

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

Case No: 69130/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 7 August 2023

SIGNATURE

In the matter between:

FEDBOND NOMINEES (PTY) LIMITED

Applicant

(Registration number: 1964/009690/07)

And

CRYPTON PROPERTIES CC

First Respondent

(Registration number: 1996/033173/23)

KOSTA GEORGIEV

Second Respondent

(Identity number: 6[...])

JUDGMENT

SARDIWALLA J

[1] This is an application for summary judgment in terms of Rule 32(2) of the Uniform Rules of Court. The relief sought is as follows:

A. Summary judgment be granted against the Respondents, jointly and severally, the one paying the other to be absolved, in the following terms:

1. Payment in the amount of R3 183 870.26;
2. Interest on the sum of R3 183 870.26 at the rate of 11, 63% per annum, compounded monthly, calculated from 1 July 2019 to date of payment, both days inclusive;
3. Payment in the amount of R 3 158 109.32;
4. Interest on the sum of R3 158 109.32 at the rate of 11, 63% per annum, compounded monthly, calculated from 1 July 2019 to date of payment, both days inclusive;
5. Costs of suit on the scale as between attorney and client;
6. Further and/or alternative relief.

B. The following orders to be issued against the First Respondent:

7. That the following properties be declared executable for the aforementioned amounts:

7.1 PORTION 3 OF ERF 498 MARAISBURGEXTENSION 2 TOWNSHIP

REGISTRATION DIVISION 1.Q. THE PROVINCE OF GAUTENG MEASURING: 1146 (ONE THOUSAND ONE HUNDRED AND FORTY-SIX) SQUARE METRES HELD UNDER DEED OF TRANSFER T[...] TO THE CONDITIONS CONTAINED THEREIN

7.2 REMAINING EXTENT OF PORTION 42 (A PORTION OF PORTION 2) OF THE FARM PAARDEKRAAL NUMBER 226 REGISTRATION DIVISION I.Q. THE PROVINCE OF GAUTENG MEASURING: 9535 (NINE THOUSAND FIVE

HUNDRED AND THIRTY-FIVE) SQUARE METRES REMAINING EXTENT OF PORTION 23 (A PORTION OF PORTION 2) OF THE FARM PAARDEKRAAL NUMBER 26 REGISTRATION DIVISION I.Q. THE PROVINCE OF GAUTENG MEASURING: 3185 (THREE THOUSAND ONE HUNDRED AND EIGHTY-FIVE) SQUARE METRES BOTH HELD UNDER DEED OF TRANSFER T[...] SUBJECT TO THE CONDITIONS CONTAINED THEREIN

8. Further and/or alternative relief.

Factual Background

[2] The Applicant's claim was premised on the following facts:

2.1 On 4 December 2013, at Sandton, the Applicant, represented by J.W.B. Field, duly authorised thereto, and the First Respondent, represented by the Second Respondent, duly authorised thereto, entered into a written loan agreement.

2.2 The salient terms were the following:

2.2.1 The Applicant will lend and advance the amount of R2 625 000.00 ("the Loan Amount") to the First Respondent;

2.2.2 The bond term is fixed for 5 (five) years, which terminates on the date 5 (five) years from the date of registration of the bond;

2.2.3 On the expiry date the bond is to be:

2.2.3.1 Repaid in full, and shall until repaid in full remain subject to the terms and conditions as set out in the First Loan Agreement and subsequent bond registration documentation;

2.2.3.2 Settlement figures will include the balance outstanding, any unpaid interest and costs applicable for the 3 month notice period as well as any additional costs or charges levied by the manager;

2.2.4 VAT invoices and statements of account will be sent by the Manager to the First Respondent monthly to enable the First Respondent to submit VAT returns to the receiver of revenue and to keep record of the various transactions effected in terms of this First Loan Agreement;

2.2.5 Should the First Respondent not query these statements within 21 days of date of such statements, the First Respondent will be precluded from disputing the correctness of such statements later and such statements will constitute *prima facie* proof of all amounts appearing thereon and the First Respondent will bear the onus of disproving the correctness of such statements;

2.2.6 The First Respondent shall reduce the loan amount of this loan by 0.75% of the loan amount annually, paid monthly in advance together with the payment of interest and costs payment payable by the First Respondent in terms of clauses 9 and 10 of the First Loan Agreement;

2.2.7 An event of default shall occur if at any time:

2.2.7.1 The First Respondent fails to pay any sum due by it in terms of the First Loan Agreement on the due date and remains in default for 15 business days from the due date;

2.2.8 The Applicant may, without prejudice, at any time after the happening of an event of default by the First Respondent:

2.2.8.1 Levy any additional administration charge on the outstanding amount owing under the loan agreement, compounded monthly in advance from the date of occurrence of the event of default up until and including the date of remedy of the default or date of permanent repayment of all amounts owing under the loan agreement, whichever is the earlier;

2.2.8.2 Require on demand payment of all of the First Respondent's indebtedness under the First Loan Agreement or any mortgage bond

registered which is then outstanding, whether or not it is then due for payment, at which stage the full value will become immediately due.

2.3 On 4 April 2014, pursuant to the First Loan Agreement, a first Participation Bond was registered over the property described therein.

2.4 The salient terms of the Maraisburg Participation Bond were the following:

2.4.1 The First Respondent is truly and lawfully indebted and held and firmly bound unto and behalf of the Applicant, its order, successors in title or assigns for or as representative of the participants in this bond in the sum of:

2.4.1.1 R2625000.00 (two million six hundred and twenty five thousand Rand) being the amount of money which the Manager on behalf of the Applicant has agreed to lend to the First Respondent which amount is to be advanced to the First Respondent or its nominee after registration of this bond and subject to the terms, conditions and provisions of this bond and under the security hereof; and

2.4.1.2 R1 312 500.00 (one million three hundred and twelve thousand five hundred Rand); and

2.4.1.3 Interest payable in terms of this bond read with the First Loan Agreement;

2.4.2 The First Respondent is hereby bound:

2.4.2.1 To pay or cause the capital amount and all other amounts due in terms of this bond to be paid to the Applicant or other holder of this bond, its order or assigns with such interest as may from time to time become due and payable thereon on the terms hereafter set out; and

2.4.2.2 For the proper performance of the terms applying to this bond which are hereinafter set out;

2.4.3 As security for the due and proper payment and fulfilment of the terms applying to this bond, the First Loan Agreement, the rules of the collective investment scheme and the collective Investment Schemes Control Act; the First Respondent declared to bind specifically as a first participation mortgage bond over the property described therein;

2.4.4 The First Respondent, renounced all benefits arising from the - exceptions *non numeratae pecuniae, non causa debiti, errore calculi*, revision of accounts, no value received, and all other exceptions which might or could be taken at law or in equity to the payment of the indebtedness of the First Respondent, with the force and effect of which exceptions the First Respondent declared itself to be fully acquainted, and acknowledged and declared itself to be truly and lawfully indebted and held firmly bound unto and in favour of the Applicant;

2.4.5 The First Respondent shall pay all amounts owing under this bond as follows:

2.4.5.1 The interest calculated as set out above, shall be paid monthly in advance on the first day of each month during the currency of this bond;

2.4.5.2 The equivalent of 0.75% of the capital amount of this bond per annum which amount shall be divided into 12 equal monthly instalments and each instalment shall be payable monthly in advance starting on 1 February 2014, or date of registration of this bond, whichever is the earlier, and thereafter on the first day of each succeeding month during the currency of this bond;

2.4.5.3 On the fifth anniversary of the date of registration of this bond, the capital and any other amount outstanding is to be repaid in full;

2.4.6 The First Respondent shall pay, on demand, to the Applicant all the costs of and incidental to suing for the recovery of the capital amount and/or interest thereon and/or the additional amount, or any portion thereof and/or any other monies due by the First Respondent to the Applicant under this bond calculated on the scale

charged between the Applicant's attorneys on an hourly tariff plus all disbursements; in general all costs, including costs as between attorney and own client, which might arise out of or in connection with the First Respondent's indebtedness to the Applicant hereunder, the bond and/or the mortgaged property;

2.4.7 Should the First Respondent —

2.4.7.1 Fail to make any interest payment to the Applicant on due date;
or

2.4.7.2 Fail to make any capital payment to the Applicant on due date; or

2.4.7.3 Be in default of and/or breach of any of the terms, conditions and/or provisions of the First Loan Agreement, the rules, the Act and/or this bond then and in such case or any of such cases, the Applicant shall be entitled forthwith without any notice or further notice to the First Respondent to:

2.4.7.3.1 Claim and recover from the First Respondent the capital amount, or the balance thereof then owing, and all interest thereon, together with all other amounts which may be due to the Applicant in terms of this bond, notwithstanding that the capital amount or such balance thereof and/or the interest thereon may not yet be due and payable; and/or

2.4.7.3.2 Have the mortgaged properties excused by legal process and/or declared executable for such amounts as shall be due and owing under this bond by the First Respondent to the Applicant;

2.4.8 The Applicant shall be entitled to issue a written certificate of indebtedness, which shall set forth:

2.4.8.1 The amount of the First Respondent's indebtedness to the Applicant;

2.4.8.2 The rate of interest payable thereon, and the date from which such interest is reckoned;

2.4.8.3 The date upon which such indebtedness is due and payable;

2.4.9 The Applicant shall be entitled to claim from the First Respondent and the First Respondent shall be obliged to pay the Applicant the amounts specified in the certificate of indebtedness which certificate of indebtedness for purposes of this agreement and for any legal action instituted thereon shall:

2.4.9.1 Constitute the cause of action by means of which the Applicant shall be entitled to claim and recover the amount stated therein from the First Respondent; and

2.4.9.2 Be binding on the First Respondent; and

2.4.9.3 Be deemed to be liquid for purposes of the Applicant obtaining provisional sentence and/or other judgment against the First Respondent; or

2.4.9.4 Constitute *prima facie* proof --

2.4.9.4.1 of the amount of the First Respondent's indebtedness to the Applicant arising from this bond;

2.4.9.4.2 of the fact that the amount of the indebtedness specified in the certificate of indebtedness is due and payable;

2.4.9.4.3 of the rate/s of interest payable on the amount due;

2.4.9.4.4 of the date/s from which interest is to be calculated;

2.4.10 As a result of the Applicant's so having discharged the onus of proof as contemplated supra, place on the First Respondent the onus or duty of rebutting the fact that:

2.4.10.1 The amount specified in the certificate of indebtedness is due and payable; and/or

2.4.10.2 The rate/s of interest and the date/s from which such interest should be reckoned is correctly specified therein;

2.4.11 The First Respondent waves its right to:

2.4.11.1 Challenge the appointment of the person signing the certificate;

2.4.11.2 Dispute the fact that it is his signature which appears on the certificate;

2.5 All conditions precedent were fulfilled to the satisfaction of the Applicant and its Manager.

2.6 The Applicant complied with all of its obligations in terms of the First Loan Agreement and Maraisburg Participation Bond by, inter alia, advancing the Loan Amount to the First Respondent.

2.7 In breach of the terms of the First Loan Agreement and Maraisburg Participation Bond, the First Respondent failed to make payment of the monthly instalments to the Applicant when payment became due and failed to make payment of the full outstanding balance on the fifth anniversary of the registration of the Maraisburg Participation Bond, remained in default for a period exceeding 15 business days from due date(s) and remains in default to date.

2.8 In the premise, the full outstanding balance of the Loan Amount, interest, costs and charges became due and payable at the option of the Applicant, which option the Applicant exercised as set out herein below alternatively exercises

herewith and/or became due and payable on the fifth anniversary of the registration of the Maraisburg Participation Bond.

2.9 As at 1 July 2019, the First Respondent was indebted to the Applicant in the amount of R3 183 870.26 together with interest thereon at the rate of 11.63% per annum, compounded monthly, calculated from 1 July 2019 to date of payment, both days inclusive. A certificate of indebtedness, signed by a director of the Applicant, confirming the aforesaid is annexed to the particulars of claim "FED3".

3.1 On 4 December 2013, at Sandton, the Applicant, represented by J.W.B. Field, duly authorised thereto, and the First Respondent, represented by the Second Respondent, duly authorised thereto, entered into a second written loan agreement annexed to the particulars of claim as "FED4".

3.2 The terms of the Second Loan Agreement are mutatis mutandis similar to that of the First Loan Agreement.

3.3 On 4 April 2014, pursuant to the Second Loan Agreement, a first Participation Bond was registered over the properties described therein. The Paardekraal Participation Bond is annexed to the particulars of claim as (annexure "FED5").

3.4 The terms of the Paardekraal Participation Bond are mutatis mutandis similar to that of the Maraisburg Participation.

3.5 All conditions precedent of the Second Loan Agreement were fulfilled to the satisfaction of the Applicant and its Manager.

3.6 The Applicant complied with all of its obligations in terms of the loan agreement and First Participation Bond by, inter alia, making the Loan Amount available to the First Respondent.

3.7 In breach of the terms of the Second Loan Agreement and the Paardekraal Participation Bond, the First Respondent failed to make payment of the monthly instalments to the Applicant when payment became due and failed to make payment

of the full outstanding balance on the fifth anniversary of the registration of the Paardekraal Participation Bond, remained in default for a period exceeding 15 business days from due date(s) and remains in default to date.

3.8 In the premise, the full outstanding balance of the loan account became due and payable at the option of the Applicant, which option the Applicant exercised as set out herein below alternatively exercises herewith and/or became due and payable on the fifth anniversary of -the registration of the Paardekraal Participation Bond.

3.9 As at 1 July 2019, the First Respondent was indebted to the Applicant in the amount of R3 158 109.32 together with interest thereon at the rate of 11.63% per annum, compounded monthly, calculated from 1 July 2019 to date of payment, both days inclusive. A certificate of indebtedness, signed by a director of the Applicant, confirming the aforesaid is annexed to the particulars of claim as "FED6".

4.1 On 4 December 2013 at Sandton, the Second Respondent, acting personally, signed an unlimited suretyship for the debts of the First Respondent in favour of the Applicant. The written suretyship is annexed to the particulars of claim as "FED7".

4.2 The salient terms of the suretyship were the following:

4.2.1 The Second Respondent, under renunciation of the benefits of the legal *exceptions ordinis seu excussionis et divisionis, de duobus vel pluribus reis debendi*, revision of accounts, no value received, *errore calculi, non numeratae pecuniae* and cession of action with the full force and effect whereof the Second Respondent acknowledged to be fully acquainted, bound himself, jointly and severally, as surety for and co-principal debtor in solidum with the First Respondent to the Applicant for the payment on demand of all sums of money and/or for the due and punctual performance of all obligations 'howsoever arising which the First Respondent may then or from time to time thereafter owe or be indebted to the Applicant from whatsoever cause arising, in excess of the amounts referred to in the suretyship, together with any interest and/or any other charges or costs (including attorney and client costs)

which the First Respondent may be or become liable for from time to time to pay to the Applicant or perform and whether such undertakings or obligations being incurred by the First Respondent solely or jointly or in partnership with any person or persons, company or companies;

4.2.2 Without prejudice to anything herein before contained, the suretyship shall apply to and cover the Applicant in respect of claims which the Applicant may have acquired or in the future may acquire against the Respondent, from any party whomsoever or whatsoever;

4.2.3 A certificate under the signature of the Applicant (the appointment or qualification or authority of such person signing on behalf of the Applicant need not be proved) as to the amount owing by the First Respondent to the Applicant, and that the date for the payment of such amount and/or discharge of the First Respondent's obligations and/or payment by the Respondents or discharge of the Respondent's obligation hereunder has arrived shall be -

4.2.3.1 binding on the Respondents and prima facie proof of the amount of indebtedness under the suretyship; and

4.2.3.2 valid and enforceable as a liquid document against the Respondents for purposes of obtaining provisional sentence or summary judgment,

5. In the premise, as at 1 July 2019, the First and Second Respondents are, jointly and severally, the one paying the other to be absolved, indebted to the Applicant as follows:

5.1 In the amount of R3 183 870.26 together with interest thereon at the rate of 11.63% per annum, compounded monthly if same remains unpaid, calculated from 1 July 2019 to date of payment, both days inclusive in respect of the First Loan Agreement and Maraisburg Participation Bond.

5.2 In the amount of R3 158 109.32 together with interest thereon at the rate of 11.63% per annum, compounded monthly if same remains unpaid, calculated from 1 July 2019 to date of payment, both days inclusive in respect of the Second Loan Agreement and Paardekraal Participation Bond.

6.1 On 28 February 2019, the Applicant demanded payment of the arrear amounts (then amounting to R262 941.00 and R260 760.49 respectively) from the First Respondent. The Applicant's demand is annexed as "FED9".

6.2 On 12 July 2019, the Applicant again demanded payment of the arrear amounts (then amounting to R654 837.74 and R626 204.08 respectively) from the First Respondent. The Applicant's second demand is annexed as "'FED10".

6. 3 The First Respondent failed to make payment to the Applicant within 7 days as demanded and the Applicant exercised its option to claim the full outstanding balance of both loan accounts. Despite demand, the Respondents fail and/or refuse to make payment to the Applicant.

ISSUES FOR DETERMINATION

[3] Whether the Respondents have a bona fide defence.

[4] Whether there are triable and mitigating issues raised by the Respondents.

Legal Principles

[5] In terms of Rule 32(2) (b) the Applicant has to identify a point in law and facts relied upon which its claim is based. The Applicant has the onus to prove why the defence pleaded does not raise any issues for trial. It is not enough to merely state that the Respondents do not have a *bona fide* defence. To the contrary the Respondents have to prove that they at the very least have a defence and state the material facts upon which their defence is based. This then enables the court to decide as to whether they have a bona fide defence or not.

[6] The onus rests with the plaintiff to show that the defendant does not have a defence on the merits of the case. See **Breitenbach v Fiat SA (Edms) BPK 1976 (2) SA 226 T at 227F.**

[7] The contentious issue for determination is whether the Respondents has raised a *bona fide* defences. The Applicant submitted that the Respondents have not alleged any facts in their plea and the balance of the denials amounts to a bare denial. The Respondents have not succeeded in disclosing triable issues and therefore issues raised do not constitute *bona fide* defences.

[8] It is the submission of the Applicant that the Respondents have admitted the following:

8.1 the provisions of the National Credit Act does not find application;

8.2 The fact that the loan agreement and suretyship were entered into and the participation bonds registered;

8.3 The terms of the various agreements and participation bonds; and

8.4 The loan amount as set out in the first loan agreement was advanced;

[9] The Respondent have not plead any version and simply deny the amounts claimed are due and do not satisfy the requirements of a *bona fide* defence. Further the Respondents deny that the Applicant complied with all of its obligations, however in terms of the first loan agreement all conditions had to be fulfilled prior to the registration of Maraisburg Participation bond which the Respondents have admitted has been registered. The Respondents also do not allege which manner, if any, the Applicant did not comply with its obligations in terms of the first loan agreement and Maraisburg Participation Bond. In any event any such alleged breach did not result in the Respondents cancelling the agreement. Therefore, even if such right accrued the Respondents elected not to cancel the agreements or issue summons.

[10] The Respondents made no allegation which would establish the exception *non adimpleti contractus*. That the Respondents admit the agreement but do not allege that the First Respondent made payment. The period exceeding the loan has passed and the First Respondent is therefore in default. The Applicant referred to case of *Senekal v Trust Bank of Africa LTD*¹ that there are no facts preventing the contents of the certificates from becoming sufficient proof and the bare denial of the Respondents does not disturb the certificate of balance which in any event the Respondents admitted to in their plea. The Respondents have not denied that there were demands for payment but do not state why the no payments were made. That although the Respondents deny the properties were registered in the name of the First Respondent, this is contradictory to the admissions made in terms of the participation bonds. Therefore, there is no allegation made, that if proven could constitute a valid defence.

[11] The Respondents resisted the application for summary judgement as follows:

11.1 The terms of the various agreements and participation bonds;

11.2 That the loan amount as set out in the first loan agreement was advanced;

11.3 The Applicant's is fatally defective as the Chief Financial Officer had no personal knowledge of the transactions between the Applicant and Respondents;

11.4 That the Commissioner of Oaths address is the same as that of the Applicant and is therefore not properly commissioned and is defective;

11.5 The Applicant debited the First Respondent's account for exorbitant monthly premiums for cover of R24 million on the property despite the objections on the valuation of the property by the Respondents. This led to the First Respondent being in arrears and paying penalty interests which were

¹ 1978 (3) SA at 382G to 383D see also F & I Advisors (Edms) BPK en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika BPK 1999 (1) SA 515 (SCA) at 524H to 525C

being capitalized and compounded. All requests for reconciliation of the accounts were ignored;

11.6 The Respondents has the property evaluated by API Property Group who valued the property at R11 252 179;

11.7 No notice of the increase of the interest rate from 9.85% to 11.63% was given to the First Respondent;

11.8 Until such time as a reconciliation is done by an actuary it is not possible to establish the amount owing to the Applicant and therefore the First Respondent is not liable to pay the amounts claimed by the Applicant.

11.9 The Respondents therefore have a *bona fide* defence to the Applicant's claim and accordingly the application for summary judgment should be dismissed.

[12] The Respondent contends that it has *bona fide* defences and has raised triable issues entitling it to leave to defend Applicant's claim.

[13] Summary judgment is an extraordinary, stringent and drastic remedy, it calls for strict compliance with the prerequisites as provided for in Rule 32 (2) (b). See **Gull Steel (Pty) Ltd v Rack Hire BOP (Pty) Ltd 1998 (1) SA 679 (O) at 683 H.**

[14] In **Maharaj v Barclays Ltd 1976 (1) SA 418 (A) Maharaj v Barclays Ltd 1976 (1) SA 418 (A) Maharaj v Barclays Ltd 1976 (1) SA 418 (A)** the courts are vested with an unfettered discretion which has to be exercised judicially when considering summary judgment applications. Summary judgment will be granted in the event where the plaintiff has made out an unanswerable case against the defendant who simply wants to unnecessarily delay the plaintiff's case. In **Maharaj supra**, the court held that in deciding whether or not to grant summary judgment, the principle is that the court has to look at the matter and all the documents that are properly before it.

[15] The Respondents have taken issue with the calculation of the interest rate at which the Applicant has calculated the amount owing amongst and the amount owing in itself until an actuary has done a reconciliation.

[16] The Applicant's cause of action which constitutes its foundation in this application is disputed merely on the issue of the amount. In my view the defences raised do not provide an explanation to the claim and the claim therefore has not been answered by the Respondents especially why no payments at all were made. The Respondents raised technicalities regarding the defectiveness of the summary judgment application but did not deny the terms of the agreements or that they were entered into. In consideration what the Court held in **Maharaj** *supra* the Respondents have not placed any documents before this Court other than copies of the valuation and insurance premiums that they have been charged. Notably the correspondence attached questions why the property is valued at R7 000 000 when it is R9 300 000 and requested copies of the cover from Zurich insurers. In my opinion, this does not take the matter any further or correspond with the Respondents version that it was being charged insurance premiums by the Applicant for the property at a valuation rate of R24 000 000. There are no documents placed before this court that speak to this. This in my opinion also does not explain why the payments were not made by the Respondent in answer to the Applicant's claim. I am not satisfied that there is a triable issue. I am of the view, that the bare denial and technicalities, without any proof in relation to documents provided before me by the Respondents does not assert a triable issue.

[17] I am not satisfied that the defences raised by the Respondents to the Applicant's case are *bona fide* defences which can be sustained by the Respondent at the subsequent trial.

[18] I therefore make the following order:

18.1 Summary judgment is granted with costs.

**SARDIWALLA J
JUDGE OF THE HIGH COURT**

Appearances:

For the Applicant: Adv K M Riley

Instructed by: Hillary Shaw Attorney

For the Respondent: Schoonees Belling & Georgiev