IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: ***NO*** (2) OF INTEREST TO OTHER JUDGES: ***NO*** (3) REVISED: Date: ***10th NOVEMBER 2017*** Signature: ______________

CASE NO: 2017/23508

In the matter between:

CHANGING TIDES 17 (PTY) LIMITED N O Plaintiff

and

MWELI: VUSUMUZI PETRUS First Defendant

MWELI: FELICITY LETTA PHUMELELE Second Defendant

JUDGMENT

<u>ADAMS J</u>:

[1]. This is an application by the plaintiff for summary judgment against the first and second defendants. The defendants are opposing the application on the basis that they had been induced to enter into the 'loan agreement' with the plaintiff by misrepresentations made by the plaintiff and / or its agents. The misrepresentations consisted of statements made on behalf of the plaintiff to the effect that the immovable property, which they intended purchasing with the amount borrowed, was in 'good condition', when in fact and in truth it had a number of serious defects. Had they known the true state of affairs, so the defendants allege, they would not have entered into the loan agreement. The defence raised by the defendants in their affidavits resisting summary judgment is therefore primarily based on grounds which, if proven by them, would entitle them to avoid the contract for the purchase and sale of the immovable property in question.

[2]. The defendants however do not dispute the fact that the plaintiff is entitled to claim payment of the loan amount from them in that the capital amount of the loan agreement had been advanced to them. But for the defence of fraudulent misrepresentation raised by the defendants, they seem to accept their indebtedness to the plaintiff and the fact that they are in breach of the agreement between them and the plaintiff, which entitled the plaintiff to claim from them the relief claimed in this application for summary judgment. In other words, the defendants in my view do not take issue with the fact that the amount had been advanced to them and that they are at present in arrears with the payment of their monthly repayment instalments. This may be somewhat of an oversimplification of the matter, but in a nutshell this is the case for the defendants in this application for summary judgment.

[3]. Reduced to the essentials and with a little simplification in order to assist the narrative, it appears from the particulars of plaintiff's claim that on the 20th May 2013 the first and the second defendants ('the Borrowers') entered into a

loan agreement with Blue Banner Securitisation Vehicle RC1 (Pty) Limited (‘the Lender’), pursuant to which the capital amount of R1 400 000 was lent and advanced to the defendants. The plaintiff undertook to indemnify the lender against default by the defendants in terms of their aforementioned loan agreement obligations. In consideration for the provision by the plaintiff of such guarantee the defendants undertook in terms of a separate contract, described as the 'Indemnity', to accept liability to the plaintiff, as a principal obligation, in the full amount outstanding in terms of the loan in the event of the lender advising the plaintiff that the defendants were in default of the repayment obligations under the loan and having called upon the plaintiff to stand good in terms of the aforementioned guarantee. At the date of the signing of the loan agreement by the defendants on the 17th May 2013 the total indebtedness of the defendants to the lender, inclusive of the capital sum, interest payable over the period of the life of the loan and other administration charges, was an amount of R3 070 964.33, payable in 240 monthly instalments of R12 795.68 per month.

[4]. To afford security for the performance of their contingent obligation to the plaintiff under the aforementioned 'Indemnity' should the need arise, the defendants mortgaged in favour of the plaintiff their immovable property, being Erf […] Benoni Extension 10 Township, which the defendants had purchased from a party unrelated and unconnected to either the lender or the plaintiff. The loan amount of R1 400 000 was used to finance the purchase price of the property from the third party. It requires emphasising that, but for the fact that they were involved in the financing of the purchase price, the lender and the plaintiff had no involvement whatsoever in the purchase of the property by the defendants.

[5]. The defendants are alleged to have fallen into arrears with their repayments and the consequent action instituted against them by the plaintiff is premised on the enforcement of the 'Indemnity' agreement and the attendant

mortgage contract. As required, the plaintiff gave notice to the defendants in terms of s 129(1) of the National Credit Act, 34 of 2005 ('the NCA').

[6]. The defendants deny that they are indebted to the plaintiff in the amount claimed or in any amount at all. As indicated above, in their affidavits resisting summary judgment, the defendants allege that they are entitled to avoid the loan agreement on the basis that they were induced by fraudulent representations by the plaintiff and its agents to enter into the said agreement. The main and most obvious difficulty with this contention on behalf of the defendants is that the claim against them by the plaintiff is based on an 'Indemnity' agreement which is separate and distinct from the loan agreement, and which stands completely on its own and which formed the basis for the registration of the Indemnity Bond by the defendants in favour of the plaintiff over the immovable property of the defendants. There is therefore no legal basis on which the defendants can rely on a misrepresentation which clearly relates to the purchase agreement, which may or may not be causally connected to the home loan agreement, in its attempt to avoid the Indemnity agreement. In any event, the Indemnity agreement concluded between the plaintiff and the defendants expressly provides as follows:-

> 'A party may not rely on any representation which allegedly induced that party to enter into this Common Term Agreement and / or any Guarantee unless the representation is recorded in this Common Terms Agreement or the relevant Guarantee.'

[7]. This, in my judgment, puts paid to the defendants' defence of fraudulent misrepresentation. The point is that the defendants, in my view, obfuscate the duties and legal obligations of the seller of the property with the legal duties of the plaintiff, a guarantor, who has no connection to the sale agreement. The defendants' cause of action is ill – advised and not sustainable.

[8]. Additionally, Mr Pullinger, who appeared on behalf of the plaintiff, argued that the defendants in their affidavits resisting summary judgment have not alleged the material elements necessary to sustain a defence based on fraudulent misrepresentation. I find myself in agreement with these submissions. The defendants complained that the Valuer appointed by the plaintiff and its agents assured them that the immovable property was free of defects at the time of purchase. This was factually incorrect, so it was claimed by the defendants. Therefore, so the argument is further developed by the defendants, during June 2016 they stopped payments towards the bond as, according to them, the total instalments paid up to that point in time was sufficient and presumably a fair price for what they purchased. This again demonstrates how ill – advised the defence of the defendants is. Importantly, this allegation seems to suggest that the defendants are claiming damages based on the misrepresentations, and that they are not claiming an avoidance of the contract on the basis of a material misrepresentation. This brings me back to the submission by Mr Pullinger that the defendants have failed to tender restitution of whatever they received pursuant to the agreement which they are now endeavouring to avoid, that being the 'Indemnity' agreement. At the very least, the defendants ought to have tendered return of the loan amount, that being R1 400 000. They have not tendered *restitutio in integrum*, and for that reason alone their defence falls flat.

[9]. In terms of the Indemnity, the amounts at any time owing by the defendants to the plaintiff (including any interest and the rate at which interest is to be calculated, as well as further charges) and the fact that such indebtedness is due and payable may be determined and proved by a certificate signed by any manager, trustee or account of the Trust. Such certificate shall be accepted as proof of the facts stated therein, unless the mortgagor is able to prove the facts as incorrect.

[10]. In this application for summary judgment, the plaintiff's claim is for payment of an amount of R1 406 151.11, together with interest thereon at the

rate of 11.30% per annum, an order declaring the defendants' immovable property specially executable and cost of suit. The capital amount claimed is supported by a *'Certificate of Balance',* as provided for in the mortgage bond and referred to supra. According to the particulars of plaintiff's claim, as verified by the affidavit in support of summary judgment, the arrears on the defendants' bond account on the 1st of March 2017 amounted in total to R146 865.24. None of the aforegoing issues are dealt with in any way by the defendants in their affidavits resisting summary judgment. Applying some basic arithmetic and assuming that the defendant made regular and timeous payment of the monthly instalments up to June 2016, when they decided to stop making payment, they had paid to date the total amount of R12 795.68 X 12 (months per year) X 4 (years since date of agreement on 20 May 2013) = R614 192.64, which means that the defendants still owe on the capital amount alone a balance of approximately R600 000.

[11]. As indicated above, the defendants, in their affidavits resisting summary judgment, take issue with the plaintiff in relation only to cancellation and avoidance *ab intio* of the contractual relationship between the parties. It is the case of the defendants that they are legally entitled to avoid the agreement between them and the plaintiff, which means that the plaintiff is not entitled to summary judgment. That is the sum total of the facts alleged by the defendants in support of their denial that they owe to the plaintiff the amount claimed. The clear and unequivocal claim by the plaintiff in the application for summary judgment is that the defendants owe it an amount of R1 406 151.11 in respect of the Indemnity agreement. Plaintiff also stated unequivocally that the defendants are in breach of the loan agreement with the Lender in that they are in arrears with their monthly payments to the tune of R146 865.24, which in turn entitles it (the plaintiff) to call up the loan in full as provided for in the Indemnity Mortgage Bond, which contained an acceleration clause.

[12]. The question then is whether, if regard is had to the aforegoing, whether the plaintiff is entitled to summary judgment.

[13]. Uniform Rule of Court 32(3)(b) requires the defendants to satisfy the court by affidavit that they have a *bona fide* defence to the plaintiff's claim. *'Satisfy'* does not mean *'prove'*. What the rule requires is that the defendants set out in their affidavit facts which, if proved at the trial, will constitute an answer to the plaintiff's claim. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in its 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.

[14]. All that the court enquires, in deciding whether the defendant has set out a *bona fide* defence, is: (a) whether the defendant has disclosed the nature and grounds of his defence; 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 *bona fide* and good in law.

[15]. In terms of subrule (5): *'The court may enter summary judgment.'* The word *'may'* in this subrule confers a discretion on the court, so that even if the defendant's affidavit does not measure up fully to the requirements of subrule (3)(b), the court may nevertheless refuse to grant summary judgment if it thinks fit. The discretion, clearly, is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he ought to have that relief.

[16]. Applying these principles *in casu*, I am satisfied that in their resisting affidavits the defendants have not demonstrated a *bona fide* defence on the merits of the plaintiff's claim. The plaintiff is therefore entitled to summary judgment.

Rule 46(1)(a) Considerations

[17]. Uniform Rule 46(1)(a) provides that no writ of execution against the immovable property of any judgment debtor shall issue until —

> 'a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or
>
> such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property'.

[18]. The effect of the proviso is that only a court is competent to declare any or all of a judgment debtor's residential immovable property specially executable under the provisions of rule 46(1)(a)(ii).

[19]. If such residential property consists of the judgment debtor's primary residence, the court has, in terms of the proviso to rule 46(1)(a)(ii), to consider <u>all relevant circumstances</u> before ordering execution against such property. In deciding whether or not to declare the primary residence of a judgment debtor who is a natural person specially executable, the court must consider all relevant circumstances as contemplated in the sub-rule. This means *'legally relevant circumstances'*.

[20]. In *Jaftha v Schoeman; Van Rooyen v Stoltz*, 2005 (2) SA 140 (CC), the Constitutional Court gave the following examples of such circumstances:

(a) Whether the rules of court have been complied with;

(b) Whether there are other reasonable ways in which the judgment debt can be paid;

(c) Whether there is any disproportionality between execution and other possible means to exact payment of the judgment debt;

(d) The circumstances in which the judgment debt was incurred;

(e) Attempts made by the judgment debtor to pay off the debt;

(f) The financial position of the parties;

(g) The amount of the judgment debt;

(h) Whether the judgment debtor is employed or has a source of income to pay off the debt;

(i) Any other factors relevant to the particular case.

[21]. In *Gundwana v Steko Development CC & Others,* 2011 (3) SA 363 (CC), the Constitutional Court added the following to the circumstances referred to above: It is only when there is a disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.

[22]. It is obvious that not each and every one of the above considerations will of necessity have to be taken into account in every matter. The enquiry must always be fact bound to identify the criteria that are relevant for the particular case.

[23]. Applying the aforegoing principles *in casu*, I have had regard to the following circumstances:

(a) By all accounts, the plaintiff has complied in all respects with the court rules applicable to the type of relief sought in this application. Additionally, the plaintiff has complied with the provisions of the Practice Manual of this division as well as the guidelines contained in the relevant case authorities.

(b) I am of the view that, having regard to the undisputed fact that as and at the 1st of March 2017 the arrears amounted in total to R146 865.24, the possibility is slim in the extreme that the defendants will liquidate their indebtedness within a reasonable period without the plaintiff having to resort to executing against the residence of the respondent.

(c) The judgment debt due by the defendants to the plaintiff is for the sum of R1 406 151.11, plus interest thereon and costs of suit. It can therefore not be said that the amount due is of a trifling nature. Therefore, the issue of the proportionality of prejudice of the creditor if execution was to be refused compared to the prejudice the debtor would suffer if execution went ahead and he lost his home, at best does not favour the defendants.

[24]. As was said by Mokgoro J in the *Jaftha* matter (supra) at par [42]:

> 'The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances, it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process'.

[25]. Also at par [43]:

> 'However, it is clear that there will be circumstances in which it will be unjustifiable to allow execution. The severe impact that the execution process can have on indigent debtors has already been described. There will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor. Besides, the facts of this case also demonstrate the potential of the section 66(1)(a) process to be abused by unscrupulous people who take advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances will also be unjustifiable'.

[26]. The property in question has, by all accounts, not been purchased with the assistance of a Government Housing subsidy. The defendants also are clearly not of the same ilk from a means point of view as the debtors in the *Jaftha* matter. I do not have before me any indication that the execution would infringe on the constitutional right of the defendants to have access to adequate housing. The execution for example would not prevent them from obtaining finance in the future for purposes of acquiring immovable property.

[27]. The property in question is presumably occupied by the defendants. There are no occupants who can be said to fall within the category of the vulnerable in our society. There is most certainly no information and evidence before me of such circumstances. I can therefore safely infer that this is a consideration which would not favour the defendants.

[28]. No indication is given by the defendants of the reasons for the debts being incurred by them.

[29]. On the available evidence, it cannot possibly be suggested that the plaintiff has instituted action with an ulterior motive. If anything, I am of the view that the plaintiff has treated the defendants fairly and reasonably, with due regard to their constitutional rights.

[30]. These factors, in my view, mitigate against the defendants and in favour of the plaintiff. I must just mention that in their answering affidavit resisting summary judgment, the defendants do very little, if anything, by way of bringing to my attention any circumstances as envisaged in Rule 46(1)(a)(ii). Instead the defendants opted to focus their attention on persuading the court that they have *bona fide* defences in respect of the merits of the plaintiff's claim. I have already indicated that I am of the view that these defences are not sustainable.

[31]. In that regard, I am guided by what was said in *FirstRand Bank Ltd v Folscher and Another, and Similar Matters,* 2011 (4) SA 314 (GNP), under the heading: *'The manner in which the relevant information should be placed before the court',* at par [42]:

> 'If a creditor's claim is opposed, the debtor will ordinarily be in the best position to advance any contentions he may wish to make, and will be able fully to inform the court of any aspect that should be taken into account'.

[32]. Defendants did not apprise me of any further circumstances which may be relevant to my assessment relative to whether it would be just and equitable to issue a writ.

[33]. In the circumstances of this matter, I am of the view that there are no aspects that might be regarded as extraordinary which would persuade a court to decline a writ of execution. Accordingly, there is no reason why I should not declare the immovable property of the defendants specially executable.

Order

Accordingly, I grant summary judgment against the first and the second defendants jointly and severally, the one paying the other to be absolved, as per prayers (a), (b), (c)(i), (c)(ii) and (d) of the attached Draft Order, which I have marked **‘X’**, signed and dated.

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

HEARD ON:	7th November 2017
JUDGMENT DATE:	10th November 2017
FOR THE PLAINTIFF:	Adv A W Pullinger
INSTRUCTED BY:	Moodie & Robertson
FOR THE SECOND DEFENDANT:	Adv J G Dobie
INSTRUCTED BY:	Nkosi Nkosana Incorporated