

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	<u>NOT</u> REPORTABLE
(2)	<u>NOT</u> OF INTEREST TO OTHER JUDGES

CASE NO: 2024-020685

DATE: 19 SEPTEMBER 2025

In the matter between:

FIRSTRAND BANK LIMITED t/a FIRST NATIONAL BANK

Applicant

and

AMORICOM (PTY) LIMITED

First Respondent

TERRENCE MATHEBULA

Second Respondent

Coram: Adams J

Heard: 21 May 2025

Delivered: 19 September 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 19 September 2025.

Summary: Monetary judgment – application for – written loan agreement between the applicant and the first respondent – second respondent bound

himself as surety for and co-principal debtor with the first respondent in favour of the applicant – loan also secured by a continuous covering mortgage bond in favour of the applicant over the first respondent's property – first respondent fell into arrears with instalments – parties concluded a written 'repayment arrangement, incorporating a special power of attorney' in regard to the property –

Pursuant to and in terms of the repayment agreement, property sold by the applicant – shortfall after sale claimed in opposed motion court proceedings – substantial portion of the shortfall relates to payment made in respect of arrear municipal rates and taxes – respondents accepted that the applicant was entitled to sell the property – however, they allege that the applicant acted unreasonably in selling the property at the price it did – respondents allege that there were better offers on the table than the one accepted by the applicant –

Held that, all things considered, the applicant acted reasonably – and that the applicant exercised its discretion reasonably, or, as it is known in our law, *arbitrio bono viri* –

Judgment granted in favour of the applicant against the respondents,

ORDER

Judgment is granted in favour of the applicant against the first and the second respondents, jointly and severally, the one paying the other to be absolved, for: -

- (a) Payment of the sum of R1 481 090.83.
- (b) Payment of interest on the sum of R1 481 090.83 at the applicant's prime lending rate (at the time being 11.75% per annum) plus 0.50% per annum, calculated daily and compounded monthly in arrears, from 14 February 2024 to date of final payment, both days inclusive.
- (c) Costs of the application on the attorney and client scale, including Counsel's charges on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.

JUDGMENT

Adams J:

[1]. This is an opposed application by the applicant for judgment against the first and the second respondents, jointly and severally, for payment of the sum of R1 481 090.83, plus interest thereon and costs of suit. The applicant's cause of action is based on a written loan agreement concluded at Sandton between the applicant and the first respondent on 30 August 2018 ('the loan agreement') in terms of which the applicant lent and advanced to the first respondent an amount of R3 850 000. The aforesaid capital sum of R3 850 000, together with interest thereon and other charges provided for in the loan agreement, were to be repaid by the first respondent to the applicant in sixty monthly instalments of R51 949.97 each.

[2]. The second respondent, in terms of a written Suretyship, bound himself as surety for and co-principal debtor with the first respondent in favour of the

applicant. The loan was furthermore secured by a continuous covering mortgage bond in favour of the applicant over the first respondent's property, being Erf 196, Kempton Park Township, Gauteng Province ('the property'), for the sum of R3 850 000.

[3]. By July 2022, the first respondent had fallen hopelessly into arrears with its monthly instalments payable in terms of the loan agreement, and, in an attempt to assist the respondents and with a view to avoiding litigation, the parties on 20 July 2022 concluded a written so called 'Repayment Arrangement', incorporating a special power of attorney ('the SPOA') in regard to the property. In terms of the Repayment Arrangement, the parties agreed that the respondents would settle their admitted indebtedness and any other monies owing to the applicant in terms of the Repayment Arrangement on or before 1 October 2022. In the event that the respondents breached any of the terms of the Repayment Arrangement, the first respondent irrevocably and unconditionally authorised, instructed and consented to the applicant disposing of the property on terms and in the manner deemed appropriate by the applicant, and appropriating the proceeds of the disposal in permanent reduction of the respondents' indebtedness and any other monies owing to the applicant in terms of the Repayment Arrangement.

[4]. Simultaneously with signature of the Repayment Arrangement, the first respondent executed an irrevocable and unconditional SPOA in favour of any manager of the applicant, authorising the applicant's representative to take all steps necessary to give effect to the disposal of the property upon the breach by the respondents of any of the terms of the Repayment Arrangement. It was also agreed that the applicant's representative would be entitled to *inter alia* at its own discretion to sell the property by way of a closed auction or a public auction (with or without a reserve price) or private treaty and/or to agree to a purchase consideration which the applicant's representative deems reasonable.

[5]. Subsequent to the conclusion of the Repayment Arrangement, the respondents failed to settle their indebtedness on or before 1 October 2022.

Accordingly, and, as it was entitled to do in terms of the Repayment Arrangement, read with the SPOA, the applicant proceeded with the disposal of the property and on 21 April 2023 sold the property for R3 850 000, excluding VAT, as a consequence whereof the applicant received the net proceeds of the sale in the sum of R4 030 509.40, which it duly credited to the respondents' account and their indebtedness, leaving a net balance, according to the applicant, of the sum of R1 481 090,83, plus interest thereon, payable by the respondents to the applicant, which is the amount claimed by the applicant in these proceedings.

[6]. The transfer of the property to the purchaser took place on 24 November 2023. Importantly, in order to ensure that the registration of the transfer to the purchaser proceeded, the applicant advanced payment on behalf of the first respondent to the City of Ekurhuleni of the rates clearance figures in the amount of R1 271 444.11 for purposes of obtaining the relevant rates clearance certificate. This sum was debited to the respondents' account and their indebtedness to the applicant, as per and in terms of the Repayment Arrangement. The foregoing shortfall of R1 481 090.83, for which, according to the applicant, the respondents remain liability, together with interest thereon. Much of this indebtedness relates to the amounts paid by the applicant to the local authority for purposes of obtaining a rates clearance certificate. All of the foregoing was done, in my view, in terms of and according to the letter and the spirit of the Repayment Agreement, which incorporated by reference the SPOA.

[7]. The first and the second respondents accept that the applicant was entitled, in terms of the Repayment Agreement, read with the SPOA, to sell the property. However, they resist the application for judgment on the basis of a denial that the applicant was entitled to sell the property, as it did, for the lesser amount of R3 850 000, excluding VAT, as, so the case on behalf of the respondents go, the applicant unreasonably refused and/or failed to accept two better offers procured by the respondents for R5 400 000 and R7 200 000 respectively. In sum, the application is opposed by the respondents on the following two bases: (a) The applicant failed to properly execute its mandate as the agent of its principal, the first Respondent; and (b) The applicant has failed to

prove the quantum of its claim. The point about the latter defence is that, according to the respondents, the quantum of the contractual damages claimed by the applicant is wholly unreasonable and unrealistic.

[8]. The issue which I have to adjudicate is a factual one. I need to consider whether factually the applicant has proven the amount claimed by it as reasonable. Put another way, the issue for determination in these proceedings is whether the applicant exercised its discretion reasonably, or, as it is known in our law, *arbitrio bono viri*.

[9]. The applicant contends that its discretion was unfettered. In any event, so the case on behalf the applicant goes, it did indeed exercise its discretion *arbitrio bono viri*.

[10]. As indicated above, in essence the case on behalf of the respondents is that they procured two offers to purchase the property, in the sums of R5 400 000 and R7 200 000 respectively, which, had any one of these two offers been accepted, would have raised sufficient proceeds to settle the debt to the applicant and would have been sufficient to defray the amounts owing to the local authority.

[11]. The respondents further contend that the applicant, acting in terms of the SPOA, had a duty to the first respondent not to sell the property for less than the respondents' outstanding indebtedness, together with arrear rates and taxes, '... unless it could be shown that the reasonable market price of the property would not realize a sufficient amount to cover the outstanding debt to the applicant and the municipality'.

[12]. Mr De Oliveira, Counsel for the applicant, submitted that, objectively considered and taking into account the history of the matter and numerous still-born offers to purchase sent by the second respondent to the applicant over an extended period of time, the applicant acted reasonably and rationally throughout. I find myself in agreement with this contention. It is so, as submitted by Mr De Oliveira, that the reasonable man in the mercantile world would have

done precisely as the applicant did. He would rightly have viewed the second respondent's communications with the applicant and its appointed auctioneers, at the eleventh hour, with circumspection and avoided another delay in the sale of the property, and losing the firm offer for R3 850 000, excluding VAT.

[13]. I therefore conclude that the applicant acted reasonably and rationally when it proceeded to accept the offer of R3 850 000, excluding VAT. Its representatives acted with good faith and honesty throughout. I come to this conclusion on the basis of the considerations set out in the paragraphs which follow.

[14]. The first offer relied upon by the respondents was emailed to the applicant effectively in response to the representative of the bank advising the respondents that it had obtained the offer which it ultimately accepted. Moreover, the first offer relied upon by the respondents presented with serious discrepancies, which made the applicant, rightly so, sceptical about the genuineness of the offer.

[15]. Moreover, by the time the applicant accepted the final offer for R3 850 000, a period in excess of five months had transpired from the date on which the respondents ought to have settled their indebtedness in full. During that period, the respondents did not come up with any offers. It was only after the applicant indicated to the respondents that they intended accepting the offer for R3 850 000 and after they were afforded a further indulgence to come up with an offer, that the respondents presented what appears to have been questionable offers to purchase.

[16]. Sight should also not be lost of the history of the matter leading up to the conclusion of the Repayment Agreement, which included a number of still-born offers to purchase presented by the respondents. It is therefore understandable that the applicant treated with circumspection the offers received *ex post facto* the final offer accepted by the applicant.

[17]. For these reasons, I am of the view that the grounds of opposition as raised by the respondents are devoid of merit.

[18]. Judgment should therefore be granted in favour of the applicant against the respondents. As regards costs, same should follow suit. And, in that regard, the agreements between the parties provided for the award of costs on the scale as between attorney and client in favour of the applicant.

Order

[19]. In the result, Judgment is granted in favour of the applicant against the first and the second respondents, jointly and severally, the one paying the other to be absolved, for: -

- (a) Payment of the sum of R1 481 090.83.
- (b) Payment of interest on the sum of R1 481 090.83 at the applicant's prime lending rate (at the time being 11.75% per annum) plus 0.50% per annum, calculated daily and compounded monthly in arrears, from 14 February 2024 to date of final payment, both days inclusive.
- (c) Costs of the application on the attorney and client scale, including Counsel's charges on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	21 May 2025
JUDGMENT DATE:	19 September 2025
FOR THE APPLICANT:	M De Oliveira
INSTRUCTED BY:	Jason Michale Smith Incorporated, Rosebank, Johannesburg
FOR THE FIRST AND THE SECOND RESPONDENTS:	C R Du Plessis
INSTRUCTED BY:	Louanne Visser Attorneys Inc, Ruimsig, Roodepoort