IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 22695/2021

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

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Date Signature

In the matter between:

SB GUARANTEE COMPANY (RF) PROPERTY LIMITED **APPLICANT**

and

LEBOGANG MOGALE **FIRST RESPONDENT**

NORMALI CECILIA MOGALE **SECOND RESPONDENT**

JUDGMENT

BASSON, J

Introduction

[1] This was an opposed summary judgment for payment of monies lent and advanced together with an application declaring the respondents' (Mr. and Mrs Mogale) primary residence specially executable in terms of Rule 46A. On 17 July 2023 this court granted summary judgment against the respondents and declared the property specially executable with a reserve price at R 2 800 000.00. The following are concise reasons for my order.

Terms of the loan agreement

[2] On 18 December 2018, the respondents concluded a home loan agreement (“the home loan agreement”) with Standard Bank (“the Bank”) towards the purchase of a house (“the property”). The applicant (SB Guarantee Company (RF) Property Limited) furnished the Bank with a guarantee guaranteeing payment of all sums due by the respondents in terms of the loan (“the guarantee”). The principal debt incurred by the respondents to the bank was for an amount of R 3,700,000.00. The loan amount was to be repaid by the respondents in monthly instalments of initially R 37 388.50 per month. A certificate signed by any of the Bank’s managers, whose appointment need not be proven, would, on its mere production be sufficient proof, unless the contrary could be proved, of any amount payable by the respondents, the rate of interest payable, and the date from which the interests needs to be calculated.

[3] The respondents executed an indemnity in favour of the applicant entitling the applicant to realise the mortgage bond registered against the respondents’ house (“the property”) and to recover all amounts owed to the applicant in the event of a breach of the terms of the home loan agreement. A mortgage bond was registered against the property in favour of the applicant wherein the respondents admitted to being indebted to the applicant for the indebtedness arising from the indemnity (“the bond”).

[4] In the event that the respondents were in default under the loan agreement, the Bank was entitled to give the respondents notice of such default and commence legal proceedings to enforce the loan agreement including the exercise of the bank’s rights in terms of any collateral held. In the event of such a default, all amounts

secured by the mortgage bond would become immediately due and payable in full upon demand.

The default

[5] The respondents first defaulted on their repayments in March 2019 when their debit order was reversed. In a letter dated 19 January 2020, the bank notified the respondents that they are in breach of the home loan agreement by failing to pay the monthly instalments since 19 October 2019. It is evident from the respondents' payment history, that they were already arrears already in 2019, well before the onset of the COVID-19 epidemic and subsequent lockdown. The relevance of this will be clarified later in the judgment. The respondents were notified that their breach resulted in the respondents being indebted to the applicant in the amount of R 3,730 354.49 under the indemnity.

[6] Throughout 2020 until 2022 most of the respondents' debit orders were reserved on the due date. In some months the respondents would make direct payments into the loan account within a day, often for amounts less than what was due in terms of the debit order. In other months they made no payments into the loan account after the debit order was reversed. Despite sporadic and partial payments towards their monthly instalments following reversals, they remained in arrears.

[7] The last payment towards the loan was on 1 April 2022 in the amount of R 25 000.00, along with an additional payment of R 30 000.00. However, the debit order was once again reversed on 19 April 2022 and no further payments were made after that date. At this point, the bond repayments were more than 120 days in arrears.

[8] From the papers, it appears that the applicant's attorneys have made several attempts to rehabilitate the respondents in order to avoid judgment being taken against them and to avoid a forced sale of the property. The applicant also referred the respondents to its Credit Customer Assist Department to explore alternative payment arrangements. They were also presented with the opportunity to join the applicant's Easysell Program, but they declined this option.

[9] The applicant argued that, given the substantial arrears and the outstanding balance owed in terms of the loan, executing against the property was the only viable option.

[10] Default notices were sent to the respondents in terms of section 129 read with section 130 of the National Credit Act ("the NCA"). When no response was received to the default notices, the applicant proceeded with instituting action out of this court.

[11] The summons was personally served on the second respondent on 14 March 2021. On the same day, the summons was also served on the second respondent who accepted service on behalf of the first respondent in his temporary absence. The respondents served a Notice of Intention to Oppose on 17 March 2022 and on 19 April 2022 the respondents served their plea and special plea.

[12] When the section 129 notice (6 April 2021) was dispatched, the respondents were in arrears in the amount of R 105,909.51. (If the R 40 000.00 payment made on 17 February 2021 is taken into account, the arrears as of February 2021 were approximately R 65 909.51.) As of 11 May 2022, according to the most recent Certificate of Balance, the respondents were in the sum of R 215 470.95.

Point in *limine*

[13] The respondents have raised a point *in limine* contending that the applicant had withdrawn its action against them, based on an email attached to the respondents' papers. The applicant refutes this claim. After reviewing the papers and particularly the email relied upon by the respondents to support their contention, I can find no proof that the applicant's claim has been withdrawn. Crucially, the applicant has not formally served the respondent with a Notice of Withdrawal of the action via email or any other means. Therefore, the claim against the respondents remains alive.

The respondents' defence

[14] The respondents assert that they are not in breach of the Loan Agreement and dispute the accuracy of the arrears amount. However, these defences lack

merit. According to the terms of the Mortgage Bond, the respondents' indebtedness can be determined and substantiated by a certificate signed by any manager or administrator of the applicant. Unless the respondents can demonstrate the inaccuracy of the facts, the certificate will be sufficient for establishing the respondents' indebtedness.

[15] The high-watermark of the respondents' defence seems to be their reliance on the National State of Disaster declared in response to the COVID-19 pandemic. They argue that this constituted a "force majeure and/or supervening possibility". However, it is necessary to note that, as previously mentioned, the respondents defaulted in early 2019 well before the declaration of the National State of Disaster. Moreover, the payment history throughout 2019 up until 2022 well after the declaration of the National State of Disaster, shows a pattern of irregular payments and reversals.

Bona fide defence?

[16] In terms of Rule 32(2)(b) of the Uniform Rules of Court, a plaintiff in summary judgment proceedings, shall in an affidavit 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. In terms of Rule 32(3)(b) of the Rules, the defendant resisting summary judgment must set out in his affidavit facts which if proved at trial, shall disclose fully the nature and grounds of the defence and the material facts relied upon.

[17] The principles governing summary judgments are trite and need not be restated. Suffice to refer to the well-known judgment in *Maharaj v Barclays National Bank Ltd*[1] where the court held as follows regarding the discretion of the court:

> "Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a *bona fide* defence to the claim. Where the defence is based upon facts,

[1] 1976 (1) SA 418 A at 426A-C.

> in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: *(a)* whether the defendant has 'fully' disclosed the nature and grounds of his defence and the material facts upon which it is founded, and *(b)* whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both *bona fide* and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be."

Regarding what is meant by the words "fully" disclose, the court in *Breitenbach v Fiat SA (Edms) Bpk*[2] explained as follows:

> "I respectfully agree, subject to one addition, with the suggestion by MILLER, J., in *Shepstone* v. *Shepstone*, 1974 (2) SA 462 (N) at pp. 466-467, that the word 'fully' should not be given its literal meaning in Rule 32 (3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the Court to consider in relation to the requirement of *bona fides*."

Impossibility and force majeure

[18] Before turning to the defence of impossibility of performance/force majeure, it must be noted that neither of the parties addressed the legal position regarding a defence of impossibility of perforce in their heads of argument. Whilst the respondent as a layperson might be excused for this omission, one would have expected the applicant's counsel to have addressed the issue. However, with that said, the

[2] 1976 (2) SA 226 (T) AT 228 D-E.

respondents have raised the issue as a defence and consequently this court must give due consideration to this defence.

[19] The point of departure is the home loan Where the contract is silent, the common law principles relating to impossibility of performance must be considered.

[13] The court in *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and another; Nyoni v Mezepoli Nicolway (Pty) Ltd and another*[3], had occasion to consider the role of *force majeur* where the contract does not provide for such a clause:

> "[36] 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 *MV Snow Crystal*, the Supreme Court of Appeal (per Scott JA) said as follows:
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> > '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.'
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> [37] In *Unlocked Properties 4 (Pty) Ltd v A Commercial Properties CC*, the court, citing *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd*, stated as follows:
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> > 'The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make

[3] (2021) 42 ILJ 600 (GJ).

performance does not terminate the contract or extinguish the obligation.'

[38] In *Unibank* 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] The court also drew a distinction between "economic difficulty" and "force majeure" emphasising that economic hardship is not a *force majeure* event as it does not render performance objectively and totally impossible:

"Trading may be more burdensome or economically onerous, but economic hardship is not categorised as being a force majeure event. It does not render performance objectively and totally impossible.

[21] The personal incapability of a person not to be able to perform is thus not regarded as an impossibility. [4]

[22] Returning to the facts in the present matter. The respondents contend that their business was adversely affected by the COVID-19 lockdown. However, despite this claim, the payment history of the respondents reveals two critical points. Firstly, their history of non-payment and/or sporadic payment preceded the COVID-19 pandemic. Secondly, whilst it is acknowledged that many South Africans had experienced financial difficulties as a result of the hard lockdown, it cannot be argued that COVID-19 made it objectively and absolutely impossible for them to meet their obligations. And, as the Court pointed out in *Matshazi*[5]*:* "Performance is not excused in all cases of force majeure". It is evident from their payment history that the respondents were able to make sporadic and substantial payments into their bond account, often within a day of the debit order being reversed. For instance[6], in March 2020 the debit order was reversed, yet on 13 March 2020 the respondents made a direct payment of R 40 000.00. On 15 April 2020 the debit order was reversed but on

[4] *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA) ad para [22].
[5] *Supra* n ….
[6] I do not purport to record the entire payment history. This is merely a few examples.

16 March 2020 a short payment of R 20 000.00 was made. On 15 August 2020, the debit order was reversed yet on the following day a direct payment of R 35 000.00 was made. Another example is 15 September 2020 when two direct payments were made after the reversal. One for R 20 000.00 and the other for R 35 000.00. On 16 November 2020, the debit order was reversed yet shortly thereafter two payments were made of R 20 000.00 each were made. The payment history in 2021 follows a similar trend. The last direct payments of R 25 000.00 and R 30 000.00 were made early in April 2022. When the debit order was again reversed later in April 2022, no further payments were made. At that stage, the account was 120 days in arrears in the amount of R 215 460.95.

[23] Therefore, taking into consideration their payment history I am not persuaded, that it was an absolute impossibility for the respondents to meet their obligations under the agreement with the Bank. Consequently, the respondents have failed to raise any *bona fide* and triable defence. Given these circumstances, the application for summary judgment stands to succeed.

[24] As for the question of whether the property should be declared specially executabile, I have taken into account the fact that this is a family home. Nevertheless, I am not persuaded that the order will render the respondents homeless. Their ability to make substantial payments, albeit falling short of the required amount of R 37 388.50 per month demonstratives their ability to secure alternative housing. At the very least, they will be able to enter into a lease agreement for an alternative house. The respondents' arrears on their loan is substantial. They have been afforded the opportunity to make of the EasyShell option and other options to bring the arrears up to date. They have failed to make use of these options. The applicant, on the other hand, has no other option to mitigate their own losses. Considering the valuation report of the valuator, which is R 3 800 000.00, the realisable value of a forced sell at R 2 800 000.00, the outstanding amount on the bond and the outstanding rates and taxes as at 17 May 2017 totalling R 18 068.79, I deem it far to set a reserved price of R 2 800 000.00.

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JUDGE A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for the reasons is deemed to be ……. October 2023.

Appearances:

For the applicant Adv Tebogo Mogale

Instructed by Hannes Gouws & Partners Inc

For the respondents In person