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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. **68/2023**

In the matter between:

STANDARD BANK OF SOUTH AFRICA LIMITED

Plaintiff

and

BLUCHER HAUMAN MELLET N.O.

First Defendant

HENDRIK FRANCOIS MELLET N.O.

Second Defendant

JANA PRINSLOO N.O.

Third Defendant

FIND A LOAD CC

Fourth Defendant

DEMICENTO (PTY) LTD

Fifth Defendant

CAROLINA JOHANNA PIENAAR

Sixth Defendant

BLUCHER HAUMAN MELLET

Seventh Defendant

BLUCHER HAUMAN MELLET N.O.

Eight Defendant

EUGENE HOLTZHAUSEN N.O.

Ninth Defendant

In Re:

BLUCHER HAUMAN MELLET N.O.

First Applicant

HENDRIK FRANCOIS MELLET N.O.

Second Applicant

JANA PRINSLOO N.O.

Third Applicant

and

STANDARD BANK OF SOUTH AFRICA LIMITED

Respondent

JUDGMENT BY: VAN RHYN, J

HEARD ON: 25 JANUARY 2024

DELIVERED: 18 MARCH 2024

- [1] This is an application for an order to declare certain immovable property, being Remaining Extent of the Farm Ospoot A 446, district Philippolis, Free State Province and the Farm Ospoot Dam 473, district Philippolis Free State Province (“the property”) specifically executable, together with ancillary relief. The main application is opposed by the first to third and the sixth to eighth respondents. The first to third and the seventh respondents launched a counter application in terms of which cancellation figures are sought from the bond holder for the cancellation of the mortgage bond over the property. The counter application is opposed by the applicant. I refer to the parties as in the main application for ease of reference.
- [2] The plaintiff is Standard Bank of South Africa Limited (Registration number: 1962/000738/06) (“Standard Bank”) which conducts business as a retail bank, an authorised financial services provider and registered credit provider with its registered address at 15 Simmonds street Johannesburg, Gauteng Province. Standard Bank instituted action on 9 January 2023 against the nine respondents (cited as defendants) due the failure to effect the monthly instalments due in term of a business term loan.
- [3] The first to third respondents are cited in their capacities as the duly authorized trustees of the Blucher Mellet Family Trust, IT7[...] (“the Blucher Mellet Trust”). The fourth respondent, Find a Load CC and the fifth respondent, Dimicento (Pty) Ltd, have their chosen *domicillium citandi et executandi* at the farm Overeenkomst, Bainsvlei, Bloemfontein. The sixth respondent is Carolina Johanna Pienaar of Bloemfontein. The seventh respondent is Blucher Hauman Mellet, cited in his personal capacity. The eighth respondent is Blucher Hauman Mellet N.O. cited with

the ninth respondent Eugene Holtzhausen NO, both in their capacities as the duly authorised trustees of the Overeenkomst Trust IT70[...].

- [4] On 20 April 2023 Standard Bank obtained default judgment against the nine respondents in the main action under Case No 68/2023 for payment of the amount of R2 428 149.55 together with interest thereon and costs of suit on an attorney and client scale. The judgment is for the debt under a business term loan on account number 0[...]. On 5 July 2023 a payment of R1 000.000.00 (One Million Rand) was made on the business term loan account, reducing the outstanding amount to R1 512 532.96.

- [5] Standard Bank furthermore issued summons out of this court against the Blucher Mellet Trust and the other respondents, cited as defendants, on 28 September 2022 under Case No 4736/2022. The claim under Case No 4736/2022 is defended and a trial date has not yet been set.

- [6] The Blucher Mellet Trust is the registered owner of the property. A continuing covering mortgage bond with number B58[...] (the “mortgage bond”) is registered over the property as surety for the business term loan in favour of Standard Bank. On 10 March 2023 the Blucher Mellet Trust sold the property to Trevi Import and Export (“the purchaser”). The purchaser obtained a loan from First National Bank. The purchaser of the property has made a payment of R1 000 000.00 as deposit on the purchase price on 5 July 2023 which amount has been deposited into the business term loan account.

- [7] The attorney acting on behalf of the Blucher Mellet Trust, who received instructions in relation to the cancellation of the mortgage bond and the transfer of the property to the purchaser, has confirmed that the purchaser has obtained the necessary guarantees from First National Bank to settle the business term loan. Once the cancellation figures are made available by Standard Bank, such guarantees to the value of R2 000 000.00 will be submitted.

- [8] Standard Bank’s attorney refuses to provide the Blucher Mellet Trust with the cancellation figures without which the cancellation of the mortgage bond and the

transfer of the property to the purchaser cannot proceed. Standard Bank demand guarantees and undertakings for the disputed claim under Case No 4736/2022 as well as the legal costs that may arise under the said case number in addition to guarantees and undertakings for the claim in the matter at hand (Case No 68/2023) as a pre-requisite for cancellation of the mortgage bond.

- [9] On 8 November 2023 the Blucher Mellet Trust and Mr. Blucher Hauman Mellet (cited as the 4th applicant) launched a counter application in terms of which they seek an order compelling Standard Bank to provide the cancellation figures to facilitate the cancelation of the mortgage bond and to take all the necessary steps and sign all documents that may be required to enable the Blucher Mellet Trust to proceed with the cancellation of the mortgage bond over the property and the registration of the transfer of the property to the purchaser.
- [10] The counter application is opposed by Standard Bank on the basis that the mortgage bond is a continuing covering mortgage bond which secures the indebtedness of the Blucher Mellet Trust to Standard Bank arising from any cause of debt whatsoever for the sum of R5 4000 000.00 and the additional sum of R1 350 000.00. The mortgage bond furthermore provides that the property (both farms) is bound specifically as a first mortgage as continuing covering security for the maximum sum in respect of existing, future and contingent indebtedness of the Blucher Mellet Trust to Standard Bank arising from any cause whatsoever. Standard Bank therefore seeks an order dismissing the counter-application and an order in terms of the notice of motion with costs on an attorney and client scale.
- [11] A mortgage is a real right in respect of immovable property of another securing a principal obligation between a creditor and a debtor. This real right is created by registration in the Deeds Registry pursuant to an agreement between the parties. Section 50(2) of the Deeds Registries Act¹ permits the registration of a mortgage bond to secure both existing and future debts. A covering bond seeks to secure a future debt or existing debt increased by future advances.²

¹ Act 47 of 1937.

² Shaw N.O. v Burger 1994 (1) SA 529 (C) at 531.

- [12] A covering bond is a popular instrument of real security in practice, since it is capable of facilitating an ongoing commercial relationship between the debtor and creditor. In **Forfif (Pty) Ltd v Macbain**³ it was held that, in the absence of an express or tacit provision in the bond sanctioning the acceptance of substituted security, the mortgagor was not obliged to consent to cancellation of the bond until the remaining indebtedness had been discharged in full.
- [13] Mr Berry, counsel on behalf of the Blucher Mellet Trust, argued that even though the sales agreement in respect of the property had been provided to Standard Bank and a payment of R1 000 000.00 was made in respect of the outstanding amount on the business terms loan on 5 July 2023, all these relevant facts were not disclosed in the application for declaring the property specially executable. The outstanding amount on the business term loan amounts to R 1 512 532.96 and the guarantee to the amount of R2 000 000.00 is sufficient in order to settle the amount owing in respect of the business term loan.
- [14] It is therefore contended that the conduct of Standard Bank through its attorney of record, by refusing to provide the cancellation figures and demanding, as a pre-condition for providing the cancellation figures, that guarantees and undertakings be provided in the amount of R3 197 209.57 as well as the legal costs that may arise in case no 4736/2022, are malicious and constitutes self-help. It is argued that Standard Bank holds the Blucher Mellet Trust ransom to provide surety and guarantees for Case no 4736/2022 which is still to be adjudicated upon by this court.
- [15] On behalf of the respondents it is contended that Standard Bank's conduct infringes upon the Blucher Mellet Trust's right to have the matter under case No 4736/2022, where the claim is met with a special plea of prescription, adjudicated in court.
- [16] The mortgage bond was not only registered as security for the term loan but offer security for the amount claimed under case number 4736/2022. The trustees of the Blucher Mellet Trust signed suretyships in favour of Standard Bank for the debts of Find a Load CC and the mortgage bond accordingly provides security for such debt. Standard Bank is therefore not obliged to consent to the cancellation of the mortgage

³ 1984 (3) SA 611 (W).

bond over the property until all the amounts secured under the covering mortgage bond have been paid in full. In **Standard Bank of South Africa Ltd v Saunderson and Others**⁴ it was held that: “The mortgage bond curtails the right of property at its root and penetrates the rights of ownership, for the bondholder’s rights are fused into the title itself”

- [17] The argument on behalf of the Blucher Mellet Trust is therefore flawed in that the contention that the covering mortgage bond only covers the business term loan and not all the other debts of the said trust, is wrong. The guarantees which the Blucher Mellet Trust is willing to provide is not sufficient to cover the indebtedness of the respondents under both case numbers, being the matter at hand and case number 4736/2022. The sale of the property in execution can be avoided if the Blucher Mellet Trust provides the guarantee as requested by Standard Bank in the amounts as set out in the certificate of balance pertaining to the account held in the name of Find a Load CC and the certificate of balance in the account held in the name of the Blucher Mellet Trust. The total amount due and payable is R3 197 209.57
- [18] Standard Bank is accordingly not obliged to consent to the cancellation of the mortgage bond until all amounts due under the said bond has been paid in full. The rights of the Blucher Mellet Trust to deal with the property are curtailed and affords Standard Bank a hold on the properties for as long as the secured debt remains unpaid. I therefore agree with the contention by Mr Els, counsel for Standard Bank, that the counter application is bad in law and cannot succeed.
- [19] The debt and the breach of repayment of the mortgage bond is not disputed. The question which remains is whether Standard Bank has made out a proper case for the relief sought in the notice of motion in terms whereof the property is to be declared specially executable. During argument it was conceded that the property is not the primary residence of any of the said respondents. The debt was incurred as a business term loan and not to purchase the property. Mr Berry argued that this matter should be postponed pending the finalization of the Case number 4736/2022 on the basis that the relief sought by Standard Bank is not only premature, but will impact extremely negatively upon the Blucher Mellet Trust. I agree with the contention on

⁴ 2006 (2) SA 264 (SCA) at [2].

behalf of the Blucher Mellet Trust that the court has a wide discretion to grant the relief sought or not.

[20] In Standard Bank's opposing and replying affidavit a concession is made that the intended sale in execution of the property will only take place after judgment has been granted under case number 4736/2022, alternatively, before finalisation of the matter under the said case number in which event Standard Bank will take steps to secure any surplus derived from the sale until finalisation of such action. During argument I was informed that the pleadings in case number 4736/2022 are closed and it is anticipated that a trial date will most probably be available during the second or third term of 2024.

[21] I agree that a proper case has been made out for an order declaring the immovable property, as described in the notice of motion, specially executable and an order in terms whereof the Registrar is authorised and directed to issue a writ of execution against such property. However, no reserve price has been suggested in the prayers and, at present, not enough updated information is available to accurately determine a reasonable reserve price to be set by this court.

[22] Mr Berry furthermore argued that the court has, apart from the provisions of Rule 45A to suspend the operation and execution of any order for such period as it may deem fit, an inherent discretion to order a stay of a sale in execution and to suspend the operation of an ejectment order granted by it. I am of the view that, in light of Standard Bank's concession that the intended sale, if so granted, will in any event only occur after the finalisation of case number 4736/2022, the determination of a reserve price should be postponed to a later stage when an updated payment history, proper updated valuation of the property and updated amounts owed to the Mangaung Metro Municipality are available. The operation and execution of the order in favour of Standard Bank should be suspended pending the finalisation of Case number 4736/2022 and the determination of a reasonable reserve price.

[23] There is no reason why costs should not follow the event.

[24] ORDER:

1. The property described as:
 - (a) Remaining Extent of the Farm Ospoot A 446, district Philippolis, Province Free State in extent 1535,7161 (one thousand five hundred and thirty five comma seven one six one) hectares held by Deed of Transfer number T10[...];
 - (b) The Farm Ospoot Dam 473, district Philippolis, Province Free State in extent 19,9529 (nineteen comma nine five two nine) hectares held by Deed of Transport number T10[...] is declared specially executable.
2. The Registrar of this court is authorised and directed to issue a writ of execution against the immovable properties as described in paragraph 1 above as to enable the sheriff to attach and execute upon the properties mentioned in paragraph 1 above in satisfaction of the judgment debt, costs and interest thereon.
3. The execution in terms of the writ of execution is stayed pending the finalisation of Case Number 4736/2022 and the setting of a reasonable reserve price by the court.
4. The applicant (The Standard Bank of South Africa) is granted leave to supplement the papers and to re-enrol the application to enable the court to set a reasonable reserve price of the properties in paragraph 1 above at which the properties may be sold at a sale in execution.
5. The First, Second and Third Respondents are granted leave to file a supplementary affidavit in response to the applicant's supplementary affidavit, if they wish to make submissions which are relevant to the making of an appropriate order in the determination of a reasonable reserve price for the properties described in paragraph 1 above.
6. The respondents, jointly and severally, the one to pay the others to be absolved, are ordered to pay the costs of the application to date of this order, on an attorney and client scale.

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant:

Instructed by:

ADV. J ELS
PHATSHONAE HENNEY ATTORNEYS
BLOEMFONTEIN

On behalf of the Respondents:

Instructed by:

ADV. A BERRY
MARIUS VAN ZYL ATTORNEYS
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