the limitation and disclosure of Finance Charges Act No. 73 of 1968 or any act replacing it from the date on which it became due."

- [4] Riordan avers that it supplied VTT with goods at VTT's request during the period of 12 December 2019 to 26 March 2020 (namely, until just before the Covid-19 pandemic lockdown) under account number 5291 to the value of R396,792.59 (which amount was due 1 May 2021), and during the period of 3 to 9 November 2021 under account number _5295 to the value of R185,857.10 (due 1 January 2022), totalling R582,649.69. Riordan opened two accounts for VTT to assist VTT to trade and settle the first account.
- [5] Riordan alleged that VTT failed to settle both of the above accounts within 30 days of the statement date in terms of the agreement and accordingly, so contends Riordan breached the agreement.
- [6] It is common course that on 5 May 2022 Riordan's attorneys accordingly demanded the amounts due from VTT. On 17 May 2022 Mr Ndlovu signed an acknowledgement of debt in respect of the amounts claimed herein, which *inter alia* set out the repayment terms for the debt, interest and costs. The acknowledgement also states that if Mr Ndlovu defaults on any of the repayments, the full amount is immediately due. VTT and/or Mr Ndlovu have failed to pay the amounts claimed to date and this has led to the present litigation.

- [7] The respondents do not deny the existence of the agreement or the amount claimed but raise the following three points *in limine*:
- (a) The Respondents aver that this Court does not have jurisdiction over the application as the agreement excludes this Court's jurisdiction.
 - (b) The Respondents aver that Covid-19 constitutes a force majeure within the definition of the agreement, that the concomitant lockdown prevented the Respondents from performing in terms of the agreement, and that this Court should resultantly dismiss this application.
 - (c) Finally, the Respondents aver that the Applicant recklessly provided them with credit just before lockdown which by inference amount to recklessness lending.

Issues for determination

- [8] The issues for determination are whether the defences of lack of jurisdiction; force majeure and the alleged reckless credit can be sustained under the circumstances.

The legal principles and reasons

Lack of jurisdiction

- [9] It is trite in our law that in appropriate circumstances, lack of jurisdiction may be raised as a defence *in limine*. The respondents state that the Court lacks jurisdiction to adjudicate the application because of Clause 16.2 which states that:

“Whatever the amount owing by the Customer (or any surety of the Customer) to the Company, the parties consent, in terms of section 45 of the Magistrate Courts Act 32 of 1944 to the jurisdiction of the Magistrate court having jurisdiction, for the determination of any action on proceedings otherwise beyond the jurisdiction of the court which may be brought by the Company against the Customer arising out of the transaction between the parties, it being recorded that the Company shall be entitled but not obliged, to bring any action in the said court.”

[10] The difficulty that the respondents have with this point in limine is that Riordan has a choice whether to bring the action in the Magistrate’s Court or this Court. This view is fortified by the use of the words “it being recorded that the Company shall be entitled but not obliged, to bring any action in the said court” which means that Riordan is within its right to bring the application to this Court. Accordingly, the lack of jurisdiction as a point *in limine* has no merit.

Force Majeure

[11] Another point to consider is the point raised about the lock down due to Covid-19 as a *Force Majeure*. The respondents base their point due to the Clause 18 of the agreement which states that:

“No failure by either party to perform in accordance with any provision of this agreement shall constitute a breach of this agreement if the failure arose as a result of *force majeure*, including acts of god, war, strike or changes in laws, regulations or ordinance or the like made by a competent authority or other circumstances outside the control of the parties.”

[12] The respondents contends that early 2020, the country was under lockdown due to Covid-19 and as a result they could not fulfil their payment

obligations because VTT could not trade. It is not clear from the opposing affidavit how long could VTT not trade and what industry was it under.

[13] It must be stated that under appropriate circumstances, impossibility of performance due to *force majeure* may be excused. In the matter of *Frajenron (Pty) Ltd v Metcash Trading Ltd and Others*¹, the following was stated by Vally J at para [13] about impossibility of performance (footnotes omitted):

“[13] Our law on the impossibility of performance evolved on a similar footing. As noted above, it commenced with the dictum (quoted in [10] above) in *Peters, Flamman & Co*. By that dictum the two factors or circumstances that would excuse the non-performance are *vis major* and *casus fortuitous*. As the law evolved it was clarified that not every *vis major* or *casus fortuitous* will excuse the non-performance. Facts specific to a case will determine whether the non-performance should be excused. These would include the nature, terms and context of the contract, the nature of the parties, their relationship and the nature of the impossibility relied upon. No party is allowed to rely on an impossibility caused by its own act or omission – there should be no fault or neglect on its part in the creation of the impossibility. The impossibility must be absolute and not relative and it must be applicable to everyone and not personal to the defendant, i.e. it must be objective.”

[14] The facts of a specific case determine whether the non-performance of a party should be excused. Only where the impossibility is absolute and not relative, i.e. in respect of everyone and not personal to the defendant, can it be found that a defendant is excused from his non-performance.²

¹ 2020 (3) SA 2010 (GJ)

² *Firststrand Auto Receivables (RF) Limited v Zungunde* (19875/2021) [2023] ZAGPPHC 60 (27 January 2023) para 22.

[15] It is trite in our law that if performance of a contract is impossible due to unforeseen events, not caused by the parties, parties are excused from performing in terms of the contract.³ In order to determine whether the contract should be discharged due to impossibility, the Court should, as held by Stratford J in *Hersman v Shapiro & Co*⁴,

“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.”

[16] In *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*,⁵ the Supreme Court of Appeal (per Scott JA) held as follows:

"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."

[17] Consequently, for the defence of impossibility of performance due to *force majeure* to succeed and lead to termination of a contract or extinguish an obligation, the impossibility must be absolute, or objective as opposed to relative or subjective⁶. This means, in principle, that-

³ Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd 2000 (4) SA 191 (W) at 198.

⁴ 1926 TPD 367.

⁵ 2008 (4) SA 111 (SCA).

⁶ Unlocked Properties 4 (Pty) Limited v A Commercial Properties CC(18549/2015) [2016] ZAGPJHC 373 (29 July 2016) citing with approval Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd footnote 3 above at 198.

“It must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract”⁷

[18] In *Scoin Trading (Pty) Ltd v Bernstein NO*⁸, Pillay JA, remarked as follows:

“The law does not regard mere personal incapability to perform as constituting impossibility [...]”. Similarly, an inability to pay money will ordinarily amount to nothing more than subjective impossibility.⁹

[19] A further example of mere relative or subjective impossibility is again found in *Unibank Savings and Loans*¹⁰, where it was held that: “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.”

[20] In the instant case, it is common fact that the contract made provision for impossibility of performance due to force majeure as defined therein. The analysis of the statement of account which is not disputed, reveals that as early as on 12 December 2019, the first respondent had purchased stock on credit and made over 13 purchases on credit between 13 January 2020 until 26 March 2020 and again during November 2021 outside of hard lock down. There is no evidence from the opposing affidavit on how the lockdown affected the first respondent’s inability to pay its debt in accordance with the agreement. In the Court’s view, the impossibility to pay is subjective and cannot pass the required objective test as no facts

⁷ LAWSA Vol 5 (1) First Reissue (Butterworths) 1994 at para 160; and *Wesbank, A Division Of Firststrand Bank Ltd v PSG Haulers CC* (38510/2020) [2022] ZAGPJHC 519.

⁸ 2011 (2) SA 118 (SCA) at para 22.

⁹ *Du Plessis v Du Plessis* 1970 (1) SA 683 (O); *Aida Uitenhage CC v Singapi* 1992 (4) SA 675 (E); and more generally, Van Huyssteen, Lubbe, and Reinecke *Contract: General Principles* 5 ed (Juta & Co Ltd, Cape Town) at 182-184.

¹⁰ Above footnote 5

are averred to show how the alleged force majeure affected its payment obligations.

- [21] The second respondent signed the Acknowledgment of Debt confirming the indebtedness and standing as surety for the first respondent. This not in dispute.

Reckless Lending

- [22] The respondents also raise the defence of reckless lending and aver that the credit was in violation of National Credit Act, No 34 of 2005(“NCA”). It is not clarified to this Court on what basis is NCA relied upon. What is not disputed is the fact that the maximum limit of R250 000 which is applicable for the purposes of the NCA has been exceeded because the quantum claimed which is not disputed is in excess of R500 000. Without the need to ventilate on what constitute reckless lending, the Court is satisfied that there is not factual or legal basis for the respondents to aver that the stock purchased on credit in terms of the agreement amounted to reckless lending. Consequently, the defence must fail.

- [23] The agreement provides for costs on the client and attorney scale.

Order

- [24] Having read the documents filed of record, heard counsel for the parties, and having considered the matter, judgment is granted in favour of the Applicant against the Respondents, jointly and severally, the one paying the other to be absolved, for:

24.1. Payment of the sum of R582,649.69;

24.2. Interest on the sum of R582,649.69 at a rate of 7% per annum from

31 December 2021 to date of final payment; and

24.4. Costs on an attorney and own client scale and collection commission.

ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 31 May 2024.

Appearances:

For the applicant: Adv K Lavine

Instructed by Orelowitz

For the respondents: Ms EZ Makula

Instructed by Makula Attorneys

Date of Hearing: 12 February 2024

Date of Judgment: 31 May 2024

