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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2022/010613

In the matter between:

ANDTASH (PTY) LIMITED Applicant

and

LEON OLIVIER First Respondent

COLLETT OLIVIER Second Respondent

Neutral Citation: *Andtash (Pty) Limited v Leon Olivier & Another* (Case No. 2022/010613) [2023] ZAG

PJHC 502 (17 MAY 2023)

JUDGMENT

STRYDOM, J

Introduction

[1] This is an opposed application for an order to direct the first and second respondents ("the respondents") to pay the applicant the sum of R1 452 468.72, and to declare the immovable property situated at Erf [...], Magaliessig

Extension 24 Township, Registration Division RR, Province of Gauteng ("the property") executable.

Factual Background

[2] On or about 9 March 2021, the applicant and the respondents entered into a written loan agreement ("the loan agreement") in terms of which the applicant lent and advanced the respondents the amount of R3 400 000 to enable the respondents to purchase the property. On transfer of the property, a first covering mortgage bond was registered over the property securing repayment of the loan amount to the applicant.

[3] It is common cause that the amount of R3 400 000 was lent and advanced to the respondents enabling them to buy the property.

[4] In terms of the loan agreement, certain amounts would have been paid as lump sums to reduce the debt. The balance was payable in monthly instalments of not less than R25 333.33 each. The full outstanding balance of the loan was due to be paid before 31 May 2026.

[5] Clause 4 of the loan agreement recorded that second respondent was a staff member of the applicant and due to her employment with the applicant it was agreed to advance an interest free loan to the respondents. *Mora* interest will only accrue in the event of default. It was stipulated that the loan was not at arms' length or in the pursuance of the normal course of business of the applicant.

[6] Clause 7 of the loan agreement stipulated as follows:

> "The Borrowers may repay the loan or any portion thereof at any time and prior to 31st May 2026 without penalty. In the event the Borrowers cease to be in the employ of the Lender the loan repayment shall be continued, to full settlement, by no later than the 31st May 2026."

[7] In terms of clause 12 of the loan agreement, it was stipulated that should the respondents fail to make payment on the due date of any amount owing in

terms of the loan agreement, the full outstanding balance would become immediately due and payable.

[8] In terms of the loan agreement, a certain amount of R429 292.05 would be set off against the loan as this amount was stated to be owing to the second respondent by the applicant.

Common cause facts

[9] The respondents have defaulted on the loan agreement in that they have failed to pay the monthly instalments of R25 333.33 on or before 31 May 2022 and 30 June 2022, and the full outstanding amount in terms of the loan agreement, being R1 452 468.72 became due and payable. This amount was calculated by giving the respondents full credit pursuant to the loan amount of R429 292.05.

[10] It became further common cause during argument before this Court that the National Credit Act No. 34 of 2005, is not applicable to this transaction as this was not a credit agreement at arms-length and the loan was not granted by applicant in the normal cause of its business.

The Applicant's case

[11] The applicant's case is premised on the loan agreement and the bond registered in its favour securing payment of the loan. The applicant cancelled the loan agreement and the full outstanding amount be came due and payable. The applicant asks for repayment of the full outstanding amount and that the property be declared executable.

The Respondents' defence

[12] The respondents ask this Court to refer the matter to oral evidence on the basis that a factual dispute presented itself on the papers. This alleged factual dispute related to the unfair dismissal of the second respondent from the employment of the applicant which, according to the respondents, rendered performance impossible in the sense that the second respondent was deprived of an income to repay the loan. It was further argued that the dismissal was orchestrated by the applicant to cause non-payment and the breach allowing

the applicant to invoke the terms of the loan agreement, *inter alia,* to claim for the full outstanding balance of the loan and, ultimately, to sell the property in execution.

[13] It was further argued that the factual dispute extended to the amount of the outstanding debt as the amount of R429 292.05, which was deducted from the outstanding debt, is disputed by the applicant. The applicant stated that for purposes of the application it will give respondents a credit on their loan account. The liability of the applicant pertaining to this debt was the subject matter of a disciplinary hearing in which the applicant alleged that the second respondent's claim that she was owed this amount came about as a result of fraudulent claims made by her. She alleged an oral agreement with the deceased founder of the applicant.

[14] It is clear that the existence of this debt is contested and cannot be decided on the papers before this court. This was already the subject of a disciplinary hearing and remains contentious. A factual dispute remains in existence between the parties in this regard. The question remains, however, whether this factual dispute renders a decision in this application impossible applying the oft quoted *ratio* in *Plascon Evans*[1] and the decision in *Room Hire*[2]

[15] Dealing with the alleged factual dispute relating to this amount, the applicant, for purposes of its current claim, credited the loan account with this amount which left the outstanding balance of R1 452 468.72, representing the amount which is claimed in this application.

[16] In my view, there is currently no factual dispute before this Court relating to the outstanding balance which is claimed. At best for the respondents, they owe at least the amount claimed. For purposes of this application, no claim is made by the applicant as far as the disputed amount of R429 292.05 is concerned. This court need not decide whether this amount can be claimed in separate proceedings but what is clear is that the amount of R 1 452 468.72 is not

[1] *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984).

[2] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

disputed. The matter should not be referred to oral evidence on strength of this undisputed amount. The outstanding amount can only become higher not lower. Oral evidence pertaining to the disputed amount would not disturb the balance of probabilities. The current cause of action is the non-payment of amounts due in terms of the loan agreement which lead to the full outstanding balance of the debt to become due and payable. This full amount represents at least the amount claimed in this application, to wit, R 1 452 468.72. No real dispute of fact which cannot properly be decided on affidavit has presented itself on the papers before court as far as the current claim of the applicant is concerned. No defence is raised pertaining to the amount claimed and oral evidence cannot result in a finding that a lesser amount is due and payable.

[17] The respondent's submissions relating to the factual dispute was not limited to the above-mentioned amount. It was argued that the fraud allegations levelled against the second respondent and the reasons why she lost her employment further contributed to the creation of a factual dispute not capable of being decided on affidavit.

[18] On behalf of the respondents, it was argued that the essence of their defence is underpinned by the fact that their performance, in terms of their contractual obligations to repay the loan, was rendered impossible as a result of the unfair, factually unsupported and opportunistic dismissal of the second respondent from her employment with the applicant. It was argued that by depriving the second respondent of her employment with the applicant, the applicant knowingly made the continued repayment of the loan impossible.

[19] It was argued that the Court should not authorise execution against the property, which is the primary residence of the respondents, as the Court should consider all relevant factors before such order is made. The respondents placed reliance on Rule 46(b) which provides:

> "(b) a court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, *having considered all relevant factors*, consider that execution against such property is warranted."

[20] It was argued that as the applicant rendered repayment impossible by depriving second respondent of an income. The question for consideration in this matter is whether the alleged dispute pertaining to the dismissal of the second respondent has any bearing on the loan agreement and performance in terms of the loan agreement. If not, the alleged factual dispute concerning the dismissal of the second respondent becomes irrelevant.

[21] Before a court refers a matter for the hearing of oral evidence, the court will have to be satisfied that the evidence to be adduced should have a bearing on the cause of action and the defence of a respondent. If the dispute of fact has no bearing on the possible outcome of the matter, no referral would be warranted.

[22] To consider this, the court will have to consider whether the alleged impossibility of performance which, according to the respondents was occasioned by second respondent's alleged unlawful dismissal and the respondents' consequential inability to repay the debt, would be a defence against the claim for repayment of the debt and the declaration of executability of the property.

[23] The eagerness of the respondents to have the matter referred to oral evidence lead to a situation where the defences of the respondents were only stated superficially. It appears that the breach of the respondents and the existence of the debt is not disputed but what is disputed is the declaration of executability of the property based on circumstances which lead to the inability of the respondents to repay the debt. It was argued that these circumstances should prevent a court from ordering executability of a primary residence.

[24] What was not stated was what effect the alleged prevention of performance would have on the outstanding debt. Did this extinguish the liability to repay the entire debt, or did it only suspend repayment for a period? The respondents did not claim that the prevention of performance, allegedly caused by the applicant, constituted a repudiation of the loan agreement, which was accepted by the respondents, whereby the debt was extinguished.

Applicable legal prescripts and analysis

[25] It is clear that the court here is not dealing with a situation where performance became absolutely impossible. As far as this is concerned it is accepted as a general rule, as seen in *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd*[3] that if performance of a contract is impossible due to unforeseen events, not caused by the parties, parties are excused from performing in terms of the contract.

[26] Having regard to the above, as Stratford J held in *Hersman v Shapiro & Co*[4] one must, in order to see whether the contract should be discharged due to impossibility-

> "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."

[27] Consequently, to terminate a contract or extinguish an obligation, the impossibility must be absolute, or objective as opposed to relative or subjective.[5] 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"[6]

[28] In *Scoin Trading (Pty) Ltd v Bernstein* NO[7], Pillay JA, remarked as follows: "The law does not regard mere personal incapability to perform as constituting

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[3] *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W) at 198.
[4] *Hersman v Shapiro & Co* 1926 TPD 367.
[5] *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W) at 198.
[6] LAWSA Vol 5 (1) First Reissue (Butterworths) 1994 at para 160; and *Wesbank, A Division Of Firstrand Bank Ltd v PSG Haulers CC* (38510/2020) [2022] ZAGPJHC 519.
[7] *Scoin Trading (Pty) Ltd v Bernstein* NO 2011 (2) SA 118 (SCA) at para 22.

impossibility […]". Similarly, an inability to pay money will ordinarily amount to nothing more than subjective impossibility.[8]

[29] A further example of mere relative or subjective impossibility is again found in *Unibank Savings and Loans*[9], where 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."[10]

[30] In the present case performance to pay the monthly instalments never became impossible as payments could still be made regardless of where the monies came from. The second respondent never suggested that it would be impossible to ever earn an income again. At best, she showed that it was after her dismissal difficult for her to fulfil the loan obligation, which subjective impossibility does not release her from her liability to perform her contractual obligations.

[31] The second respondent blames the applicant for the respondents' inability to pay as she was allegedly unlawfully dismissed and deprived of her income to pay the instalments as and when they became due. This alleged relative prevention of performance should be considered within the contractual framework.

[32] Clause 7 of the loan agreement provided for the scenario that the second respondent might have left the employment of the applicant. In such circumstances the respondents remained responsible for the repayment of the debt as provided for in the loan agreement. This clause did not distinguish between the various ways in which the employment could be terminated and certainly did not exclude the possibility of dismissal for whatever reason. The respondents assumed the risk that second respondent's employment with the applicant could be terminated for whatever reason. Impossibility of performance

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[8] See, in this regard *Du Plessis v Du Plessis* 1970 (1) SA 683 (O); *Aida Uitenhage CC v Singapi* 1992 (4) SA 675 (E); and more generally, Van Huyssteen, Lubbe, and Reinecke *Contract: General Principles* 5 ed (Juta & Co Ltd, Cape Town) at 182-184.

[9] *Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd* 2000 (4) SA 191 (W).

[10] Id.

does not extinguish the obligation to perform if the debtor assumed the risk of performance being rendered impossible.[11] Even if she was unlawfully dismissed, she would have remained bound by the terms of the loan agreement unless the contract was terminated. A contract is not terminated when performance is prevented. Under given circumstances prevention of performance could lead to a cancellation of a contract but this is not what happened in this case. The respondents remained bound by the terms of the loan agreement.

[33] Any suggestion that it was a tacit term of the loan agreement that repayment of the loan agreement was subject to the continued employment of the second respondent should be rejected. First, clause 7 envisaged a situation that the second respondent might have left the employment of the applicant before the debt was fully paid. The agreement was silent as to the reasons for termination of employment. Second, no tacit term was alleged in the papers before this court although a submission in this regard on how the loan agreement should be interpreted was made in the respondents' heads of argument.

[34] The respondents have not convinced this court that the dismissal of second respondent and their inability to make payment in terms of the loan agreement created a defence in law for the respondents against the claims of the applicant. The leading of oral evidence would in my view not disturbed the probabilities and the finding of this court.

[35] Accordingly, a factual disputed pertaining to the dismissal of second respondent became irrelevant for purposes of a decision in this matter.

[36] The respondent complained that the loan agreement attached to the founding affidavit was in many respects deficient and illegible. The court could read the agreement and it was not denied that this was a copy of the agreement signed by respondents. There is no merit is this complaint.

[11]De Wet and Yeats *Kontrakte en Handelsreg* 4 ed (Butterworths & Co, Johannesburg 1978) at 158.

[37] The court have considered the fact that the property is the primary residence of the respondents and the circumstances under which the full outstanding balance due in terms of the loan agreement became payable.

[38] The court is further of the view that considering the estimated value of the property in the region of R3 400 000 and the extent of the outstanding amount the respondents would not be destitute if the property is sold in execution, and they are forced to relocate. To safe guard the interests of the respondents the court will determine a reserve price if and when the property is sold in execution. The reserve price of R 2 400 000 should be set.

[39] The following order is made:

1. the first and second respondent are jointly and severally ordered to make payment to the applicant of the sum of R1 452 468.72, the one paying, the other to be absolved;

2. the first and second respondent are jointly and severally ordered to make payment to the applicant of interest on the abovementioned amount in terms of the Prescribed Rate of Interest Act 55 of 1975, as amended, the one paying, the other to be absolved;

3. the immovable property situated at Erf [...], Magaliesig, Extension 24 Township, Registration Division I.R, Province of Gauteng, is declared executable pursuant to covering mortgage bond B15289/2021, attached to the founding affidavit marked “RDT4”;

4. a reserve price when selling the property in the amount of R2 400 000.00 is set; and

5. the first and second respondent are directed to pay the costs of the application on an attorney and own client basis.

R STRYDOM

JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

For the applicant:	Mr. S. Bunn
Instructed by:	Hewlett Bunn Incorporated
For the first and second Respondent:	Mr. D. Snyman
Instructed by:	JNS Attorneys
Date of hearing:	25 April 2023
Date of judgment:	17 May 2023