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

Case Number**: 31542/2019**

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff

And

BASIL AUBREY WILLIS First Defendant

RECHELLE WILLIS Second Defendant

JUDGMENT

SENYATSI J

Introduction

[1] This is an opposed summary application for monetary judgment and special executability against the first defendant. The plaintiff also seeks, at the same

hearing, a separate application for default judgment and special executability only against the second defendant in terms of Rule 46A, because monetary judgment has already been granted against her.

Background

[2] Following the joint practice note of both parties filed by counsel, the background as captured therein is as set forth in the preceding paragraphs.

[3] On or about 18 May 2005 and 4 April 2006, the Plaintiff (represented by a duly authorised official) and the Defendants concluded two written Home Loan agreements ('the First and Second Loan Agreement') in terms of which the Defendants would borrow the capital amounts of R634 400.00 and R165 600.00, respectively.

[4] The Defendants' account fell into arrears and on or about 28 June 2019, the Defendant's account was in arrears to an amount of R215 478.41 (Two Hundred and Fifteen Thousand and Four Hundred and Seventy-Eight Rand and Forty-One Cents) and total the outstanding amount owed to the Plaintiff was R1 052 299.78 (One Million and Fifty-Two Thousand and Two Hundred and Ninety-Nine Rand and Seventy-Eight Cents).

[5] On 01 July 2019 and 07 June 2021, the Plaintiff addressed notices in terms of Section 129(1)(a) of the National Credit Act 34 of 2005 to the Defendants' *domicilium* address which was served by registered mail.

[6] The Plaintiff then served Combined Summons and Particulars of Claims at the Defendants' chosen *domicilium* address on 12 September 2019. The Defendants then served their notice of intention to defend on 19 September 2019. On 25 May 2020, the first defendant served his plea. At the time when the First Defendant served his plea, he had been placed *ipso facto* barred from pleading. Further, the applicant was authorised to serve a section 129 notice on the defendant as per the court order by Yende AJ dated 5 March 2021.

[7] After the application for summary judgment was launched against both defendants, the Court per the order of Engelbrecht AJ, granted leave to defend the application in favour of the first defendant during November 2021 and granted default judgment against the second defendant as she had not filed her notice of intention to defend. So, the only relief sought against her, as already stated, is the executability of the judgment on the immovable property.

Contentions by the first defendant

[8] The first defendant having filed a plea resists the application for summary judgment. In his plea and opposing affidavit against the summary judgment, the first defendant firstly, states that due to Covid-19 which resulted in the national shutdown, his real estate business suffered financially, and it was impossible for him to perform his repayment obligations, the plaintiff now applies for summary judgment which is being resisted by the first defendant. Secondly, he also contends that Standard Bank failed to comply with the section 129 (1) of the National Credit Act, no: 34 of 2005 in that the notice calling up the loans was not delivered to him.

[9] He states that he made numerous attempts to restructure his loan without success with the plaintiff. He argues that he has minor children that he must maintain and that the immovable property should not be declared especially executable in terms of Rule 46A of the Uniform Rules. Other than the bare denials alluded to herein, the first defendant admits all the averments made by the applicant in its comprehensive particulars of claim.

Issue for determination

[10] The issues for determination are firstly, whether there is a triable issue based on the defence of the impossibility of performance due to Covid-19 and secondly, whether the alleged non-delivery of section 129(1) notice offers refuge to the first defendant and thus a triable issue.

The Legal principles

Summary judgment

[11] I will now deal with the principles on summary judgment, the defence of impossibility of performance and the alleged failure to serve the first defendant notice in terms of section 129.

[12] The summary judgment application is regulated by Rule 32 of the Uniform Rules which states thus:

> "Summary judgment
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> (1) The plaintiff may, after the defendant has delivered a plea, apply to court for summary judgment on each of such claims in the summons as is only—
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> (a) on a liquid document;
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> (b) for a liquidated amount in money;
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> (c) for delivery of specified movable property; or
>
> (d) for ejectment."

[13] The objective of the rule is to prevent a plaintiff's claim, based upon certain causes of action, from being delayed by what amounts to abuse of the process of court.[1] The procedure is not designed to shut down a defendant who can show that there is a triable issue applicable to the claim from laying his defence before the court.[2]

[14] In *Joob Joob Investments (Pty)Ltd v Stocks Mavundla Zek Joint Venture*[3] , the Court said the following regarding the procedure:

> "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 a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a

[1] *Meek v Kruger* 1958(3) SA154(T)at 159-160; *Joob Joob Investments (Pty)Ltd v Stocks Mavundla Zek Joint Venture* 200(5) SA 1 (SCA)at 11C-G.
[2] *Majola v Nitro Securitisation 1 (Pty)Ltd* 2012 (1) SA 226(SCA) at 232F-G.
[3] [2009] ZASCA 23; 2009 (5) SA 1 (SCA); [2009] 3 All SA 407 (SCA) at para 32 -33.

defendant with a triable issue is not shut out. In the *Maharaj* case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both *bona fide* and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.

Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are 'drastic' for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G-426E."

[15] Although the remedy is regarded as stringent or extraordinary in that it effectively closes the door of the court on the defendant without affording an opportunity to ventilate the case by way of trial[4], the situation is different in circumstances where the defence raised by the defendant is a counterclaim instead of a plea. In that case, even where summary judgement has been granted for that part of the claim that would be extinguished by the counterclaim, the defendant can still pursue the counterclaim by issuing summons in a separate action.[5]

[16] The plaintiff must confine himself to what the rule allows;[6] and he is not allowed to file the replying affidavit[7] or cross-examine the defendant or any other person who gives evidence.[8] these restrictions upon the plaintiff make it clear that an application for summary judgement is in no sense a preliminary trial of the issues involved.[9] The procedure is intended neither to give the plaintiff a tactical advantage

[4] *Stock Mavundla Zek Joint Venture* above at para 32.
[5] *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA) at 35D-F; Erasmus, Superior Court Practice, Vol.2, D1-384 para 2.
[6] *Venter v Cassumjee* 1956(2) SA 242(N)
[7] Rule 32(4) Erasmus ,above D1-386 para 2
[8] Rule 32 (4)
[9] *Belrex 95 CC v Barday 2021* (3) SA178(WCC) at para 25.

in the trial[10] nor to provide a preview of the defendants evidence or to limit the defences to those raised by the defendant.

[17] On application for summary judgment, the rule requires that a statement of facts should accompany the application in terms of which the deponent can positively swear to the facts forming the basis of the application.

[18] In *Barclays National Bank Ltd v Love*[11] (quoted with approval in *Maharaj* [12]at 424B-D) the following is said:

> "We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; *indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment."*

[19] In *Rees and Another v Investec Bank Limited*[13], the Supreme Court of Appeal, quoting with approval the requirements of an affidavit said the following:

> "In *Maharaj*[14]*,* Corbett JA in considering the requirement that the affidavit should be made by the plaintiff himself 'or by any other person who can swear positively to the facts' stated:
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> 'Concentrating more particularly on requirement (*a*) above, I would point out that it contemplates the affidavit being made by the plaintiff himself or some other person "who *can swear positively to the facts".* In the latter event, such

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[10] *Uranovsky v Pascal* 1964(2) SA 348(C); *Hodgetts Timbers (East London) (Pty) Ltd v HBC Properties (Pty)Ltd* 1972(4) SA 208(E) *Howff (Pvt) Ltd v Tromp's Engineering (Pvt)Ltd* 1977(2) SA 267; *Flamingo General Centre v Rossburg Food Market* 1978 (1) SA 586 (D); *Beltrex 95 CC v Barday* 2021 (3) SA 178 (WCC) at para 25.
[11] 1975 (2) SA at 514 (D) at 516H-517A.
[12] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)
[13] [2014] ZASCA 38; 2014 (4) SA 220 (SCA) paras 10,
[14] Above foot note 12.

other person's *ability to swear positively to the facts is essential* to the effectiveness of the affidavit as a basis for summary judgment; and the Court entertaining the application therefor must be *satisfied, prima facie, that the deponent is such a person.* Generally speaking, before a person can swear positively to facts in *legal proceedings they must be within his personal knowledge.* For this reason *the practice has been adopted, both in regard to the present Rule 32 and in regard to some of its provincial predecessors (and the similar rule in the magistrates' courts), of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect), unless such direct knowledge appears from other facts stated . . .* The mere assertion by a deponent that he "can swear positively to the facts" (an assertion which merely reproduces the wording of the Rule) is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words. . . In my view, this is a salutary practice. *While undue formalism in procedural matters is always to be eschewed*, it is important in summary judgment applications under Rule 32 that, in substance, the plaintiff should do what is required of him by the Rule. The extraordinary and drastic nature of the remedy of summary judgment in its present form has often been judicially emphasised . . . The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law. One of the aids to ensuring that this is the position is the affidavit filed in support of the application; and to achieve this end it is important that the affidavit should be deposed to by either by the plaintiff himself or by someone who has personal knowledge of the facts.

Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the Court. . .The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter "at the end of the day" on all the documents that are properly before it….""

Impossibility of performance

[20] Supervening impossibility occurs when the performance of contractual obligations become objectively impossible due to unforeseeable and unavoidable events that are not the fault of any party to the contract.

[21] If provision is not made contractually by way of a *force majeure* clause, a party will only be able to rely on the very stringent provisions of the common law doctrine of supervening impossibility of performance, for which objective impossibility is a requirement[15]. Performance is not excused in all cases of *force majeure*[16].

[22] In *MV Snow Crystal*[17], the Supreme Court of Appeal (per Scott JA) said as follows:

> "As a general rule impossibility of performance brought about by vis major or casus fortuitus 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 relation 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 the impossibility will lie upon the defendant."

[23] In *Unlocked Properties 4 (Pty) Limited v A Commercial Properties CC*[18], the court, citing *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd*[19], stated as follows:

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[15] *Matshazi v Mezepoli Melrose Arch (Pty) Ltd and Another* [2020] ZAGPJHC 136 para 36.
[16] *Glencore Grain Africa (Pty) Ltd v Du Plessis NO & Others* [2007] JOL 21043 (O); (4621/99) [2002] ZAFSHC 2 (28 March 2002) at 10.
[17] *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* [2008] ZASCA 27; 2008 (4) SA 111 (SCA) para 28
[18] [2016] ZAGPJHC 373
[19] 2000 (4) SA 191 (W).

"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.*"*[20]

[24] *In Unibank* it was held that—

"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."[21]

[25] In *Barkhuizen v Napier*[22] it was held that:

"For instance, common law does not require people to do that, which is impossible.

"This principle is expressed in the maxim *lex non cogit ad impossibilia* – no one should be compelled to perform or comply with that which is impossible."

This maxim derives from the principles of justice and equity, which underlie the common law. Over the years, the maxim has become entrenched in our law and has been applied to avoid time bar provisions in statutes."

[26] In *Montsisi*[23], the Appellate Division held that the principle expressed by the maxim *lex non cogit ad impossibilia* applied to a statutory time bar provision contained in section 32(1) of the Police Act 7 of 1958. The case concerned a plaintiff who sued the Minister of Police for damages for unlawful assault alleged to have been committed upon him by police while he was being detained in terms of section 6 of the Terrorism Act 83 of 1967. The court held that it was impossible for the plaintiff to comply with the provisions of section 32(1) while he was in detention, and that therefore the expiry period provided for in section 32(1) did not run against him so long as he was in detention.

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[20] Unlocked Properties- above para 23. In *Unibank*, the court has stated as follows: "A contract is … terminated only by objective impossibility (which always or normally must be total). Subjective impossibility to receive or make performance at most justifies the other party in exercising an election to cancel the contract."

[21] *Unibank Savings* (note 19 above) at 198D.

[22] 2007(5) SA 323, CC para 75

[23] *Montsisi v Minister van Polisie* 1984(1) SA 619(A)

[27] In the matter of *Transnet Ltd v The MV Snow Crystal*[24] it was said:

> "This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by vis major or casus fortuitus 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 relation 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 the impossibility will lie upon the defendant."

[28] In *World Leisure Holidays (Pty) Ltd v Georges*[25], the court dealt with temporary impossibility. It stated that:

> "The temporary impossibility of performance does not, of itself, bring a contract to an immediate end. The respondent's alternative claim accordingly raises the question of when a creditor is entitled to treat a contract as being at an end whilst performance is temporarily impossible. The answer is that he is only entitled to do so where the foundation of the contract has been destroyed; or where all performance is already, or would inevitably become, impossible, or where part of the performance has become, or would inevitably be, impossible and he is not bound to accept the remaining performance."

[29] In the instant case, there is no averment on how Covid-19 made it impossible for the first defendant to perform his obligations. No financials records have been attached to the opposing papers. The bare denial under paragraph 19 of the particulars of claim which deals with the balance of the two loans as at 28 June 2019 is not a defence and opens itself up for summary judgment. The first defendant does

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[24] 2008(4) SA 111 SCA, para 28
[25] (2002) (5) SA at 532F-534G

not advance any averment such as that he is up to date with his repayments obligations. Accordingly, I am satisfied that there is no triable issue on this point.

Non-delivery of the Notice in terms of section 129(1)

[30] The first defendant denies that he received the section 129(1) notice. Section 129[26], envisages the required procedure prior to enforcing a debt agreement and further that one may not commence any legal proceedings to enforce the agreement before:

(a) proving notice to the debtor, and

(b) complying with section 13.

[31] In *Kubyana v Standard Bank of South Africa Ltd*[27]**,** held that delivery of section 129 through postal service and confirmation of such delivery entails the following:

(a) the s129 notice was sent through registered mail to the correct postal branch and nominated address by the consumer. A track and trace may be used to verify this information, and

(b) the Post Office issued a notification to the consumer that a registered item was available for her collection.

[32] The Plaintiff served the s129 notice to the first defendant by service through the Sheriff on 1 and 2 July 2019. The first defendant was sent first notification in respect of the Reeds post office on the 13th of September 2022 and the parcel track slip which confirm the delivery has been filed as part of the papers before me. I am satisfied that the plaintiff has complied with the procedures of service to the chosen address of the first defendant. There is therefore no merit for this defence and absent that, there is no triable issue.

[33] Having regard to the bare denials by the first defendant, I am not persuaded by his resistance to the summary application that there is any triable issue that requires the matter to be referred to trial. I say so because not only does the first defendant admit that he is behind with his repayment obligations, but he also avers

[26] The National Credit Act 34 of 2005.
[27] 2014 (3) SA 56 (CC).

that his attempt to have the repayment restructured were not accepted by Standard Bank. I have not been provided with any authority to the proposition that refusal by the plaintiff to restructure the repayment of a loan is a defence. Accordingly, the application for summary judgment must succeed**.**

Rule 46A

[34] I have considered the submissions made in respect of the application for the declaring the immovable property especially executable. Having done so, I am not satisfied that the evaluation performed in respect thereof complies with Rule 46A because a trainee performed the valuation. The deponent on valuation states that he did not deal with the valuation but that the valuation was performed by his candidate valuer who is under his super vision.

Order

[35] Having heard Counsel and having considered the written heads of argument and having read the documents filed of record, the following order is made:

> 1. Summary Judgment is granted against the **First Defendant**, in the following terms:
> a. Payment of the sum of R1 052 299.78;
> b. Interest on the amount of R1 052 299.78 at a rate of 10.25% per annum, from 28 June 2019 to date of payment, both dates included;
> c. Payment of monthly insurance premiums of R1 057.11 from 28 June 2019 to date of payment; and
> d. Costs of suit on the Attorney and Client scale.
> 2. As Against **Both Defendants**:
> Summary Judgment is granted against the First Defendant and Default Judgment in terms of Rule 46A to declare the immovable property
> PORTION 4 OF ERF 7[…] K[…] T[…]
> REGISTRATION DIVISION I.R.,
> PROVINCE OF GAUTENG

MEASURING 1670 (ONE THOUSAND SIX HUNDRED A SEVENTY) SQUARE METERS HELD OF DEED OF TRANSFER T81332/2005 SUBJECT TO THE CONDITIONS THEREIN CONTAINED ("the Property") is postponed *sine die*;

3. The applicant is directed to perform an independent valuation by a suitably qualified valuer within 20 days of this order to assist the Court to exercise its judicial oversight in terms of rule 46A;

4. The applicant is directed to supplement its papers in the Rule 46A application with the new evaluation and set the application down on the same papers duly supplemented.

5. The costs of the Rule 46A application are reserved.

ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **2 December 2024.**

Appearances:
For the plaintiff: Adv M Amojee
Instructed by Strauss Daly Inc.
For the defendant: Adv K Ntjana
Instructed by Austin Shirinda Attorneys

Date of Hearing: 2 September 2024
Date of Judgment: 2 December 2024