

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

**APPEAL CASE NO: A5074 /2022
COURT A QUO CASE NO: 2020/7843**

1. Reportable: No
2. Of interest to other judges: No
3. Revised

Wright J
19 May 2023

In the matter between:

TUHF LIMITED

APPELLANT

And

**28 ESSELEN STREET HILLBROW CC
266 BREE STREET JOHANNESBURG (PTY) LTD
10 FIFE AVENUE BEREA (PTY) LTD
68 WOLMARANS STREET JOHANNESBURG (PTY) LTD
HILLBROW CONSOLIDATED INVESTMENTS CC
MARK MORRIS FARBER**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT**

Neutral Citation: *Tuhf Limited v 28 Esselen Street Hillbrow CC & 5 Others* (Case No: A5074/2022) [2023] ZAGPJHC 518 (19 May 2023)

FULL COURT APPEAL – JUDGMENT

WRIGHT J (ADAMS et STRYDOM JJ concurring):

1. In this appeal, we were told by counsel that the 2nd respondent is now in business rescue. There was no appearance for it when the matter was called. Nothing in this judgment is to be read as a finding for or against the 2nd respondent.
2. The appellant company, TUHF, lends money to businesspersons, natural and legal, to allow them to purchase, improve and then let out residential buildings in the inner cities of South Africa. In turn, those who borrow from TUHF let out the buildings at rentals which are intended by the borrowers to yield a profit and over time, an increase in value of the building.
3. The first and fifth respondents are close corporations. The second to fourth respondents are companies.
4. The sixth respondent, Mr Farber, is a natural person. He is the sole interest or shareholder and director in the first to fifth respondents. He is an experienced businessman and has a detailed knowledge of buying and letting residential property in the inner city.
5. TUHF lent money to 28 Esselen, the first respondent. This was so that 28 Esselen, or another related entity in the greater fold of Mr Farber could buy, improve and then let out at a profit a certain residential building. The residential building would be bought, owned and registered in the name of 28 Esselen. TUHF required security for the repayment by 28 Esselen of the loan.
6. TUHF launched an unsuccessful application for the payment of money and to perfect its security. Leave to appeal to this Full Court was granted by the learned judge below.
7. 28 Esselen mortgaged the property in favour of TUHF. The third to fifth respondents put up sureties in favour of TUHF for the debts of 28 Esselen owed

by it to TUHF. Mr Farber signed personal surety. Mr Farber signed the suretyships on behalf of the third to fifth respondents and he signed the resolutions on behalf of each authorising the giving of each surety.

8. The written loan agreement between TUHF and 28 Esselen contained a number of clauses relevant to the present dispute.
9. In Part B, clause 1(a), 28 Esselen is to pay a base instalment each month. It is common cause that 28 Esselen has done so. Under Part I, clause 1, 28 Esselen is to register a mortgage bond over the property in favour of TUHF. It is common cause that this was done.
10. Under clause 17.1 of the loan agreement, 28 Esselen shall pay promptly on due date *"all rates, taxes, water and electricity charges (whether levied as basic charges or in respect of actual consumption), sanitation charges (in respect of refuse removal and sewerage) and other like imposts that may be payable in respect of the Property to any governmental, provincial, divisional council, municipal or other like authority"*.
11. Under clause 17.2, 28 Esselen shall *"provide proof of the aforesaid payments to the Lender whenever requested to do so."*
12. Under clause 18.1, *"Each of the following events shall constitute an Event of Default under the Loan Facility*
 - "18.1.1 - the Borrower fails to pay any amount(s) due by it in terms of this agreement on the due date for payment thereof or breaches any other provision of this Agreement and fails to remedy such breach within any applicable cure period;*
 - 18.1.6 – the Borrower or any Surety commits a breach of any of the terms and conditions of this Agreement or any Security to which it is a party*
 - 18.1.20 – the Borrower fails to comply with all and any municipal by-laws*
13. Under clause 18.2 - *"Forthwith upon the occurrence of an Event of Default and at any time thereafter, if such event continues, the Lender shall in its sole*

and absolute discretion be entitled (but not obliged), without prejudice to any other rights which the Lender may have, by notice issued by the Lender to the Borrower to –

18.2.3 – accelerate and declare all amounts owing in terms of this Agreement immediately due and payable...”

14. Under clause 3 of the mortgage bond, 28 Esselen became liable to make payment promptly on due date of the municipal “*rates, taxes and other like imposts.*”
15. Under clause 4, 28 Esselen ceded to TUHF its right to rental from its tenants.
16. On 20 December 2019, TUHF’s attorneys wrote to 28 Esselen alleging municipal arrears, by 28 Esselen as at 4 December 2019, for rates, water and sanitation and refuse in a total amount of R2 847 909,65. It was alleged that as at 10 December 2019, the water arrears owed to the municipality were R98 858,23. 28 Esselen was given ten days to remedy its breach. Cession of rentals was demanded.
17. 28 Esselen’s attorney answered in detail, denying liability. On 17 January 2020, TUHF’s attorneys dealt in detail with the contents of the letter they had just received and threatened legal proceedings. Letters were swapped and on 24 February 2020 TUHF’s attorneys claimed, according to a breakdown apparently attached to that letter, R9 349 073,89. The breakdown includes amounts for a raising fee, capital, interest, legal fees, penalty interest and a reversal of penalty interest. Payments received are reflected. This breakdown runs from the period 8/8/2017 to 10/2/20.
18. TUHF launched its application for payment of this amount with interest and seeking to enforce its security. It sought an order that it take cession of rentals and that the property be declared specially executable. Relief related to these latter two claims was sought. A penalty of 5% on “*the monthly outstanding instalment amount*” was sought. TUHF abandoned the claim for the penalty during argument before us.

19. It is expressly stated in the founding affidavit that as at 10 January 2020 the amount owed to the City for water was R105 362,56 and that as at 5 February 2020 the amount owing for rates, sewer and refuse was R2 957 706,63.
20. It is common cause that the building is occupied by tenants who use water, electricity and other municipal services on an ongoing basis.
21. The application was launched on 5 March 2020.
22. TUHF says that its security is being prejudiced by the non-payment by 28 Esselen of municipal charges. It says that because there is an embargo on the Registrar of Deeds against him or her transferring immovable property, possible buyers of the property would pay less for the property by the amount of the municipal arrears if they would buy the property at all. It appears to be common cause that the loan would not have been made in the first place but for the security.
23. The answering affidavit by Mr Farber is long and detailed. He raises specific defences to specific municipal charges. He alleges billing chaos in the City of Johannesburg. He throws much doubt on the accuracy of municipal charges allegedly owing by 28 Esselen to the City. But what he does not do is say what amount he thinks is owed by 28 Esselen to the City. Nor does he estimate what such amounts might be for the various charges.
24. Mr Farber employed an expert in municipal billing, Mr Venter, who disputes the City's charges but does not say what total amount is actually owed or estimated to be owed. Mr Venter, on 11 February 2020, sent a report to Mr Farber which report is incorporated into the defence to the application.
25. Mr Venter says that rates of R40 000 per month are incorrect but that the "*correct billing should be approximately R8 000 per month.*"
26. Mr Venter says that the last time electricity was debited was in 2014.
27. Regarding water, he says that as at 7 February 2020 the reading is 3373 kilolitres while the invoice from the City reflects 5238 kl. On his version there is

an overbilling by 1865 kl. This calculation in effect admits a liability for 3373 kl for the relevant period.

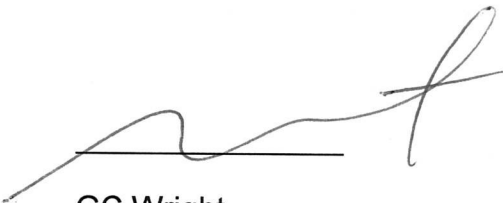
28. Dealing with prescription, Mr Venter says that "*When the accounts are corrected, we will do application for Prescription*". He says further that "*I therefore advised clients to correct the account and then settle Council*". Mr Venter seems implicitly to be of the view that money is owed by 28 Esselen to the City. He does not refer to the possibility of the accounts being in net credit.
29. The high-water mark for the respondents appears to be the possibility that the City may credit the rates account with an amount up to R1 000 000. But even if this is to be done, an amount of R2 000 000 may be outstanding for rates.
30. It seems to be common cause that no rates have been paid since about February 2015. That date is about five years before the demand letter from TUHF's attorney. R8 000 per month x 12 months x 5 years gives R480 000 as owing by 28 Esselen to the City on Mr Venter's estimate.
31. In the answering affidavit the statement is made that "*the first respondent tenders to make payment*" to the City "*once the aforesaid issues have been resolved*".
32. The only reasonable inference to draw from these facts is that 28 Esselen is in arrears with its municipal accounts and probably in a substantial amount.
33. Even if the letter of demand contains incorrect detail like the precise amount owing or an incorrect description of the kind of municipal service the demand remains valid. Compare *Matador Buildings (Pty) Ltd v Harman* 1971 (2) SA 21 CPD at 27H – 28A.
34. The question is not whether TUHF has proved precisely what is owed by 28 Esselen to the City in respect of a particular municipal service. It suffices for TUHF to prove a breach in the form of municipal arrears.
35. Even on the respondents' version at least something, if not a substantial amount was owed by 28 Esselen to TUHF when demand was made and the application launched. In these circumstances, TUHF has made out a case for relief.

36. There is no public policy which stands in the way of enforcement of the security. The parties are both business persons of means and experience who contracted a commercial arrangement at arms' length. Without the security, the loan would not have been advanced. The respondents know this. 28 Esselen has been using the City's alleged billing problems not to pay the City.
37. In my view, the tenants of the building are not presently at risk. If and when TUHF seeks to evict a tenant it will have to comply with the PIE Act. TUHF accepts this.
38. Regarding the sureties of the third to fifth respondents, Mr Farber says that they fall foul of various formal requirements. I disagree. Mr Farber is the sole interest or shareholder and director of these respondents. He does not need to give himself notice, or discuss things with himself, irrespective of which hat he is wearing at any given time.
39. A point is taken that the suretyships by the third to fifth respondents are void as they were prejudicial financially to the third to fifth respondents when they were put up. This is unlikely to be so. Mr Farber, a business person with experience in the field is unlikely to have negotiated and agreed to things financially detrimental to these respondents. If he did, he might be guilty of making a misrepresentation to TUHF to grant the loan in the first place, of reckless trading or of contravening the impeachable transaction provisions of the Insolvency Act. He does not contend for any of the latter three propositions.
40. Under clause 21.4 of the loan agreement the respondents are liable for costs on the attorney and client scale. Under clause 19 of the mortgage bond costs are agreed on the attorney and own client scale. In my view, costs on the attorney and client scale suffice. There is no reason not to apply this scale to the costs of the appeal.

ORDER

1. The appeal is upheld against the 1st and 3rd to 6th respondents.
2. The appeal against the 2nd respondent is removed from the roll.
3. The 1st and 3rd to 6th respondents are jointly and severally to pay the costs of the appeal on the attorney and client scale, including the costs of senior and junior counsel where employed.
4. The order of the court below is set aside and replaced with an order reading -
 - "1. 28 ESSELEN STREET HILLBROW CC, 10 FIFE AVENUE BEREA (PTY) LTD, 68 WOLMARANS STREET JOHANNESBURG (PTY) LTD, HILLBROW CONSOLIDATED INVESTMENTS CC and MARK MORRIS FARBER ("the Respondents") are to pay, to the applicant, jointly and severally, the one paying the others to be absolved, the sum of R9,349,073.89 with interest calculated at the rate of 2.50% above the commercial banks' prime rate plus 1% per year, calculated daily and compounded monthly in arrears from 1 February 2020 to date of payment, both dates included;
 2. The Applicant is with immediate effect authorized to take cession of any rental amounts payable by the Waldorf Heights' tenants to 28 ESSELEN STREET HILLBROW CC ("the First Respondent"), alternatively to the 3rd to 6th Respondents, further alternatively to their duly authorized agents, until payment in 1 above has been made in full.
 3. The 1st and 3rd to 6th Respondents are to sign all documents necessary to facilitate the cession in 2 above, failing which the Sheriff is authorized to sign all documents necessary to give effect to the cession;
 4. The 1st and 3rd to 6th Respondents are to furnish the Applicant, within 15 days of this order, with the names and contact information of every tenant occupying the Waldorf Heights ("the Waldorf Heights' tenants") together with: -

- 4.1. *Copies of any written lease agreements concluded between the First Respondent, alternatively the 3rd to 6th Respondents, further alternatively their duly authorized agents and the Waldorf Heights' tenants;*
- 4.2. *Particularity and copies of any existing property management mandates with the Waldorf Heights' tenants; and*
- 4.3. *Particularity in respect of the terms of any implied and/or oral terms of any lease agreement concluded with the Waldorf Heights' tenants;*
5. *The Applicant may take steps necessary for purposes of collecting rental amounts from the Waldorf Heights' tenants;*
6. *The immovable property at ERF 3209 JOHANNESBURG TOWNSHIP REGISTRATION DIVISION I.R., THE PROVINCE OF GAUTENG MEASURING 495 (FOUR HUNDRED AND NINETY-FIVE) SQUARE METRES HELD by Deed of Transfer number T24467/2003 (hereinafter referred to as the "immovable property") is declared executable, and the Applicant is authorized to issue Writs of Attachment calling upon the Sheriff of the Court to attach the immovable property and to sell the immovable property in execution.*
7. *The 1st and 3rd to 6th respondents are jointly and severally to pay the costs of the application on the attorney and client scale. These costs include those of senior and junior counsel where so employed."*



GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

I agree


ADAMS J

Judge of the High Court

Gauteng Division, Johannesburg

I agree


STRYDOM J

Judge of the High Court

Gauteng Division, Johannesburg

I agree

HEARD : 17 May 2023**DELIVERED : 19 May 2023****APPEARANCES :****APPELLANT Adv AC Botha SC****adrianbotha@counsel.co.za****083 458 2282****Adv Eloize Eksteen****eksteen@counsel.co.za****083 296 5747**

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