

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2022-007978**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
DATE 28 February 2025	SIGNATURE

BEFORE THE HONOURABLE JUSTICE, AUCAMP AJ

In the matter between:

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK

Applicant

And

TSHEPORI HOLDINGS (PTY) LTD

First Respondent

PHILLIP TSHEPO RIBA

Second Respondent

JUDGMENT

- [1] On 7 October 2019, the applicant, FirstRand Bank Ltd t/a First National Bank ("***the Bank***") and the first respondent, Tshepori Holdings (Pty) Ltd, concluded

a written overdraft facility agreement ("**the facility agreement**") in terms of which the Bank lent and advanced monies to the first respondent.

- [2] The second respondent, Phillip Tshepo Riba ("**Riba**") bound himself as surety and co-principal debtor, jointly and severally in solidum with the first defendant, for the repayment on demand of any sum or sums of money, which the first respondent owed or may thereafter owe to the applicant from whatever cause arising and the due fulfilment of all obligations of the first respondent to the Bank.
- [3] The Bank duly complied with its obligations pursuant to and in terms of the agreement, more specifically the Bank allowed the first respondent to draw on the facility.
- [4] The Bank alleges that as a result of a change in the first respondent's behavioural, financial and/or transactional circumstances, the Bank elected to terminate the agreement and demand payment of all amounts owing to it. The changed circumstances are recorded as (a) a failure to make regular and sufficient deposits and credits into the facility account to repay interest and fees and (b) a notable reduction in turnover on the facility account.
- [5] The Bank alleges that as at 30 June 2022, the respondents was and remains indebted to the Bank in an amount of R550,771.15 together with such further interest on the said amount at the rate of 22.00% (prime plus 13.75%), per annum linked, capitalised monthly from 1 July 2022 to date of final payment.
- [6] Finally, the Bank alleges that the provisions of the National Credit Act, Act 34 of 2005 does not find any application to the agreement.
- [7] The plea delivered by and on behalf of the respondents, essentially raises one issue in defence of the cation, that being a defence founded in the principles of supervening impossibility. The defence in turn is premised on the COVID-19 pandemic and its devastating consequences on the business operations of the first respondent. The remainder of the plea contain no more than a bare denial. The affidavit resisting the application for summary judgement, echoes the content of the plea, save for an addition to the grounds of opposition, i.e

an invitation in terms of Rule 41A of the Uniform Rules having been extended to the respondents to have the matter referred to mediation, an invitation which the respondents allege, they subsequently accepted.

- [8] The heads of argument filed by and on behalf of the respondents confines the respondents' opposition to the application for summary judgement to the referred to issues.
- [9] During argument I was referred to the purported acceptance of the invitation to refer the matter to mediation however counsel for the respondents was not able to direct me to the purported acceptance. I afforded the respondents an opportunity to provide me with proof of such acceptance. I was later advised by the attorney acting for and on behalf the respondents that, apart from the delivery of the notice to defend the action, no specific response was made in terms of Rule 41A. Consequently, it became a non-issue and only the issue relating to a supervening impossibility remains.

THE TEST: SUMMARY JUDGEMENT

- [10] The principles applicable to summary judgment proceedings have been succinctly summarized by the Supreme Court of Appeal in **South African Land Arrangements CC v Nedbank Limited**.¹

"[13] The legal principles governing summary judgment proceedings are well-established. In **Maharaj v Barclays National Bank Ltd**, Corbett JA outlined the principles and what is required from a defendant in order to successfully oppose a claim for summary judgment as follows:

'...[One] of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined 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. All that the Court enquires into is: (a) whether the defendant had "*fully*" disclosed the nature and grounds of his defence and the material facts upon which it is founded, 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 both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be. The word "*fully*", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that,

¹ 2015 JDR 2364 (SCA)

while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence."

- [11] Regarding the remedy provided by summary judgment proceedings, Navsa JA said in **Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture**:²

"[31] The summary judgment procedure was not intended to "*shut a defendant out from defending*", unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful applications in our courts, summary judgment proceedings can hardly continue to be described as extraordinary.'

- [12] The Full Court in **Raumix Aggregates (Pty) Ltd v Richter Sand CC**³ explains what is required of a respondent in summary judgment:

"[15] Under the amended rule the applicant is required, 15 days after the date of delivery of a plea or an exception, to deliver a notice of application for summary judgment, together with an affidavit identifying any point of law relied upon and the facts underpinning the claim, briefly explaining why the defence as pleaded does not raise any triable issue. Under the old rule the plaintiff was required to file a brief affidavit 'verifying a cause of action' and opining that the defendant has no *bona fide* defence. These requirements are no longer applicable under the new procedure. The question is whether this change in procedure would, if applied retrospectively, adversely affect substantive rights.

[16] The purpose of a summary judgment application is to allow the court to summarily dispense with actions that ought not to proceed to trial because they do not raise a genuine triable issue, thereby conserving scarce judicial resources and improving access to justice. Once an application for summary judgment is brought, the applicant obtains a substantive right for that application to be heard, and, bearing in mind the purpose of summary judgment, that hearing should be as soon as possible. That right is protected under s 34 of the Constitution."

- [13] Although final in consequence when granted and, for that reason, not toothless, an application for summary judgement is and remains an interlocutory process, the main consideration being whether the defendant has presented a defence without merit and is only playing for time. If that is the

² 2009 (5) SA 1 (SCA)

³ 2020 (1) SA 532 (GJ)

case, the plaintiff is entitled to an immediate judgement. Failing this, the plaintiff will suffer an injustice.⁴

[14] If the defence has merit, the plaintiff is not entitled to judgement.

[15] The only issue of any relevance is the *bona fides* of the defendant's notice of intention to defend, in the sense of his entitlement to defend at all.

[16] It is not a trial of the of the entire action.⁵ Once it is accepted that the adjudication of a summary judgement application does not entail the adjudication of the entire action, the further question of what the relevance of the summary judgement affidavits, would be at the ultimate trial, should leave to defend be granted, arises.

[17] Summary judgement proceedings are not and never have been intended as a forum for the resolution of factual disputes.⁶

SUPERVENING IMPOSSIBILITY

[i] The Respondents' Allegations

[18] The respondents allege that:

18.1 [insert]

[ii] The Applicable Legal Principles

[19] Contractual obligations may be extinguished by events supervening after the conclusion of the agreement. Such events must preclude the performance of what is, on a proper interpretation of the contract, required of a party and must not merely frustrate the objectives of the parties in entering into the agreement.⁷

⁴ Pansera Builders Suppliers (Pty) Ltd v Van de Merwe (t/a Van der Merwe's Transport) 1986 (3) SA 654 (C) 660D

⁵ Van Heerden v Samarkand Motion Picture Productions 1979 (3) SA 786 (T)

⁶ Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426A

⁷ Edrei Investments 9 Ltd (In liquidation) v Dis-Chem Pharmacies (Pty) Ltd 2012 (2) SA 553 (ECP) wherein it was held that a lessee's inability to trade profitably does not afford an excuse from its contractual duties

[20] If performance in terms of an existing contractual obligation becomes subjectively or relatively impossible, the obligations are not affected. Normally, therefore, the fact that performance has become difficult since the conclusion of the agreement will not release the debtor, in so far as impossibility amounts to an inability of that debtor to perform.⁸ Should the debtor not perform or not perform adequately or defectively, the debtor would in most cases be committing a breach of contract for which the normal legal consequences would follow.

[21] An inability to comply with a monetary obligation will in the rule amount only to a subjective impossibility.⁹

[22] If performance becomes objectively or absolutely impossible, the obligation is extinguished and the duty to perform and the corresponding right to claim performance fall away.¹⁰

[23] Whether performance has become objectively impossible is determined with reference to a standard of society which includes instances of actual physical impossibility and also instances where performance remains physically possible but cannot reasonably be expected to be rendered.

[24] Meyer J in **Unlocked Properties 4 (Pty) Ltd v A Commercial Properties CC**¹¹ explained the principles underpinning the defence of supervening impossibility as follows:

“[6] The legal rules relating to initial and supervening impossibility of performance, with their consequence, in certain circumstances, of the voidness of an agreement or the extinction of the obligations created by an agreement, relate to the initial or supervening impossibility of performance of *the obligations* purported to be created or created by the agreement.’ (Per Cilliers AJ in **Rosebank Mall (Pty) Ltd and another v Cradock heights (Pty) Ltd** 2004 (2) SA 353 (W), para 64.). In **MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner**

⁸ Unibank Savings and Loans Ltd (formerly known as Community Bank) v Absa Bank Ltd 2000 (4) SA 191 (W)

⁹ Mokala Beleggings and Another v Minister of Rural Development and Land Reform and Others 2012 (4) SA 22 (SCA) para 8; Crookes Brothers Ltd v Regional Land Claims Commission, Mpumalanga and Others 2013 (2) SA 259 (SCA); Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others 2010 (4) SA 308 (LCC); cf Scoin Trading (Pty) Ltd v Bernstein NO 2011 (2) SA 118 (SCA)

¹⁰ MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal 2008 (4) SA 111 (SCA)

¹¹ (18549/2015) [2016] ZAGPJHC 373 (29 July 2016) at [6]

of *MV Snow Crystal* [2008] ZASCA 27; 2008 (4) SA 111 (SCA), para 28, Scott JA said the following about the defence:

'As a general rule impossibility of performance brought about by *vis major* or *casus fortuitous* will excuse performance of a contract. But it will not always do so. In each case it is necessary to 'look to the nature of the contract, the relationship of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving impossibility will lie upon the defendant.'

(Footnotes omitted.)

- [7] The impossibility must be absolute or objective as opposed to relative or subjective. Subjective impossibility to receive or to make performance does not terminate the contract or extinguish the obligation. (See *Unibank Savings and Loans Ltd (formerly Community Bank) v ABSA Bank Ltd* 2000 (4) SA 191 (W), at 198B-C.)

- [8] In *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 (2) SA 118 (SCA), para 22, Pillay JA, said this:

'The law does not regard mere personal incapability to perform as constituting impossibility. [WA Ramsden *Supervening Impossibility of Performance in the South African law of Contract* (1985) at 17.]. The payment of the debt is not rendered impossible by the death of the deceased – as performance of a personal nature, like singing in an opera, would have been.'

- [9] LAWSA Vol 5(1) First Reissue para 160 states:

'The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract. [D 45 1 137 5 and see *Frye's (Pty) Ltd v Ries* 1957 3 SA 575 (A)]'

- [10] RH Christie *The Law of Contract in South Africa* 3rd Ed at 101 illustrates the principle that the impossibility must be absolute, thus:

'If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract. [D 45 1 137 5.]'

- [11] ...

- [12] One further example of mere relative or subjective impossibility is to be found in *Unibank Savings and Loans* (*supra*), at 198D-E. There Fleming DJP held:

'Impossibility is furthermore 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."

- [25] The court in **Johannesburg Consolidated Investment Co v Mendolsohn & Bruce Limited**¹² rejected a claim for remission of rental because of a decline in custom arising from the outbreak of war and which rendered it no longer profitable to operate a stationer's shop. The court posited the following particularity relevant analogy:

"The consequence of holding that the defendants in this case are entitled to a remission of rent appears to me to be far-reaching. It would involve this, that on the happening of any event amounting to vis major, which caused a temporary diminution of the population of a town, every tradesman who could show that he had sustained a temporary loss, or a considerable diminution of profit might be entitled to a remission of rent. Suppose, for instance, that in consequence of the outbreak of an epidemic disease a large proportion of the inhabitants fled, with the result that owing to the absence of their usual customers the tradesmen temporarily were carrying on business at a loss, and closed their shops, it would come as an unpleasant surprise to the lessors to find that the whole of the loss is to fall upon them, and that they occupy in effect the position of insurers of their lessees' custom."

- [26] The operation of the doctrine has been explained on the basis of a term that is implied into the contract that if performance becomes impossible, the contract shall not remain binding. For example, the Solomon ACJ for the Appellate Division in *Peters, Flamman & Co* referred to the oft-cited English authority of **Tamplin Steamship Co v Anglo Mexican Petroleum Products Co Limited** L.R. 1916 2 AC 422 in which Lord Parker said:

"My Lords in considering the question arising on this appeal it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible. This principle is one of contract law depending upon some term or condition to be implied in the contract itself and not on something entirely dehors the contract which brings the contract to an end."

(emphasis added).

- [27] Lord Loreburn in the same English authority said that:

"An examination of the decisions confirms me in the view that, when our Courts have held innocent parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise."

¹² 1903 TH 286 at 295, 296

(emphasis added).

- [28] In **Schlengemann v Meyer, Bridgens and Co Limited**¹³ the court referred to another English case, **Marshall v Glanville and Another**.¹⁴

“The true principle was laid down in **The Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co**, and the question was: Did the parties make their bargain on the footing that a particular state of things would continue to exist? Here it is clear that the parties contracted on the footing that it would continue to be lawful to perform and accept the contemplated service, but, from July 1916, that footing no longer existed, and the contract came to an end.”

- [29] It follows that where the parties have expressly in their written agreement stipulated for what will happen in the event of supervening impossibility of performance, there can be no room for an implied term that the parties are excused from performance. This explains why the doctrine of impossibility of performance cannot apply if the contract provides otherwise.¹⁵ A term cannot be implied where there are express terms that provide otherwise. A term is implied in an agreement for the very reason that the parties failed to agree expressly thereon.¹⁶

- [30] But irrespective of whether the jurisprudential basis of the doctrine is an implied term, our law undoubtedly allows for parties to contractually regulate the position should there be supervening impossibility of performance.

- [31] In the present matter, it is submitted that the agreement does not contain any provisions dealing with a force majeure scenario. As such, the matter is to be approached on the principals set out above and applying same I am not persuaded that the alleged supervening impossibility constitutes triable issues, and which would compel me to refer the matter to trial.

- [32] Apart from the above, the difficulty for the respondents is that they have not established a prima facie defence that their obligations in terms of the agreement, objectively, became impossible to perform as a direct result of the Covid-19 pandemic.

¹³ 1920 CPD 494 at 500

¹⁴ 116 LT at 560 Also referred to in Bekker NO v Duvenhage 1977 (3) SA 884 (E) at 889E/F

¹⁵ See, for example, Ex Parte Lebowa Development Corporation Limited 1989 (3) SA 71 (T) at 105H/I

¹⁶ South African Mutual Aid Society v Cape Town Chambers of Commerce 1962 (1) SA 598 (A) at 615D

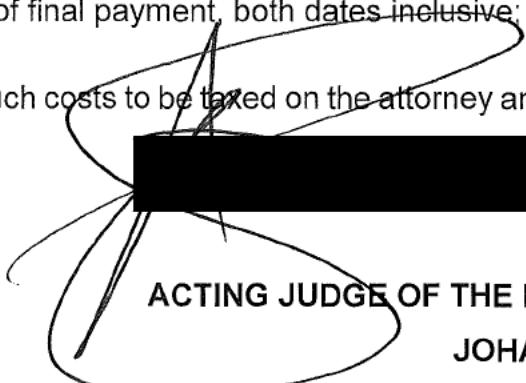
[33] Counsel for the respondents also referred me to an alleged payment that was made by and on behalf of the first respondent post the launch of the action. Attached to the particulars of claim is a certificate of balance which certificate, I am advised by counsel for the respondents, cannot be relied upon as it fails to take into account the referred to payment. In response hereto, I was provided with an updated certificate of balance which certificate on the face of it appears to be accurate.

[34] In the result I am satisfied that the Bank is entitled to receive summary judgement as prayed for and as a result I make the order as set out hereunder.

JUDGEMENT AND ORDER

[35] Summary judgement is granted against the first and second respondents, jointly and severally, the one paying the other to be absolved, in the following terms:

- a. *Ex abundanti cautela*, the termination of the facility agreement is confirmed.
- b. Payment of the amount of R550,771.15.
- c. Payment of interest on the aforesaid amount at the rate of 22% (prime plus 13.75%) per annum, linked, calculated and capitalised monthly from 1 July 2022 to date of final payment, both dates inclusive.
- d. Payment of costs, such costs to be taxed on the attorney and client scale.


[REDACTED]
S AUCAMP
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be **10h00 on-28 February 2025**

Heard on: 28 January 2025
Date of Judgement: 28 February 2025

For the Applicants:

Adv V Mabasa
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Jay Mothibi Incorporated

For the Respondents:

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