

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 16759/2021

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 9 November 2023

E van der Schyff

In the matter between:

FIRST NATIONAL BANK

APPLICANT

and

KARIN PIETERSE

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] The applicant/plaintiff approached the court for summary judgment against the respondent/defendant for payment of an amount of R1 242 886.89 together with interest and an order declaring the respondent's immovable property specially executable. The applicant also seeks condonation for the late filing of the application. In this application for summary judgment, the respondent/defendant raised several defences. The respondent contends that the court does not have the necessary jurisdiction to hear the application as the property is situated in Brits in the North-West Province, that the respondent raised triable issues as defences to the claim,

and that the applicant's application for condonation for the late filing of the application for summary judgment should not be condoned.

Re: Jurisdiction

[2] The respondent did not raise the issue of the court's alleged lack of jurisdiction as a defence in her plea, and I am of the view that it cannot subsequently be raised as a defence in the affidavit opposing summary judgment. The grounds of the defence raised in the opposing affidavit should accord with the allegations in the plea. In any event, the geographical area of Brits does fall within the jurisdictional area of the High Court, Gauteng Division.¹

Re: Condonation

[3] The Plea was ostensibly uploaded to the Caseline's file on 13 June 2022. The term 'deliver' is defined in Rule 1 of the Uniform Rules of Court. The term 'deliver' encompasses two distinct actions, both that must be completed. These are that service on all parties must have occurred and filing of the document with the registrar. It is only after the Plea was uploaded to the Caseline's file that it was properly filed with the Registrar of the Court and was thus 'delivered' as required in terms of Rule 32(2)(a). The application for summary judgment was filed in Caselines and served on the defendant's attorney of record on 22 June 2022. On this basis alone, it cannot be said that the application for summary judgment was brought out of time.

Triable issues

[4] Because I am of the view that one of the defences raised by the defendant does raise a triable issue, and constitutes a *bona fide* defence,² I am not expressing my view on any of the remaining defences. The defendant pleaded and stated in the affidavit opposing summary judgment that she fell in arrears due to the Level 5

¹ GG No. 39540 21 December 2015, GN 1266.

² *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems v National Security and Fire (Pty) Ltd* 2020 (6) SA 624 (WCC) at para [13].

lockdown regulations imposed in terms of the Disaster Management Act, 57 of 2002. She explains that she is a registered dog breeder who breeds the Boerboel breed predominantly for the export market. Since she was prohibited from exporting, her income ceased immediately, and as a result, she fell in arrears with the payment of her monthly bond installments.

[5] The plaintiff, in dealing with this issue in the application supporting summary judgment, states that because the respondent's income derived from the sale and export of Boerboel dogs was not a pre-requisite to the respondent's ability to perform her obligations to pay the minimum installments due to it, the respondent's failure to pay as a result of the Covid 19 pandemic does not constitute a defence of *vis major*, and is not a triable issue.

[6] I had regard to the caselaw I was referred to. I agree with the view expressed in *Standard Bank Namibia Limited v A-Z Investment Holdings (Pty) Ltd*³ that the effect of the COVID-19 pandemic on a particular business activity or agreement should be assessed on the premise of the facts of the particular case. The defendant should be allowed to lead her evidence in an effort to substantiate her Plea in this regard. It is for the trial court to determine whether she makes out a case that meets the stringent provisions of the common-law doctrine of supervening impossibility of performance.

Costs

[7] Since the trial court will be hearing evidence before deciding the action, it would be in the best position to determine the matter on the evidence. It is only during the trial that it will become evident whether the plaintiff was justified in approaching the court for summary judgment. For this reason, considering the facts of this case, the costs of this application are costs in the cause.

ORDER

³ 2022 JDR 0043 (MN).

In the result, the following order is granted:

- 1. The application for summary judgment is dismissed.**
- 2. Costs are costs in the cause.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on Caselines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For the applicant: Adv. A. P. Ellis

Instructed by: PDR Attorneys Inc.

For the respondent: Adv J.J Scheepers

Instructed by: JJ Jacobs Attorneys Inc.

Date of the hearing: 6 November 2023

Date of judgment: 9 November 2023