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

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA

Case No.: 337/22

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

_____ **Date:** _____

In the matter between:

NEDBANK LIMITED **Plaintiff**

and

THOMAS JOHANNES MATHEBULA **Defendant**

Case No.:

384/22

In the matter between:

NEDBANK LIMITED **Plaintiff**

and

THOMAS JOHANNES MATHEBULA **Defendant**

"This judgment was prepared and authored by the Judge whose name is reflected herein, duly signed, and is submitted electronically to the Parties/their legal representatives by email. This judgment is further uploaded to the electronic file of this matter on Case Lines by the Judge or his Secretary. The date of this judgment is deemed to be 12 June 2024."

JUDGMENT

MTEMBU AJ

Introduction

"Regardless of the view that this Court may take of the defence raised by the respondent, the catastrophic effect of the Covid-19 pandemic on lives and livelihoods worldwide is indisputable."

[1] The above remark was enunciated by **Molemela JA** in Slabbert N O & 3 Others v Ma-Afrika Hotels t/a Rivierbos Guest House (772/2021) [2022] ZASCA 152 (4 November 2022), at para 21. I am starting with this remark precisely because the defendant's defence raised in this matter is primarily based on lockdown restrictions, as he says, it prevented him from performing his contractual obligations for the period of the 'hard lockdown' 26 March - 30 April 2020 and beyond.

[2] The plaintiff, in two actions instituted against the defendant on what appears to be the same causes of action, has applied for summary judgments. The parties agreed that these applications be heard

simultaneously. The claim in case number 337/22 is almost identical to the claim in case number 384/22. The affidavit in support of the application for summary judgment is substantially identical in its wording to the one in case number 384/22. It is not surprising, given the similarity of the respective causes of action and the fact that the parties in both actions are represented by the same attorneys. It was, therefore, prudent that these matters be consolidated in order to reduce the burden of determining two applications which are identical in terms of the cause of action and the defence thereto.

[3] The plaintiff is a registered credit provider and duly registered as such in terms of the National Credit Act 34 of 2005 ("the NCA or the Act"). The plaintiff and the defendant, in separate transactions, entered into Instalment Sale Agreements ("Agreement") on 19 September 2018.

Summary of the facts

[4] Briefly, the facts underscoring the present application are that the plaintiff has instituted an action against the defendant wherein the plaintiff relies on a breach by the defendant of the aforesaid Agreement and claims, *inter alia,* the relief, namely: confirmation of termination of the agreement entered into between the parties; return of the motor vehicle to the plaintiff forthwith; forfeiture of all amounts already paid by the defendant in terms of the Agreement; the plaintiff be authorised to sell the vehicle in execution; the plaintiff be given leave to approach the court for an order enforcing the remaining obligations of the defendant, if the vehicle has been attached and sold, and the net proceeds of the sale are insufficient to discharge all of the defendant's financial obligations under the Agreement; payment of attorney and client costs; and further and or alternative relief.

[5] In each case, the plaintiff, Nedbank Limited, entered into a written Agreement with the defendant. In terms of each Agreement, the plaintiff

would supply and deliver the motor vehicle. The defendant, in return, would pay a monthly instalment for each motor vehicle.

[6] The defendant, in each transaction, allegedly defaulted on his obligation to pay the monthly instalment. The plaintiff alleges that it has validly cancelled each of these agreements, and the plaintiff seeks to repossess each motor vehicle.

[7] The conclusion of the Agreement in its terms, delivery of the vehicles to the defendant and the defendant's breach of the said agreement by its failure to make regular monthly payments are not disputed. It was further not disputed that the plaintiff reserved ownership of the two motor vehicles until the defendant discharged his indebtedness to the plaintiff.

[8] The defendant did not dispute that he was in arrears at the time nor did he contend that the plaintiff was not entitled to cancel the Agreement in his affidavit.

[9] The only defence raised by the defendant was that as a result of the national lockdown in terms of the Disaster Management Act 57 of 2002, he was unable to trade and there was *vis major* or a supervening impossibility of performance and as such, performance under the contract was excused.

[10] Apparently, the defendant used the motor vehicles for business purposes. In support of his defence, the defendant contended that when the country was on hard lockdown, the taxi industry was not allowed to work for a specific period, and even after the easing of some restrictions, the taxis were allowed to carry only 70% of the normal load capacity.

Legal principles

[11] There is a plethora of authorities regarding summary judgments, and they require no exclusive exposition. The issue to be decided is whether the respondent has a *bona fide* defence.

[12] Uniform Rule 32 (3) requires that the court be satisfied that the defendant's defence, as stated in his affidavit, constitutes a bona fide defence to the plaintiff's claim. In deciding whether the defendant has set out a bona fide defence, all the court enquires is whether, on the facts so disclosed, the defendant has disclosed the nature and grounds of her/his defence; and 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 bona fide and good in law. See *Maharaj v Barclays National Bank Ltd*[1]*.*

[13] Rule 32(3)(b) expects defendants to satisfy the court by disclosing their *bona fide* defence to the action. The defendant has to disclose fully the nature and grounds of the defence and the material facts relied upon therefor.

[14] Uniform Rule 32 was amended with effect from 1 July 2019. Under the amended Rule, a plaintiff must wait for the defendant to deliver a plea before a plaintiff may institute summary judgment proceedings. Therefore, a Judge cannot entertain a summary judgment application in terms of the said rule without a plea having been filed. There have been no material changes. The requirements for how a defendant may successfully oppose summary judgment remain the same.

[15] The issue to be determined is whether the defendant, indeed, has disclosed a *bona fide* defence. During the hearing, the preliminary points raised by the defendant were abandoned.

Analysis of the defendant's defence

[1] 1976 (1) SA 418 (A) at 425G–426E.

[16] As already stated above, to avoid summary judgment a defendant wishing to satisfy the court by affidavit that he has a *bona fide* defence to the action, shall "disclose" fully the nature and grounds of the defence and the material facts relied upon therefor. (Rule 32(3)(b)). The test of *bona fide* means that the defendant's allegations ought not to be inherently and seriously unconvincing. See Breitenbach v Fiat SA (Edms) Bpk[2]

[17] The defendant's defence is that lockdown restriction constitutes a vis major or supervening impossibility, and thus, he is excused from his obligations. As a general rule, the impossibility of performance brought about by vis major or casus fortuitus will excuse the performance of a contract.[3] 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.[4] The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation.[5]

[18] The instalment sale agreement does not make provision for *force majeure*. Under these circumstances, the defendant is thus constrained to illustrate compliance with the common law doctrine of supervening impossibility of performance[6].

[19] Dippenaar J in Wesbank,a Division of Firstrand Bank Limited v PSG Haulers CC (38511/2020) [2022] ZAGPJHC 603 (25 August 2022) an unreported case, stated that:

[2] 1976(2) SA 226 (T) at 228B.
[3] *Transnet Ltd v The MV Snow Crystal* (250/07) [2008] ZASCA 27 (27 March 2008) ; 2008 (4) SA 111 at para 28
[4] Ibid at para 28
[5] *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and Another; Nyoni v Mezepoli Nicolway (Pty) Ltd and Another; Moto v Plaka Eastgate Restaurant and Another; Mohsen and Another v Brand Kitchen Hospitality (Pty) Ltd and Another (2020/10556; 2020/10555; 2020/10955; 2020/10956;) [2020] ZAGPJHC 136; (2021) 42 ILJ 600 (GJ) (3 June 2020) at para 37*
[6] *Wesbank,a Division of Firstrand Bank Limited v PSG Haulers CC (38511/2020) [2022] ZAGPJHC 603 (25 August 2022) an reported case, at para 17*

"[14] As held in Glencore Grain Africa (Pty) Ltd v Du Plessis NO and Others, 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".

[20] Dippenaar J further stated that:

"the change in the defendant's financial position is not, as required by law, absolute. The obligation to render performance even during lockdown can, in general, be performed by parties in the position of the defendant. The defendant's personal incapability does not render the instalment sale agreement void"[7]*.*

[21] In Freestone Property Investment (Pty) Ltd vs Remake Consultants CC and Another[8], it was held that:

"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 their respective obligations for the period of the '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 endure for the entire period corresponding to the first defendant's non-payment of rentals. [My Emphasis]

[7]Para 21; See also FirstRand Auto Receivables (RF) limited v Andrew Zungunde under case no: 19875/2021, delivered on 27 January 2023, an unreported case which followed the salutary approach as enunciated by Dippernaar in Wesbank, where Kilmartin AJ stated that:
"[25] As it was not objectively impossible for all persons to pay their vehicle instalments during Lockdown, I find that any impossibility is relative to the Defendant because of his personal situation. Therefore, the Defendant cannot rely on the common law doctrine of supervening impossibility of performance. I therefore find that there is no merit in the second defence."
[8] 2021 (6) SA 470 (GJ), at para 27

[22] The declaration of the state of disaster and the continued effect of the Covid 19 pandemic may have resulted in a dramatic decline in custom but does not afford a defence.[9]

[23] The court in *Johannesburg Consolidated Investment Co v Mendelsohn & Bruce Limited* 1903 TH 286 also rejected a claim for remission of rental because of a decline in custom arising from the outbreak of war, which rendered it no longer profitable to operate a stationer's shop. The court conjectured the following particularly relevant analogy at 295, 296:

"*The consequence of holding that the defendants in this case are entitled to a remission of rent appears to me to be far-reaching. It would involve this, that on the happening of any event amounting to vis major, which caused a temporary diminution of the population of a town, every tradesman who could show that he had sustained a temporary loss or a considerable diminution of profit might be entitled to a remission of rent. Suppose, for instance, that in consequence of the outbreak of an epidemic disease a large proportion of the inhabitants fled, with the result that owing to the absence of their usual customers the tradesmen temporarily were carrying on business at a loss, and closed their shops, it would come as an unpleasant surprise to the lessors to find that the whole of the loss is to fall upon them, and that they occupy in effect the position of insurers of their lessees' custom."* [My Emphasis]

[24] The Supreme Court of Appeal in *Slabbert N O & 3 Others v Ma-Afrika Hotels t/a Rivierbos Guest House* (772/2021) [2022] ZASCA 152 (04 November 2022) left the issue open whether the restrictive regulations applicable during the period 26 March 2020 to 20 September 2020 constituted a supervening impossibility of performance.[10] However, it

[9] Ibid at para 29
[10] See para 25

held that the period after 20 September 2020 cannot be considered for purposes of supervening impossibility since there was no government-imposed trade ban at that time. Even if it is accepted that the Covid-19 regulations that prevented or restricted trade were the cause of the default in rental payment, there is no justification for such default beyond 20 September 2020, regardless of the diminished commercial ability that may have resulted from the Covid-19 pandemic. Thus, the doctrine of impossibility of performance could not be triggered beyond 20 September 2020.[11] In a judgement of this division, decided before the SCA decision in ***Slabbert,*** Gilbert AJ in ***Freestone***[12] held that, "whatever the defence the first defendant may have that it was excused from paying rentals for the period of the 'hard lockdown', that impossibility of performance does not relate to the full period for which it did not make payment".

[25] What can be gleaned from the authorities referred to above is that it is generally accepted by our courts that even if the defendant were to succeed in its defence of the supervening impossibility of performance, it would still not be relieved of its contractual obligations during the remaining period of the Covid-19 restrictions after the hard lockdown. That impossibility of performance does not relate to the full period for which it did not make payment.

[26] The defendant remained in possession of the motor vehicles throughout the lockdown period up to this moment. It was not disputed that the plaintiff reserved ownership of the two motor vehicles until the defendant discharged its indebtedness to the plaintiff. Neither did the defendant dispute that he was in arrears at the time, nor did he contend that the plaintiff was not entitled to cancel the agreement in his affidavit. Even if I were to accept that the defendant was indeed operating the motor vehicles for business purposes and thus Covid-19 caused an impossibility to

[11] Ibid at para 25; the issue in this case was in respect of the operation of a guest lodge during lockdown restrictions. Guest houses were only permitted to operate during alert level 2 which came into effect from 18 August 2020 to 20 September 2020. It was on this basis that the court stated that impossibility could not be triggered beyond 20 September 2020.

[12] 2021 (6) SA 470 (GJ), at para 32

honour his contractual obligations due to a total shutdown in the economy, such impossibility of performance cannot extend beyond 31 April 2020 since the lockdown restrictions were progressively eased. During this period, public transport was permitted to operate, with limitations on the number of passengers and stringent hygiene requirements, including that all passengers should wear face masks. I must also highlight, though, that the impossibility of performance is not one-sided. It must not be possible for anyone to make that performance. If the impossibility is peculiar to a peculiar contracting party, the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract.[13]

[27] For the authorities referred to above, I see no reason why I should not grant summary judgment.

[28] At best, for the defendant, given the stringent and extraordinary nature of summary judgment proceedings, the issue of arrear payments is the one in which I can refuse summary judgment. For purposes of summary judgment, an arguable defence is in respect of at least a portion of the arrears. I decline to descend into the arena of prospects of success. This, in my view, does not fall within the purview of the summary judgment court. It is trite that should there be, on the facts presented by the defendant, an arguable defence, he has passed the test on paper and must be granted leave to defend. That defence will then be properly adjudicated upon at a trial in due course. In such an instance, it cannot be contended that the defence is without merit. The court is then required to refuse summary

[13] Matshazi v Mezepoli Melrose Arch (Pty) Ltd and Another; Nyoni v Mezepoli Nicolway (Pty) Ltd and Another; Moto v Plaka Eastgate Restaurant and Another; Mohsen and Another v Brand Kitchen Hospitality (Pty) Ltd and Another, supra, at para 37; See also Freestone Property Investment (Pty) Ltd vs Remake Consultants CC and Another, supra, at para 12, where it was held that:
"A consideration of a defence of supervening impossibility of performance in the context of the regulations passed pursuant to the state of disaster should be approached from the perspective of its effect on the performance by the plaintiff of its obligations as lessor and on the performance by the first defendant's obligations as lessee, rather than approached solely from the perspective of whether the first defendant was able to perform its side of the bargain, particularly to pay rentals."

judgment even though it might consider that the defence will probably not succeed at trial[14].

Costs

[29] What remains is the question of costs. The general rule 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. In this matter, there is nothing that warrants deviation from the general rule. Although the defendant is granted leave to defend at least a portion of arrear payments, in my view, the plaintiff was a successful party.

Order

[30] Consequently, Summary judgment is granted, and an order is made as follows::

(a) The credit agreements are cancelled;

(b) The Defendant is ordered to return the 2018 TOYOTA QUANTUM 2.7 SESFIKILE 16s; with engine number […] and chassis number […] vehicle to the Plaintiff;

(c) The Defendant is ordered to return the 2018 TOYOTA QUANTUM 2.7 SESFIKILE 16s; with engine number […] and chassis number […] vehicle to the Plaintiff;

(d) The damages component of the Plaintiff's claims are postponed *sine die,* and the Defendant is granted leave to defend a portion of the Plaintiff's claims, being the arrear payments during the period of the hard lockdown;

[14] *Eisenberg's v OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O) 1055; *Arend v Astra Furnishers (Pty) Ltd* 1974 (1) SA 298 (C) 316C; see also Cohen N.O and Others v D (368/2022) [2023] ZASCA 56 (20 April 2023) at para 29

(e) The Plaintiff is granted leave to return to the Court on the same papers, duly supplemented, to obtain judgment in respect of damages suffered by the Plaintiff once the vehicles have been sold; and

(f) The Defendant is ordered to pay the costs of suit.

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A.M. MTEMBU AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Date of hearing: 24 April 2024

Date of judgment: 12 June 2024

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