

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

CASE NO: 26936/2015

DATE: 3 January 2024

(1)REPORTABLE:

(2)OF INTEREST TO OTHER JUDGES:

(3)REVISED:

Date:

Signature:

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

LEO CHARLES BAXTER

Respondent

Coram: Ternent AJ

Heard on: 24 May 2023

Delivered: 3 January 2024

Summary:

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 hand-down is deemed to be 15h00 on 3 January 2023.

JUDGMENT

TERNENT, AJ:

- [1] In April 2004, the applicant loaned the respondent a sum of R3 150 000,00 and thereafter sums of R4 500 000,00 and R15 000 000,00 in order to facilitate his purchase and the development of properties in Plettenberg Bay¹ for the purposes of establishing a polo estate called Stonefield Polo Estate. As security for these loans, the applicant registered three bonds against the properties and advanced the monies to the respondent on 13 July 2004, 21 June 2004, and 26 November and 2 December 2004 respectively.
- [2] In 2012, the parties agreed to restructure the second and third loans that had been granted in order to facilitate a further loan of R8 000 000,00 and in respect of which a further bond was registered in favour of the applicant naturally with the addition of collateral security. The restructured balance was advanced to the respondent on 29 February 2012.
- [3] In May 2014, the respondent defaulted on the monthly repayments and despite demands made upon him to pay, he indicated that he could not do so and that he would need to sell the properties to either a foreign or local buyer. His attempts failed.
- [4] As a consequence, the parties came to an understanding that the applicant would sell the properties to pay off the debt that was due to it.
- [5] In order to facilitate the sale of the properties, the respondent agreed, on 6 June 2013, to furnish a special power of attorney,² to a manager of the applicant, who would be the respondent's "*procurator in rem suam and lawful attorney and agent for the purposes of selling and disposing*" of the properties together with any improvements thereon which would either be sold privately or at an auction.

¹ Portions 94, 23 and 114 to 119 Farm Gansevallei, 0004, Knysna Road, Plettenberg Bay

² Annexure "**FA12**", CaseLines 001-188 to 001-192

- [6] On 15 August 2014, the applicant, pursuant to this authority, concluded an agreement of sale with John Alistair Leigh, or a nominee for a company to be formed, and the properties were sold for the sum of R12 000 000,00.³ As reflected in an addendum to the agreement of sale, the purchaser nominated Rare Earth Vineyards (Pty) Limited as the company and purchaser of the properties.⁴
- [7] Having not as yet received payment of the R12 000 000,00 in liquidation of the indebtedness from the sale of the properties the applicant sent two letters of demand to the respondent dated 25 September 2014⁵ and 17 October 2014.⁶ Demands were made for amounts in the sums of R32 704 292,25 together with interest at the rate of 9.25% per annum calculated daily and compounded monthly in arrears from 10 September 2014 to date of payment and R3 779 841,32 together with interest thereon at the rate of 10.75% per annum calculated daily and compounded monthly in arrears from 10 September 2014 to date of payment. The letters were addressed in terms of the provisions of section 129(1) of the National Credit Act 34 of 2005. Accordingly, the respondent was informed of his right to refer the debt to a debt counsellor in terms of section 129(1)(a) of the Act, alternatively was notified that should he not within ten business days from service of the letters remain in default for a period of 20 days the applicant would then take the necessary steps to enforce payment as it was entitled to do.
- [8] The letters of demand were served on the respondent at his chosen *domicilium citandi et executandi* namely [...] C[...] Drive, Sunninghill, Sandton when the Sheriff affixed the letters to the principal doors. In addition, the letters were also served at his residential address in South Africa, 1[...] E[...] P[...], Sandhurst, Sandton.
- [9] As required in terms of the loan agreements, the applicant furnished the Court with updated certificates of balance which reflected that after the

³ Annexure “**FA13**”, CaseLines 001-193 to 001-204

⁴ Annexure “**FA14**”, CaseLines 001-211 to 001-220

⁵ Annexure “**FA15**”, CaseLines 001-221 to 001-223

⁶ Annexure “**FA18**”, CaseLines 001-226 to 001-228

deduction of the R12 000 000,00 purchase price, the sums due under the two loan agreements, as at 6 July 2022, were amounts of R22 976 271,94⁷ and R490 607,20.⁸

- [10] The respondent delivered a notice of counter-application,⁹ dated 14 January 2016, wherein he sought in the main that the application be referred to trial or alternatively that the power of attorney be set aside and so too the agreement of sale, alternatively that the validity of the sale of the immovable properties be referred to trial. In addition an interdict was sought against the applicant preventing the transfer of the properties pending the outcome of the action. Notably, the counter-application was not supported by an affidavit and, accordingly, the application would of necessity have to rely on the answering affidavit delivered in support of the relief sought. As set out below, the respondent's counsel only persisted with the referral to trial in argument.
- [11] The application was issued on 27 July 2015 and the respondent delivered his answering affidavit during September 2015, his affidavit having been signed and commissioned on 7 September 2015. The applicant then delivered its replying affidavit on 2 October 2015.
- [12] The matter was set down on 30 May 2022 and was stood down to Friday 3 June 2022 to enable the respondent to instruct new attorneys.¹⁰ The parties then agreed to an order in terms of which the application would be postponed and the parties were afforded, more particularly, the respondent an opportunity to file a supplementary affidavit within 15 days of the order and costs were reserved.
- [13] The applicant's attorney, Mr Anthony Rousseau, of Edward Nathan Sonnenbergs delivered a supplementary affidavit, commissioned on 21 July 2022, in support of what had transpired subsequent the postponement order made by Makume J. He informed the Court that

⁷ Annexure "AR4", CaseLines 020-10

⁸ Annexure "AR4", CaseLines 020-9

⁹ CaseLines 007-1 to 007-3

¹⁰ CaseLines 016-13

the respondent was afforded an opportunity, under the order, until 30 June 2022 to file a supplementary answering affidavit. Rosseau received correspondence from Mr Jerome Levitz, an attorney at Fluxmans Incorporated on 29 June 2022. He now represented the respondent and informed Rosseau that the respondent would not be filing any further affidavits. Rousseau, in filing the supplementary affidavit, again contacted Levitz, on 5 July 2022, to affirm that no affidavit in support of the counter-application had been received and again pressed Levitz to determine whether any further affidavits would accompany the counter-application. Levitz told him, telephonically, that no affidavit was attached to the notice of counter-application, which had been served in January 2016, and reiterated that no further affidavits would be delivered by the respondent.

[14] Furthermore, Rousseau attached the certificates of balance to which I have referred above.

[15] The respondent signed his answering affidavit and the special power of attorney by affixing his thumbprint to the documents. This is as a consequence of a serious injury sustained by him during a Polo horse riding accident which has resulted in him being a quadriplegic and unable to write. The respondent also told the Court that he has a partially collapsed left lung and, at the time, a chronic infection in both lungs which requires him to reside in the United Kingdom, which he does, and continued to do at the time of the hearing before me in May 2023, for medical reasons and access to medical experts.

[16] Having perused the answering affidavit, it is common cause, as submitted to me by the applicant's counsel, that:

16.1 the written home loans were concluded between the parties as referred to above on 2 March 2004 (first and second home loans), 10 November 2004 (third home loan) and 14 February 2012 (the restructured home loan);

16.2 the applicant lent and advanced the sums of R3 150 000,00, R4 500 000,00, R15 000 000,00 and a further R8 000 000,00 to the respondent in respect of the four agreements;

16.3 mortgage bonds were registered to secure the indebtedness;

16.4 the respondent breached the terms of the restructured home loan and mortgage bond by failing to make payment as required;

16.5 the respondent agreed and came to an understanding with the applicant that the properties would be sold in order to reduce his indebtedness to it and, in so doing, he facilitated the sale of the properties by signing the special power of attorney as referred to above.

16.6 the properties were sold in the amount of R12 000 000,00; and

16.7 the respondent remains indebted to the applicant despite the proceeds of the sale having been deducted from the debt.

[17] In essence, the respondent complains that the applicant undersold the properties which had been allegedly valued by the applicant at R31 000 000,00. Furthermore, he says that he did not ratify the sale of the properties and was only told about the sale subsequent their sale in November 2014. He informed the Court that improvements had been effected to the properties amounting to R44 300 000,00 and that the best market price for the properties would be in the region of R50 000 000,00 to R60 000 000,00.

[18] In so doing, the respondent did not provide any valuations in support of these allegations. Attached to his affidavit was an incomplete property valuation report which commenced at page 7 and ran until page 28.¹¹ It appeared to be authored by a valuer, J P Maree, and was dated 8 July

¹¹ Annexure “A1”, CaseLines 003-31 to 003-52

2011. The report indicated, that the properties had a realistic market value of R31 000 000,00.¹² Subsequent the hearing and, without the leave of the Court, the complete valuation was uploaded by the respondent to CaseLines on 25 May 2023.¹³ It appeared therefrom that the valuation had been requested by the respondent and not the applicant, as contended for by the respondent in his affidavit. The applicant states that it had not done valuations prior February 2014. Its 2014 valuation was done, at the request of Bruce Noble, an estate agent at Remax, appointed by the respondent, who wanted access to the properties in March 2014 to try and sell them privately. In the face of the valuation, the applicant says that Noble and Park Village Auctions, referred to below, concluded that R15 000 000,00 was a realistic sales value. Only one offer was received which both Noble and Park Village Auctions agreed was the best offer.

[19] As submitted to me by the applicant's counsel, the respondent's defence amounts to "*a confession and avoidance*", the respondent complaining that he had suffered damages as a consequence of the conclusion of the special power of attorney and sale of the properties in the amount of R12 000 000,00.

[20] The respondent complained that:

[20.1] the applicant had failed to act in a *bona fide* manner towards him because it had:

[20.1.1] deliberately and intentionally sold the properties below the market value having assessed the value of the land at R31 000 000,00 (as already stated hereinabove, the applicant denies that it valued the properties at R31 000 000,00 and the valuation attached to the answering affidavit was at the behest of the respondent); and

¹² CaseLines 003-38

¹³ CaseLines 003-59 to 003-86

[20.1.2] that the respondent did not know of the sale and therefore did not ratify it;

[20.2] the applicant had breached its fiduciary duty towards the respondent in that:

[20.2.1] it failed to sell the properties for the best possible price;

[20.2.2] it failed to notify the respondent of the sale in terms of section 27 of the CPA; and

[20.2.3] the power of attorney did not grant an unlimited discretion to the applicant in executing the mandate.

[21] It is necessary for me to quote verbatim from the special power of attorney as follows:

“SPECIAL POWER OF ATTORNEY

*I, LEO CHARLES BAXTER IDENTITY NO: 5[...] ~~UNMARRIED~~
MARRIED OUT OF COMMUNITY OF PROPERTY
(handwritten)*

Do hereby, nominate and appoint a manager of Standard Bank of South Africa Limited (REG No: 1962/000738/06) (“SBSA”) or their nominee of SBSA (“the SBSA Representative”) with power of substitution to be my procurator in rem suam and lawful attorney and agent for the purposes of selling and disposing of:

1. Remainder of Portion 113 of the Farm Gansevallei No. 444, in the Municipality of Plettenberg Bay, Division of Knysna, WESTERN CAPE PROVINCE;

In extent 4,9760 hectares held by Certificate of

Consolidated Title T30126/2011;

- 2. Portion 114 (a portion of 113 of the Farm Gansevallei No. 444, in the Bitou Municipality, Division of Knysna, WESTERN CAPE PROVINCE in extent 4,8078 hectares held by Certificate of Registered Title T30127/2011;*
- 3. Portion 115 (a portion of 113 of the Farm Gansevallei No. 444, in the Bitou Municipality, Division of Knysna, WESTERN CAPE PROVINCE in extent 4,7855 held by Certificate of Registered Title T30128/2011;*
- 4. Portion 116 (a portion of 113 of the Farm Gansevallei No. 444, in the Bitou Municipality, Division of Knysna, WESTERN CAPE PROVINCE in extent 4,7078 hectares held by Certificate of Registered Title T30129/2011;*
- 5. Portion 117 (a portion of 113 of the Farm Gansevallei No. 444, in the Bitou Municipality, Division of Knysna, WESTERN CAPE PROVINCE in extent 4,6998 hectares held by Certificate of Registered Title T30130/2011;*
- 6. Portion 118 (a portion of Portion 113 of the Farm Gansevallei No. 444, in the Bitou Municipality, Division of Knysna, WESTERN CAPE PROVINCE in extent 4,8399 hectares held by Certificate of Registered Title T30131/2011;*
- 7. Portion 94 of the Farm Gansevallei No. 444 in the Bitou Municipality, Division of Knysna, PROVINCE WESTERN CAPE in extent 6,2179 hectares held by Deed of Transfer T66802/2004*

together with any improvements thereon by way of public auction or private treaty on such terms and conditions as the

SBSA Representative in his, her sole discretion deems fit, and to sign any documents necessary to give effect hereto; for the purposes of applying the proceeds of such sale towards the reduction of my obligations to SBSA;

And further to instruct estate agents and/or advertising agents and/or auctioneers for the purposes of assisting with such disposal and to pay from the proceeds of the sale the costs, charges and commissions of such aforementioned parties;

And further authorising the SBSA Representative to appoint attorneys and conveyancers for the purposes of conveying, ceding and/or transferring the abovementioned properties into the names of a purchaser(s) in their entire discretion;

And further authorising the SBSA Representative to sign all documentation necessary to give effect to the aforesaid;

And further authorising the SBSA Representative to renounce all right, title and interest which I had in and to the aforementioned properties;

And further to clear the abovementioned properties from all incumbrances and hypothecations according to law;

And I further hereby ratify all steps taken by SBSA and/or the SBSA Representative to give effect to the aforesaid;

And I further indemnify SBSA and hold SBSA harmless in respect of any damage or loss of whatsoever nature, and howsoever caused, arising from SBSA's bona fide and lawful exercising of its rights in terms of this Special Power of Attorney;

And I further authorise the SBSA Representative to do or

cause to be done whatsoever shall be requisite as fully and effectually, to all intents and purposes, as I might or could do it personally present and acting therein; hereby allowing and confirming all and whatsoever the SBSA Representative shall lawfully do or cause to be done to give effect to this Special Power of Attorney;

And it is further agreed that the Special Power of Attorney shall persist in full force and effect and be irrevocable until such time as my obligations to SBSA have been settled in full.”¹⁴

[22] As submitted to me, by the applicant’s counsel, these defences have no merit in the face of the special power of attorney. This is because:

[22.1] the special power of attorney expressly authorised the applicant to sell and dispose of the properties on such terms and conditions as the applicant’s manager in his or her sole discretion deemed fit;

[22.2] the respondent indemnified the applicant in respect of any damage or loss of whatsoever nature and howsoever caused, arising from the applicant’s *bona fide* and lawful exercising of its rights in terms of the special power of attorney; and

[22.3] having invited the applicant to provide a sworn valuation, the applicant complied, such valuation, dated 10 March 2014, was attached to its replying affidavit¹⁵ and which was prepared by Mr D Lazarus of Park Village Auctions.

[23] Lazarus’ report reveals that the properties had been on the market for more than three months and that no significant interest had been shown

¹⁴ The Special Power of Attorney was signed by the respondent by affixing his thumbprint thereto before two witnesses on 6 June 2013. It was notarised before a Notary Public Johannes Jacobus Nel whose certificate of authentication appears at the beginning of the Special Power of Attorney, Annexure “**FA12**”, CaseLines 001-188

¹⁵ Annexure “**RA3**”, CaseLines 004-23 to 004-30

in the properties by prospective buyers be it developers or Polo enthusiasts. Lazarus affirmed that at the current pricing of R35 500 000,00 there was very little interest shown in the properties. In addition, he stated that a fair auction sale value would be in the region of R15 000 000,00.

[24] It also appears that the respondent is untruthful when it comes to the preparation and signing of the special power of attorney. The respondent received the special power of attorney by way of an e-mail addressed to him, on 27 May 2013, by Adrian Clay of the applicant. Clay called upon the respondent to consider the document which had been discussed in January 2013 so that the applicant could assist in selling the Plettenberg Bay properties. He called upon him to do so prior the Thursday of that week when the document would be signed. Clay affirmed that should there be any questions an expert would accompany him to the meeting where the document was to be signed before the notary public.

[25] In response, the respondent acknowledges that he is in receipt of the documents and asks that the two documents be condensed into one. In the e-mail he affirms that the Stonefield Estate must be sold and acknowledges that if there is a shortfall that it will be his responsibility.¹⁶

[26] The applicant says that the notary public asked the respondent, at the meeting, whether he understood the special power of attorney and he answered in the affirmative. He proceeded to sign it.

[27] The respondent is also ambiguous when he says that he had obtained offers for the properties from prospective foreign purchasers which were more than the R12 000 000,00 purchase price, yet not good enough to seal the deal.

[28] An e-mail addressed by the respondent to Noble and others, on 9 April

¹⁶ Annexure “**RA1**”, CaseLines 004-19 to 004-20

2014, records that Stonefield has been on the market for over a year without success and that the properties must now be sold at the best offer and that a power of attorney has been provided to begin immediately with the closing date being 5 May 2014. In response Noble, who had been mandated by the respondent to sell the properties, states that he is fairly confident that one of his clients is close to making an offer but is also interested in Bitou Polo. Clearly nothing came of this offer. This is reflected in the e-mails at Annexure “**RA8**”.¹⁷

- [29] On 16 May 2014, Noble addresses an e-mail to the respondent, wherein he confirms that Jaco from Park Village Auctioneers, in Johannesburg, has affirmed that he has a mandate to sell Stonefield on auction in June 2014 unless the applicant has a buyer. He further affirms that Park Village Auctioneers has been mandated by the applicant. Once again the respondent responds, on 16 May 2014, in an e-mail. He affirms that he has given the applicant a power of attorney and that Park Village Auctioneers has been authorised to attend to the auction process.¹⁸
- [30] On 16 July 2014, Clay, in an email, confirms that the respondent, who is residing in the UK, has been afforded an opportunity to market and sell the Stonefield in the UK and that the applicant would only start the sale process from 20 August 2014. The respondent confirms this to be the case in an e-mail in reply.¹⁹
- [31] On 28 July 2014, the respondent addresses an e-mail to Clay wherein he asks for an update as to the sale and states that, depending on the price range, he may have an interested buyer in the UK. Clay responds, on 28 July 2014, in an e-mail and says, he would have to enquire from his head office, but nevertheless enquires as to what the respondent's interested buyer will offer. In response, on 28 July 2014, in a further e-mail, the respondent states that the buyer seems to be aware of the difficulty in selling the properties and his approach is that he will not

¹⁷ CaseLines, 004-37 to 004-38

¹⁸ Annexure “**RA5**”, CaseLines 004-33

¹⁹ Annexure “**RA6**”, CaseLines 004-34

accept low offers but once he has an idea of the level i.e. the price that can be obtained, he will try and negotiate them up to an acceptable price. Accordingly, the respondent fails to disclose what offers were made to him or that the offers exceeded R12 000 000,00.

[32] As is also apparent from the e-mail exchanges between the applicant and the respondent, the applicant at all times kept the respondent abreast of what was transpiring in relation to the sale of the properties. This also appears from an e-mail, dated 26 March 2014, from Clay to the respondent in which he states that auction proceedings are underway. He calls upon the respondent to furnish a signed offer to purchase prior to Park Village Auctioneers commencing advertising.²⁰

[33] Notably, the respondent could have filed a supplementary affidavit should he have taken issue with any of these aspects in the replying affidavit but failed to do so. I am of the view that he could not do so because of the incontrovertible evidence in the e-mail trail. The e-mail communications affirm that the respondent was always in the picture and, as submitted to me, had fallen on hard times in relation to the Stonefield Polo Estate.

[34] It is also evident that he was actively involved in the negotiation of the special power of attorney as he was in the sale of the properties. There is no merit in the allegations that the applicant was *mala fide* in selling the properties and that it acted in breach of any fiduciary duty to him.

[35] As also submitted to me, the very nature of the special power of attorney having been granted to the applicant *procurator in rem suam* meant that it was granted not for the benefit of the principal, the respondent, but for the benefit of the applicant.²¹

[36] The paucity of the respondent's defence is compounded when he says that he did not receive the letters of demand because he was resident in

²⁰ Annexure "RA7", CaseLines 004-36

²¹ **Glover v Bothma** 1948 (1) SA 611 (W) at 625-626

the UK. The applicant gave the respondent notice, as required, at his chosen *domicilium citandi et executandi*. To the extent that he was only notified in November 2014, to which he vaguely alludes stating that he had been informed by a friend, that is his own fault.

[37] Insofar as there is reliance on section 27 of the CPA this does not aid the respondent either. The respondent complains that the applicant was his agent and held an intermediary position and should have allowed him to consider the purchase price and ratify the sale. The applicant was an agent but in its own interest as stipulated in the special power of attorney. It is also clear that the respondent negotiated the terms of the special power of attorney which contradict his complaint and was materially involved in the sale of the properties, with the aid of Noble. Any suggestion that he should have been presented with an offer or that there was a tacit term that the properties should be sold at the best price, which it was in my view, does not pass muster.

[38] Furthermore, the bald allegations that his rights were deprived under section 51 of the CPA because provisions of the special power of attorney contravened the CPA are unhelpful. The respondent failed to detail any provisions in the special power of attorney which allegedly were unlawful and prohibited by the CPA.

[39] Importantly though the CPA is not applicable to credit agreements such as loan agreements²² governed by the National Credit Act. That definitively puts an end to these points.

[40] Many of the skittles raised in the respondent's answering affidavit were easily knocked down in the replying affidavit and wisely not argued before me by the respondent's counsel.

[41] As already set out above, the respondent's counsel focussed his argument on a referral to trial. This is dealt with in terms of the

²² Section 5(2)(d) of the CPA

provisions of Rule 6(5)(g).

[42] Rule 6(5)(g) provides that:

“(g) Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[43] Notably, in the answering affidavit, the respondent in making reference to a referral to trial raises the alleged damages claim which he indicates has not as yet been quantified but in the light of the alleged underselling of the properties forms the basis of the counter-application and also because damages cannot be determined by way of affidavit. Yet, the relief sought in the counter-application makes no mention of damages and, despite the inordinate lapse of time, there is no evidence placed before me of the damages allegedly suffered. It is therefore not an issue on the papers as it remains unsubstantiated and ill-founded.

[44] Furthermore, the standard terms of the loan agreements, clause 8.7 thereof, provide that the respondent would not be entitled to deduct any amount which he owed to the applicant from any amount owing or which may become owing by the applicant to him arising from the agreement.²³

²³ Annexure “**FA10**”, CaseLines 001-155 to 011-171 (the standard terms) at 001-164

- [45] The respondent's counsel, instead, latched onto the *parate executie* principle. The submission was that the special power of attorney permitted the applicant to sell the properties without instituting legal proceedings. It was also submitted that the respondent sought to rely on Rule 46(a) of the Uniform Rules of Court dealing with execution against immovable property. The contention was that these were the disputes supporting the application for a referral to trial.
- [46] These alleged disputes are not evident from the answering affidavit as they were not raised by the respondent.
- [47] The respondent's counsel was unable to supply the Court with any of the authorities upon which he sought to rely, having not made copies thereof for the Court or his opponent. He then sought to request that the matter be postponed or stood down to afford him an opportunity to file supplementary heads of argument. This, in circumstances where his heads had been signed, on 14 January 2016, and which heads he said did not properly deal with the submissions that he sought to make now.
- [48] I refused the indulgence which the respondent's counsel sought on the basis that the application had commenced in July 2015 – almost seven years prior to the hearing before me. Furthermore, the respondent had been afforded opportunities to file supplementary affidavits, and place further defences before me and had elected not to do so. In addition, the respondent had some 6 years to file further heads of argument and had not done so. There was no formal application before me to explain this dilatory behaviour. When I requested an explanation therefor, the respondent's counsel repeatedly stated that it was in the respondent's interests. I also enquired whether an instruction had been given to counsel to seek a postponement. The respondent's counsel then took an instruction in Court from the respondent's legal representative who was in attendance. In requesting the postponement, the respondent's counsel sought to allow for the respondent to provide the missing pages to the valuation attached to the answering affidavit. This was all at the

eleventh hour. The postponement application was not well-motivated or seriously pursued, to my mind, and refused. Furthermore, the applicant was ready to argue the application and the prejudice to the applicant was clear. The Court would also not be inconvenienced in circumstances where the respondent was the soldier of his own misfortune.

[49] The respondent's counsel also sought to question the veracity of the amounts certified in the certificates of balance. The submission made was that interest had been levied on the bank costs which it was submitted was unlawful and that this should be a separate amount. However, there was no evidence in the answering affidavit setting out where there had been a miscalculation.

[50] It was also submitted to me by respondent's counsel, again from the bar, that because no bank statements had been annexed to the papers and the amount claimed in the Notice of Motion did not accord with the amounts set out in the certificates of balance, this also upset the certificates of balance. As is clearly set out by the applicant, the amended certificates of balance reflect the reduction of the indebtedness by the R12 000 000,00 purchase price. The sale of the properties was registered and payment made on 19 August 2015, subsequent the institution of the application. Furthermore, it was not necessary for the applicant to disclose bank statements in circumstances where the loan agreements made provision for certificates of balance to be relied upon as evidence.

[51] The respondent's answering affidavit did little to take issue with the certificates of balance other than a bald allegation that the interest rate was not correctly calculated and deducted and that the respondent did not receive notice of interest rate changes, all of which was denied by the applicant.

[52] These submissions on their own do not suffice to displace the *prima facie* proof of the certificates.

- [53] In the decision of Nestadt J in ***Trust Bank of South Africa Ltd v Senekal***:²⁴

“To the same effect is the opinion of BLOCH, J., in R. v. Mantell, 1959 (1) SA 771 (C), that prima facie evidence if unanswered would justify men of ordinary reason and fairness in affirming the question which the party on whom the onus lies is bound to maintain ... How far the defendant’s evidence need go in order to answer a prima facie case depends on the facts of each particular case. Whilst no onus of proof is cast on him, he must adduce evidence sufficient to destroy the prima facie proof and thus prevent such proof from ripening into conclusive proof ... Merely to cast suspicion on the correctness of the fact or facts prima facie established and mere theories or hypothetical suggestions will not avail the defendant; the defendant’s answer must be based on some substantial foundation of fact ...”

- [54] The respondent’s counsel conceded that he was not pursuing the point on jurisdiction and that the Court did have jurisdiction.
- [55] It was also submitted to me that the respondent’s ineptitude in filing further affidavits could be put at the door of the applicant. This is incorrect. Applicant’s counsel referred to what had transpired in the matter after the postponement. The respondent was afforded every opportunity to get his house in order and failed to do so.
- [56] The respondent’s counsel also submitted that the replying affidavit introduced new matter, more particularly the 2014 valuation. This is incorrect. The replying affidavit simply dealt with the inconsistencies and broad allegations made by the respondent, all of which were unsubstantiated. This, in the face of the replying affidavit which, as

²⁴ 1977 (2) SA 587 (W) at 593

submitted to me, exposed the lack of any defence in the answering affidavit and which was entirely destructive of it.

- [57] In circumstances where the respondent himself called upon the applicant to disclose the valuation, it was attached to the replying affidavit, and justified the purchase price obtained for the properties at auction. This was not new evidence but simply affirmed the case made out in the founding affidavit as to the sale of the properties on auction and exposed the speculative and ill-founded allegations made by the respondent to the effect that the properties had been undersold.²⁵
- [58] The final submission related to the application of Rule 46(a) of the Uniform Rules of Court. This rule which deals with sales in execution of immovable property expressly requires that the Court declare a property specifically executable and requires the Court to consider whether or not the property is the primary residence of the judgment debtor and all relevant circumstances prior to making such an order. At the outset, this matter did not deal with a sale in execution and furthermore, Stonefield was a business venture and not the residential property of the respondent. As such this rule had no application to this matter, and lacked merit.
- [59] Having reserved my judgment, and without my leave, the respondent then uploaded to CaseLines a document titled “*Respondent’s synopsis*”²⁶ together with a number of authorities which had been broadly mentioned in argument but which had not been handed to the Court at the hearing. I, accordingly, afforded the applicant an opportunity to address this document and the case authorities raised therein which appeared to be premised on the respondent’s contention that the application should be referred to trial. The applicant did so and filed supplementary submissions on 1 June 2023.²⁷

²⁵ Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976(2)SA 701 (D) at 704E – 708A

²⁶ CaseLines 015-72 to 015-74

²⁷ CaseLines 005-21 to 005-27

[60] I am inclined to allow these submissions, as the applicant has had an opportunity to deal with them, and in circumstances where I am of the view that they do not ultimately further the respondent's case for a referral, there being no disputes evident.

[61] Having been furnished with the case authorities and synopsis of the respondent's submissions on the *parate executie* principle which the respondent's counsel reiterated therein, namely that the special power of attorney permitted the applicant to sell the properties without instituting legal proceedings, this is simply incorrect. The submission fails to distinguish between the existence of a *parate executie* clause in a mortgage bond as opposed to an agreement or authority that is given post default to sell the immovable properties without recourse to Court.

[62] The leading decision of ***Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another***²⁸ found that *parate executie* clauses are not enforceable when they are included in mortgage bonds relating to property. Having said so, the Court found that:

*“The second observation to be made is that where a parate executie power is granted, whether in respect of movables or immovables, and the parties were to agree after the debtor be in default that the creditor may proceed to realise the bonded property, he no longer does so by virtue of the original power, but by virtue of the fresh agreement after the debtor's default. The objection then to exercising a parate executie has fallen away. See Israel v. Solomon, 1910 T.P.D. 1183 at p. 1186.”*²⁹

[63] As such, the *parate executie* provision not being in a mortgage agreement, it is permissible.

²⁸ 1971 (1) SA 613 (T) (Full Bench)

²⁹ ***Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another*** *supra* 616D-F

[64] Subsequent thereto and in the decision of **Bock and Others v Duburoro Investments (Pty) Ltd**³⁰ Harms JA confirmed the validity of *parate executie* clauses in pledge contracts pertaining to immovable property. Harms J also said:

[7] *The principles concerning parate executie (immediate execution) are trite. A clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgagor or the court by taking possession of the property and selling it is void. Nevertheless, after default the mortgagor may grant the bondholder the necessary authority to realise the bonded property. It does not matter whether the goods are immovable or movable: in the latter instance, to perfect the security, the court's imprimatur is required. It is different with movables held in pledge: a term in an agreement of pledge, which provides for the private sale of the pledged article and in the possession of the creditor, is valid but a debtor may 'seek the protection of the Court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights.'* Smalberger JA put the proviso in slightly different terms when he said that for validity the private execution clause should not prejudice, or be likely to prejudice, rights of the debtor unduly, meaning that the clause should not contain execution provisions that would be *contra bonos mores*."

[65] As a consequence, Harms J, confirmed that it is permissible for the debtor after default to authorise the creditor to sell the property privately.

³⁰ 2004 (2) SA 242 (SCA)

[66] Insofar as the decision of ***Business Partners Ltd v Mahamba***³¹ is concerned, this decision is authority for the principle that *parate executie* clauses are only valid in pledge agreements involving movable property and not in mortgage bonds over immovable property. However, in both instances it is possible to conclude a post default agreement authorising the creditor to sell the property privately.

[67] As set out in a useful article “*Parate executie clause in mortgage bonds versus post-default authority to sell*”:³²

“It is important to note that, even though the court in Business Partners v Mahamba (supra) discussed the validity of parate executie clauses, the facts of the case did not truly involve a parate executie clause. Indeed, no such clause appeared in the mortgage bond in question. Instead, after the debtor had defaulted on the original agreement, the parties agreed in a separate agreement that the creditor could sell the property privately if the debtor breached obligations in the separate agreement. If there had been a parate executie clause in the mortgage bond itself, that would have been invalid because, as established above, such clauses are not permitted in mortgage agreements pertaining to land. However, it is clear that the parties may agree to a private sale after the debtor has defaulted on the loan, which is what happened in this case.”

[68] Materially then, this is applicable to this matter and, as such, having granted the applicant the right to sell the properties by private treaty or auction, the respondent did so in a separate agreement post default and as a consequence the *parate executie* provision is valid.

[69] That also puts paid to any of the remaining relief in the counter-application, albeit not argued before me, that the special power of

³¹ (4568/2016) [2019] ZAECHC 17 (26 February 2019)

³² Obiter 2020, Reghard Brits, Department of Mercantile Law, University of Pretoria at page 182

attorney and the agreement of sale which flowed therefrom be set aside. The interdict was not pursued as the properties had already been sold and in any event, could not have been granted on any basis in the circumstances.

[70] I was also referred to ***Sheard v Land and Agricultural Bank of South Africa***³³ which once again simply affirms that statutory provisions which enable the Land Bank to attach property without judicial sanction are invalid. This does not offend the decisions aforesaid.

[71] As such the attempt by the respondent to delay the inevitable with an ill-founded referral to trial must be dismissed.

[72] As set out in ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd***:³⁴

“The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent’s mere allegation of the existence of the dispute of fact conclusive of such existence.

‘In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence; if this is not done, the lessee, against whom the ejectment is sought, might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the lessor.’

³³ 2000 (3) SA 626 (CC)

³⁴ 1949 (3) SA 1155 (T) at 1162-1163

(per Watermeyer CJ, in Preston v Cuthbert & Co Ltd (supra, at p. 428))”

[73] In all of the circumstances, the applicant has made out a proper case and is entitled to the relief which it seeks.

[74] Insofar as the costs are sought on an attorney client scale, I was also requested to incorporate the reserved costs that were made by Makume J. The submission made by the respondent's counsel that the scale of costs was punitive is incorrect. The loan agreements make provision for costs on an attorney client basis³⁵ and there is no suggestion, as was submitted to me, that the respondent was being penalised. The respondent obtained a postponement before Makume J to secure legal representation and file supplementary affidavits, which he elected not to do. There is no reason why those costs should not be borne by the respondent and follow the result.

[75] I make an order in the following terms:

1. The respondent is to pay the applicant the sum of R490 607,20 together with interest at a rate of 11.5% from 30 June 2022 to date of payment.
2. The respondent is to pay the applicant the sum of R22 967 271,94 plus interest at the rate of 9.5% per annum from 30 June 2022 to date of payment.
3. The respondent's counter-application is dismissed with costs awarded to the applicant.
4. The respondent is to pay the costs of this application on an attorney and client scale together with the reserved costs incurred on 3 June

³⁵ Clause 2.3.2: “All costs incurred and/or paid by the Bank in connection with this bond, such as but not restricted to, insurance premiums, rates, taxes, stamp duties, legal expenses (as between attorney and own client), incurred in suing for recovery of any amount due which is secured by this bond ...”, CaseLines 001-108

2022.

P V TERNENT

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON:	24 May 2023
DATE OF JUDGMENT:	3 January 2024
	Adv J E Smit
FOR APPLICANT:	E-mail: johan@jesmit.com Cell: 082 468 1755 ENS Africa Incorporated
INSTRUCTED BY:	E-mail: nmakea@ensafrica.com kkotze@ensafrica.com Tel: (011) 269-7600
FOR RESPONDENT:	Adv G H Meyer (now deceased) Fluxmans Attorneys
INSTRUCTED BY:	E-mail: jlevitz@fluxmans.com Tel: (011) 328-1825