

REPUBLIC OF SOUTH AFRICA



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

Appeal no: A2022

Case No: 18901/21

Heard on: 2 August 2023

Judgment: 16 October 2023

Court a quo Case No: 18900/21

- (1) Reportable: No
- (2) Of interest to other judges: No
- (3) Revised. [REDACTED]

16 October 2023

J.J. STRIDOM

In the matter between:

NASER GHAHERI

First Appellant

XIAO LING CHEN

Second Appellant

**APADANA AUCTIONEERS
CLOSE CORPORATION**

Third Appellant

NG & H PLAYGROUND AND GAMES CC

Fourth Appellant

**APADANA RUGS AND ART
HOME DÉCOR (PTY) LTD**

Fifth Appellant

And

FIRTSRAND BANK LIMITED

Respondent

In the matter between:

RUG WHOLESALERS SA (PTY) LTD

First Appellant

XIAO LING CHEN

Second Appellant
(First Intervening Party)

NASER GHAHERI

Third Appellant
(Second Intervening Party)

AND

FIRSTRAND BANK LTD

Respondent

JUDGMENT

STRIJDOM, AJ

INTRODUCTION:

1. In this matter, it was decided that the appeal in Case number 18900/21 and Case number 18901/21 should be heard together.
2. The defences raised by the appellants qua sureties are the defences raised by the principal debtor, Rug Wholesalers SA (Pty) Ltd, (now in liquidation) (Wholesalers) as set forth hereunder.
3. In case number 18900/21, the court a quo handed down a money judgement in favour of the respondent against the appellants in their capacities as the sureties for Wholesalers.¹
4. On 25 July 2022, the court a quo granted leave to appeal to the full court of this division.²

¹ Caselines 000-1

² Caselines 000-28

5. The appellants do not contest Wholesalers' liability to the respondent or the fact that they have executed the suretyships relied upon by the respondent.

6. The appellant's grounds of appeal are first, that the respondent's application before the court a quo was fatally defective for want of compliance with Rule 41 A and, second, that Wholesalers' indebtedness to the respondent is not due and payable based on "force majeure" brought about by the restrictions of the COVID-19 pandemic.

7. In case number 18901/21, and on 3 June 2022 the court a quo handed down judgment in terms of which the first appellant (Wholesalers) was finally wound-up, the second and third appellants were granted leave to intervene and their application to commence business rescue proceedings in respect of the first appellant was dismissed with costs.³

8. On 25 July 2022, the court a quo granted the appellants leave to appeal against the judgment to the full court of this division.⁴

9. The second appellant acts in her capacity as shareholder and alleged creditor of the respondent. The third appellant is also alleged to be a creditor of the respondent.

THE SALIENT FACTS:

10. Wholesaler's indebtedness to the respondent stems from three loan agreements: the first concluded on 29 June 2018 for the advance of a capital sum of R10.350.000, the second concluded on 9 July 2018 for the advance of a capital sum of R5 220 000 and the third concluded on 29 March 2019 for the advance of the capital sum of R3 360 000 ("the loan agreements").

11. The loans were repayable in 120 monthly instalments and the outstanding amounts from time to time would bear interest at the rate equal to 1% above the respondent's prime interest rate. Should Wholesaler's default in its obligations under the loan agreement, the respondent has the right, on notice to Wholesalers, to accelerate and place on demand payment of the outstanding balance, which would become due and payable immediately.

³ Caselines 01-29

⁴ Caselines 000-34

12. On 17 April 2020, the respondent and Wholesalers entered into a variation agreement. In terms thereof Wholesalers were afforded a 3-month payment reprieve in respect of repayment of the capital portion of its monthly instalments in respect of the loans. During this period, Wholesalers was only liable to pay the interest portion of its monthly instalments.

13. Naser Ghaheri executed five suretyships in terms of which he bound himself in favour of the respondent as surety in solidum and co-principal debtor jointly and severally with Wholesalers.

14. Xiao Ling Chen executed five suretyships in terms of which she bound herself to and in favour of the respondent as surety in solidum for and co-principal debtor jointly and severally with Wholesalers.

15. Apadana Auctioneers CC executed two suretyships in terms of which it bound itself to and in favour of the respondents as surety in solidum for a co-principal debtor jointly and severely with Wholesalers.

16. NG an H Playground and Games CC executed three suretyships in terms of which it bound itself to and in favour of the respondent as surety in solidum for and co-principal debtor jointly and severally with Wholesalers.

17. Apadana Rugs Art and Home Decor (Pty) Ltd executed two suretyships in terms of which it bound itself to and in favour of the respondent as surety in solidum for and co-principal debtor jointly and severally with Wholesalers.

18. Wholesalers failed too punctually pay the instalments due under the loan agreements read with the variation agreement. It also failed to punctually pay the municipal rates and taxes in respect of its immovable properties mortgaged in favour of the respondent as security for its indebtedness to respondent.

19. On 15 March 2020, the government declared a national state of disaster in response to the COVID-19 pandemic. and on 25 March 2020, by way of regulations made in terms of the section 27 (2) of the Disaster Management Act 2002 introduced a national lockdown which restricted people to their homes, except for the purpose as mentioned in the regulations. The regulation came into operation on 26 March 2020. Relevant to this matter is that retail shops, except those that sold essential

goods, had to close. This affected Wholesalers' business which was closed for a period of 65 days and was unable to trade. The declaration of the lockdown prompted Wholesalers to request and to conclude the variation agreement with the respondent.

20. Wholesalers breached the agreements in that it failed to pay their monthly instalments, which had been reduced in accordance with the variation agreement for a period of three months.

21. In respect of account 3-000-015-153-376, the payment record was satisfactory up to the end of April 2020. No payments were made in May, June and July 2020, and an amount of only R64,272.99, instead of a payment due of R131.492.06, was made in August 2020.⁵

22. In respect of account 3-000-015-198-108, payments were made as required except for the months of April and May 2020.⁶

23. In respect of account 3-000-015-501-50, payments were made as required except for the months of April, May, and June 2020 when no payments were made.⁷

THE ISSUES

NON-COMPLIANCE WITH RULE 41 A:

24. It was submitted by the appellants that the main application was fatally defective, in that it had not been preceded or accompanied by a notice in terms of Rule 41 A, which had to be served in terms of Sub Rule (2)(a) at the latest, when the application was issued.

25. The main application was launched on 16 April 2021. The rule 41(2)(a) notice was signed on 5 May 2021. The appellants argued that the rule is peremptory and was ignored by the respondent, which did not seek condonation in terms of Rule 27(3).

⁵ Annexure RA4.

⁶ Annexure RA6.

⁷ Annexure RA5.

26. Wholesalers and the intervening parties signed a Rule 41(A)(2)(a) notice on 13 September 2021. The notice of motion in respect of the counterclaim was also signed on that date.

27. According to recent case law, the current judicial approach to non-compliance with the Rule 41(A) appears to be more practical.⁸

28. Where a party fails to comply with Rule 41 A procedure, they may receive notice of an 'irregular step' from their opponent. Failure to engage with the Rule 41 A process may also result in a punitive cost order for the unreasonable party. However, a court cannot force parties to mediate. Rule 41 A (3) (b) provides that a Judge may direct the parties to consider mediation at any point before judgement, but not that mediation can be imposed on the parties. This would be contrary to the nature of mediation as a voluntary process.

29. In condoning late compliance by the respondent, the court a quo exercised a discretion. The court a quo concluded that the parties are not prepared to reach out to each other, and the court is not prepared to uphold this technical objection.⁹

30. Courts have an inherent discretion in appropriate cases to condone non-compliance with the rules of court in the interest of justice, and to bring matters to finality.

31. It was decided in ***M & C Department of Public Works versus Moleske***.¹⁰

“For a party to rely successfully on the other party's failure to have delivered a Rule 41 A (2) notice, he or she would have to demonstrate that such non-compliance has created prejudice. It would be necessary to show that non-delivery of the notice has hampered the preparation and conduct of his or her defence, or that it has caused harm in the wider sense. The court needs to be satisfied, overall, that it would be in the interest of justice for the case to be removed from the roll.’

⁸ Nedbank Limited v Wesley Groenewald Familie Trust [2021] FB (Nedbank). MN v SN [2020] ZAWC HC 157 Nomandela v Nyandeni Local Municipality & Others [2021] ECM. Matsaung v Mamahule Traditional Authority [2022] ZALMPPHC.

⁹ Caselines 01-53 para 98 of judgement.

¹⁰ 2023 JDR 0306 (ECB) at para 14-19

32. I must agree with the respondent that, the appellants have not illustrated the kind of prejudice contemplated in the aforesaid decision.

33. On appeal interference with the exercise of a discretion is limited to cases in which it is found that the trial court has exercised its discretion capriciously or upon a wrong principle or has not brought its unbiased judgment to bear on the question or has not acted for substantial reason.¹¹

34. In my view, there is no basis for this court to interfere with the court a quo's discretion.

FORCE MAJEURE:

35. The intervening parties contended that the restrictions imposed under the Disaster Management Act 57 of 2002 ("the DMA") constitute force majeure which has not been excluded by the provisions of any of the agreements upon which the respondent relies and which agreements specifically incorporate the South African Common Law.

36. The court a quo concluded that on the appellant's own version, performance is not impossible. They contended that there is 'more than sufficient equity' in the mortgaged properties to settle the respondent's claim in full.¹²

37. The first intervening party states that during March 2020, as a result of the COVID-19 pandemic, the government of the Republic of South Africa instituted a lockdown which precluded Wholesalers from trading at all for the period of 65 days and subsequent extensions of the lockdown at lower levels have precluded Wholesalers from trading in a meaningful and cost-effective manner. When the variation agreement was concluded on 17 April 2020, no one knew the full extent, duration, and impact of the lockdown, and more particularly its impact on Wholesaler's business.

¹¹ General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA) at para [57].

¹² Caselines 01-360 – Appellant's founding affidavit in the counter application para 14.1.

38. According to the first intervening party, Wholesalers partially performed in terms of the variation agreement and tendered further performance. Wholesalers was able to partially fulfil its obligations under the variation agreement.

39. The court a quo found that Wholesalers having agreed to the variation agreement, it assumed the risk associated with the lockdown regulations and agreed to pay the interest during the moratorium period but did not do so.¹³

40. The court a quo, further found that Wholesalers not only commenced business by the end of June 2020, when the lockdown regulations were eased, but also commenced payments on the interest in accordance with the three agreements. Wholesalers has not provided a shred of evidence to show that it was incapable of complying with the variation agreement and has also not indicated how it had dealt with the sum of R840,000.00 advanced to it by the respondent on 20 March 2020.¹⁴

41. The doctrine of supervening impossibility of performance generally extinguishes or suspends contract obligations if performance becomes impossible through no fault of the party.

42. It was decided in *Unibank Savings and Loans Ltd (formerly Community Bank v ABSA Bank Limited)*¹⁵ that:

'A Contract is, however, terminated only by objective impossibility (which always or normally has to be total). Subjective impossibility to receive or make performance at most justifies the other party in exercising an election to cancel the contract.'

43. If provision is not made contractually by way of a force majeure clause, a party will only be able to rely on the stringent provisions of the Common Law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement.¹⁶

¹³ Caselines: 01 – 42 para 49 of judgment

¹⁴ Caselines: 01 – 43 para 51 of judgment

¹⁵ [2000] 3 ALL SA 344 (W) PAGE 350 para 9.2

¹⁶ *Mhlonipheni v Mezepoli Melrose Arch (Pty) Ltd and others* 2020 JDR 1033 (GJ) at para 36.

44. Performance must be absolutely or objectively impossible. Mere personal incapacity to perform (or subjective impossibility) does not render performance impossible. Impossibility is not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive, or unaffordable.¹⁷

45. The appellants do not explain why, if there is sufficient equity in the mortgage properties, they have not sold them and settled Wholesaler's indebtedness to the respondent.

46. In my view, the court a quo did not misdirect itself to find that the appellants reliance on vis majeure must fail.

BUSINESS RESCUE:

47. In terms of section 131 (1) read with 131 (4) of Act 71 of 2008 ("The Act") the court may make an order placing a company under supervision and commencing business rescue proceedings if: -

47.1 the company is financially distressed.

47.2 the company has failed to pay over any amounts in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment related matters, or

47.3 it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company;

48. It was submitted by the appellants that Wholesalers is the registered owner of 3 (three) immovable properties, which alone, provide more than sufficient equity to settle all of Wholesaler's liabilities to the respondent and its other Creditors in full and to provide Wholesaler's shareholders with a dividend, provided that they are not sold by way of a forced sale as part of a liquidation process.

¹⁷ Unibank Savings and Loans v ABSA Bank Limited 2000 (4) SA 191 (W) at 198 D.

49. It was further argued that if Wholesalers is placed in business rescue, as opposed to final liquidation, there would be no need to sell any of the properties and Wholesalers could resume trading profitably, as the economy recovers.

50. The appellants contended that insurance claims have been submitted by both Wholesalers, Apadama Rugs and Art Home Decor (Pty) Ltd, Apadama Rugs and Art Home Decor (Pty) Ltd has undertaken to settle the respondent's claim in full, as well as settling the amounts due to the municipality as soon as such insurance payout has been received. On 15 August 2021, a fire broke out in the Wholesalers premises and destroyed stock to the value of R40 million belonging to Apadama Rugs and Art Home Decor (Pty) Ltd.

51. The court a quo found that no cogent evidential basis was laid by the appellants that there is a reasonable prospect of rescuing Wholesalers.¹⁸

52. The appellant's hopes of Wholesalers being rescued is completely dependent on the insurance claims being settled. Apadama Rugs and Art Home Decor (Pty) Ltd have only an expectation that Santam will settle their claims and cannot be certain that the claims will be settled in full. Even if the appellants were able to utilize the proceeds of any claim which may be settled by Santam, there is no evidence to suggest that Wholesalers will be able to restore the damaged building and continue to trade.

53. No evidence has been provided by the intervening parties relating to the extent to which Wholesalers, Apadama Rugs and Art Home Decor (Pty) Ltd are still trading, the number of employees employed by the entities and any other relevant details. There is also no explanation where the resources to pay the monthly instalments on the bond will come from.

54. The appellants founding affidavit in the counter application does not establish an evidential basis that warrant a conclusion that Wholesalers is able to continue to trade profitably.

¹⁸ Caselines 01-51 para 89 of judgment.

55. The phrase 'reasonable prospect' in the present context has been defined by the Supreme Court of Appeal in ***Oakdene Square Properties (Pty) Ltd and others v Farm Bothasfontein (Kyalami (Pty) Ltd and others***:¹⁹

'As a starting point, it is generally accepted that it is a lesser requirement than 'a reasonable probability' which was the yardstick of placing a company under judicial management in terms of section 427(1) of the 1973 Companies Act.... On the other hand, I believe it requires more than a mere prima facie case or an arguable possibility. Of even greater significance, I think, is that it must be a reasonable prospect-with the emphasis on 'reasonable'- which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds in accordance with the rules of motion proceedings which, generally speaking, require that it must do so in the founding papers.'

56. It was further decided in *Oakdene* that: -

'But the applicant must establish grounds for the reasonable prospect of achieving one of the two goals in s128 (1) (b)'.

57. In my view, the appellants failed to set out facts in their founding affidavit to establish a reasonable prospect of rescuing Wholesalers.

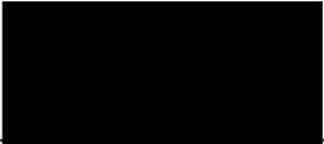
58. The court a quo evaluated all the facts that were put by the parties before it properly, and there is no sign of any misdirection on the facts and the law.

59. In the result the following order is made:

59.1 The appeal in Case number 18900/21 is dismissed with costs.

59.2 The appeal in Case number 18901/21 is dismissed with costs.

¹⁹ 2013 (4) SA 539 (SCA).


STRIJDOM JJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION
JOHANNESBURG


PP VAN NIEUWENHUIZEN AJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION
JOHANNESBURG

I AGREE


PP TP MUDAU J
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION
JOHANNESBURG

I AGREE AND IT IS SO ORDERED

APPEARANCES:

For the Applicant : Advocate M Nowitz
Instructed by : Hirschowitz Flionis Attorneys

For The Respondent : Adv NJ Horn
Instructed by : Werkmans Attorneys