

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case no: **3955/2019**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrate: YES/NO

In the matter between:

FIRSTRAND BANK LTD t/a FIRST NATIONAL BANK

Plaintiff

and

PHILIPPUS JOHANNES JACOBUS CRONJE

1st Defendant

ADOLF JOHANNES DE BRUN N.O.

2nd Defendant

PHILIPPUS JOHANNES JACOBUS CRONJE N.O.

3rd Defendant

CECILE CRONJE N.O.

4th Defendant

ANDRIES GUSTAV LE GRANGE N.O.

5th Defendant

(In their capacity as trustees of the PC
Trust registration Number [...])

DIE CRONJE SEUNS BOERDERY CC

6th Defendant

HENDRIK BERNARDUS CRONJE

7th Defendant

HESTER CRONJE N.O.

8th Defendant

(In their capacity as trustees of the Hendrik Cronje Family
Trust registration number [...])

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 24 FEBRUARY 2022

DELIVERED ON: 30 MAY2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15:30 on 30 May 2022.

[1] On 27 March 2019 the plaintiff ("the bank") issued summons against the defendants claiming payment of an amount of R30 million. The said claim is against the defendants jointly and severally, the one paying the other to be absolved. The bank relies upon five credit agreements (an overdraft facility and four loan agreements) and eight contracts of suretyships. By virtue of twelve registered mortgage bonds the bank seeks orders of executability in respect of mortgage bonds registered over immovable properties.

[2] The defendants on 11 December 2019 caused to be filed their plea seeking an order in terms of the provisions of s130(4)(b) of the National Credit Act 34 of 2005 {the "NGA") declaring that the bank has not complied with the provisions of s129 of the NC; an order that the de facto control of the PC Trust rests with Mr PJJ Cronje (Mr Cronje); that the trust operated as Mr Cronje's alter ego and that the debt of the PC Trust to the bank must be added to Mr Cronje's indebtedness when assessing Mr Cronje's financial position. A further order is sought in terms of s85 of the NCA referring the bank's claims against Mr Cronje, the trustees of the PC Trust and Cronje Seuns Boerdery to a debt counsellor who is to make a recommendation to court. Defendants seek an order declaring the overdraft facility and business loan agreement to be the granting of reckless credit. Defendants

seek a further order declaring Chapter 6 of the Companies Act to be unconstitutional based thereon that a trust does not enjoy the protection and benefit relating to business rescue and compromise with creditors and an order dismissing all of the bank's claims that are not subject to any of the mentioned orders.

[3] This is an application by plaintiff for leave to amend its particulars of claim in case number 3955/2019.

[4] On 25 March 2021 plaintiff served a notice of intention to amend. The amendment is sought in terms of Rule 28(4) of the Uniform Rules of Court. This prompted an objection by the defendants in terms of Rule 28(3), resulting in the formal application for leave to amend which served before me. The defendants filed a counter-application praying, amongst others, that the bank be ordered to furnish a reply to defendants' notice in terms of rule 35(3) dated 27 October 2020 and to defendants' request for trial particulars dated evenly.

[5] In applications where an amendment is sought the general rule is that same should be allowed unless there is good cause for not allowing the amendment. This would be the case where the application to amend is mala fide or would cause an injustice to the other side which cannot be compensated by an appropriate cost order.

See: ***Ascendis Animal Health (Pty) Ltd v Merck Sharp Dahme Corporation and Others 2020 (1) SA 327 (CC)*** at para [89].

[6] Where prejudice is complained of it should be actual specified prejudice and a mere allegation thereof does not suffice.

See: ***Shrosbree Nov Klerck NO and Others 2000 (4) SA 457 (SE)*** at 464

[7] The proposed amendment seeks the adjudication of six mortgage bonds (to be called up) and five immovable properties to be declared executable, however plaintiff does not persist in seeking relief in respect of the mortgage bonds and immovable

properties that currently form part of the bank's claim as annexures "V1" to "V8", or put differently the plaintiff does not wish to proceed with its claim against defendants based on fourteen mortgage bonds but only based on the six mortgage bonds. I may add that plaintiff also seeks an order in terms whereof the reference to the word "second" in paragraph 68 of the notice of intention to amend be removed and substituted with the word "third".

[8] The defendants oppose the proposed amendment and seek the relief in the counter-application as stated. I find it necessary to repeat the grounds upon which the defendants' objections were founded as set out in the notice of objection dated 11 October 2021:

"1. FIRST GROUND OF OBJECTION-REMOVAL OF MORTGAGE BONDS

1.1 In its notice of proposed amendment, the plaintiff states that paragraphs 1 to 11 of the existing particulars of claim, inclusive of the existing prayers and annexures thereto, will be deleted and replaced with new paragraphs numbered 1 to 105.2, and annexures different than those which accompanied the existing particulars of claim, are attached.

1.2 The effect of the proposed amendment is to delete the whole of the existing particulars of claim, including its prayers and the annexures thereto, as paragraphs 1 to 11 of the existing particulars of claim.

1.3 The proposed amended paragraphs 1 to 105.2 delete certain references to the mortgage bond security and claims for declarations of executability that formed part of the existing particulars of claim at paragraph 9 thereof, without disclosing why such an amendment is appropriate.

1.4 The mortgage bond security omitted under the proposed

amendment were marked as annexures "V1" to "VB" to the existing particulars of claim.

1.5 The prayers contained in the proposed amendment further delete the relief sought for the immovable properties (as described in annexures "V1" to "VB" above, which properties are owned by the defendants, to be declared immediately executable.

1.6 The mortgage bond security mentioned in 1.4 above constitute security under the causes of action (i.e. loan agreements) as set out in the plaintiff's particulars of claim.

1.7 The plaintiff, being a mortgagee of immovable properties owned by the defendants, and which mortgage bonds secure the claims in these action proceedings, is obliged to disclose the nature and extent of the security held over the immovable properties and/or debts of the defendants.

1.8 In the event that the proposed amendment is allowed the amended particulars of claim will not comply with 1.7 above.

1.9 This would negatively impact on the court's ability to exercise its judicial oversight when execution is sought, which executionary relief is an integral and intrinsic part of the plaintiff's cause of action which may not be separated from a claim for money judgment.

1.10 The proposed amendment would further negatively impact on the court's ability to exercise its discretion to grant or refuse the plaintiff's utilisation of the acceleration clauses, as the plaintiff's claim in this regard is for specific performance.

1.11 As a consequence of the proposed amendment the defendants will further be prejudiced in that:

1.11.1 There would be an undue protraction of legal proceedings;

1.11.2 The legal proceedings between the parties will be handled in a piecemeal manner;

1.11.3 The ultimate legal costs will increase significantly;

1.11.4 The defendants will not be able to obtain all of the relevant documentation and information as sought in their rule 35(3) request relating to the valuations of the immovable properties (specifically par 101 to 114 thereof) delivered to plaintiffs attorneys on 27 October 2020 and the defendants' request for further particulars- (specially par 133-137 thereof) served on the plaintiffs attorneys on 27 October 2020 relating to the valuations of the immovable properties;

1.11.5 The defendants' ability to prepare for trial will be curtailed; and

1.11.6 The defendants' ability to make further arrangements regarding the debt will be curtailed.

1.12 It is in the interest of the administration of justice that the same court deals with the claim for monetary relief as well as the claim in respect of immovable properties held as security and for the execution thereof, simultaneously.

1.13 It is further in the interest of the administration of justice that any order for acceleration of the loan amounts, together with any order for special/immediate execution against the immovable properties, be heard and determined in a single hearing.

1.14 In the result the proposed amendment would:

1.14.1 Render the plaintiff's particulars of claim, as amended, incomplete and lacking averments which are necessary to sustain the action and resolve the disputes between the parties;

and

1.14.2 Hamper the administration of justice, and prejudice the defendants, which prejudice cannot be cured by a costs order.

2. SECOND GROUND OF OBJECTION -VAGUE AND EMBARRASSING ALLEGATIONS SURROUNDING THIRD TERM LOAN AGREEMENT

2.1 Paragraphs 61 to 69 of the proposed amendment ("the Relevant Portion") deals with the "third term loan agreement" entered into between the plaintiff and the PC Trust on 22 August 2017.

2.2 Save for what is stated herein below the plaintiff continuously, and exclusively, makes reference to what it termed the "third loan agreement" throughout the Relevant Portion.

2.3 In paragraph 68 of the proposed amendment the plaintiff however pleads the following:

*"Furthermore, and in any event, the plaintiff pleads that the PC Trust has repudiated the **third loan** agreement in that the PC Trust refused to comply with the terms of the **third loan** agreement and has denied that the **third loan** agreement is enforceable in accordance with the terms thereof. As a result of such repudiation, the outstanding capital and interest thereon, due under the **second loan** agreement, became due and payable by the PC Trust to the plaintiff."*

2.4 It is unclear why reference is made to the "second loan agreement" in the said paragraph and the defendants submit that any repudiation of the third loan agreement does not, in accordance with the proposed amendment as pleaded, lead to the result that the outstanding capital and interest under the second loan agreement

becomes due and payable.

2.5 Should paragraph 68 of the proposed amendment be allowed to stand, it would cause the plaintiff's particulars of claim to be vague and embarrassing, and consequently excipiable.

3. In the result, the proposed amendments would render the plaintiff's particulars of claim, as amended, lacking averments necessary to sustain an action and/or vague and embarrassing, and consequently excipiable, the administration of justice would be hampered and the defendants would be prejudiced and unable to plead thereto, and the prejudice cannot be cured by costs."

[9] It was contended before me that the defendants would be prejudiced in the event that they are deprived of relevant evidence to advance their defence of reckless credit and the cause of their over-indebtedness. It was submitted that the bank wants to achieve the exact antithesis of why amendments are granted, in that it wants to depart from the particulars of claim to prevent a full enquiry. Relying on the full bench judgment of ***Absa Bank Ltd v Mokebe and Related Cases 2018 (6) SA 492 (GJ)*** at 506 para [22], I was urged to find that it is both desirable and necessary for monetary claims and executability claims to be determined simultaneously and if not, that it would result in consequences detrimental to debtors. Still relying on ***Mokebe***, I was urged to consider that the trial court would have an obligation to exercise judicial oversight in proceedings that could lead to the execution of a primary residence where the bank has an obligation to disclose the nature of its security and wherefore the bank should not be allowed to amend the existing particulars of claim where the very security that it holds is retracted from the oversight of court. Should the amendment be allowed it would in defendants' submission unduly limit the trial court's ability to exercise judicial oversight.

[10] The plaintiff referred me to the judgment of Rogers J in the Western Cape Division in the matter of ***Changing Tides 17 (Pty) Ltd NO v Frasenbourg [2020] 4 All SA 87 (WCC) (2 July 2020)***.

10.1 Rogers J discussed two full court judgments (*Mokebe* and *Standard Bank of South Africa Ltd v Hendricks & another and related cases* 2019 (2) SA 620 (WCC)) wherein it was held that it is undesirable, in foreclosure cases, to deal with a money judgment separately from special executability. I deem it appropriate to quote extensively:

"[22] I turn now to the full court judgments. The Gauteng judgment is *Absa Bank Ltd v Mokebe & related cases* [2018] ZAGPJHC 487; 2018 (6) SA 492 (GJ). The full court there held that in bond foreclosure cases the creditor should seek its money judgment and a rule 46A order of executability in the same proceedings, and that the court should hear them together. In para 13 the full court said that 'to grant judgment for the repayment of the accelerated money debt and to postpone the relief to declare the hypothecated immovable property specially executable' was a course giving rise to 'an undue protraction of the proceedings and piecemeal handling of the matter with a resultant increase in costs'.

[23] Although the full court did not in terms distinguish between ordinary and special execution against immovable property, para 13 suggests that the court was only concerned with cases where a mortgagee sought an order of special executability. In such cases it was the invariable practice, even before the introduction of rule 46A, for the money judgment and the order of special executability to come before the court at the same time.

[24] It seems to me that the balance of the full court's judgment is premised on the usual situation in bond cases, where the mortgagee prays for an order of special executability together with the prayer for the money judgment. **To the extent that the full court suggests that a bank is compelled to seek an order of special executability, this would be a drastic departure for which I find no support in the new rule 46A. Indeed, the new rule 46A seems to point in the other direction, as I shall show.**

[25] ...

[26] In para 28 the full court said the following:

'We do not deal hearing with the matter where a lender sues for money lent and advanced and does not rely on the security of a bond. Such lender who abandons reliance on its security, cannot introduce it at a future date to obtain a judgment for special executability and its execution will be without the benefits afforded by a mortgage bond, due to the bar to bring matters piecemeal. The banks argued that the unsecured creditor is in a better position than a secured creditor because the former is able to obtain a money judgment without any baggage, should the claim be pleaded correctly whilst the mortgagee has an additional onus. **The argument does not pass muster. Rule 46A is not confined to secured creditors. The unsecured creditor armed with its judgment without security, has an obligation to satisfy the court of its entitlement to have a primary home declared executable, and not specially, in the same manner that is provided for in rule 46A.** It has a more onerous process to follow. This obligation arises at a next court proceeding, after executing against other property of the debtor. The comparison and perceived more onerous obligation on the mortgagee is consequently not valid.'

[27] If the first three sentences of this passage mean that a mortgagee who sues for a money judgment without asking for an order of special executability is thereby abandoning reliance on, and loses the benefit of, its security, I cannot agree. **The mortgagee can plead a perfectly sound cause of action for the payment of money without seeking to bypass the default mode of execution laid down in rule 46(1)(a). The absence of a claim by the mortgagee for special executability does not show an intention to abandon its security. The failure to seek and get an order of special executability simply means that, although the mortgage remains**

in place as real security, the mortgagee must follow the ordinary process of execution, excussing movables before executing against the immovable property. That this can be done appears from an earlier full court judgment in the former Transvaal Provincial Division: see *Gerber v Scholtz & others* 1951 (2) SA 166 (T) where, due to an oversight, the mortgagee's summons had not included an order declaring the mortgaged property specially executable. See also *Prudential Building Society v Botha* 1953 (3) SA 887 (W) where there had been a similar oversight.

[28] Regarding the balance of para 28 of the full court's judgment, it is of course so **that an unsecured creditor who has obtained a money judgment and excussed movables will, by virtue of the new rule 46A, have to come back to court if it wishes to execute against residential property. A mortgagee who has obtained a money judgment without seeking or getting an order of special executability is in exactly the same position.**

[29] In para 29 the full court said that it was the duty of a mortgagee to bring its entire case forward in one proceeding simultaneously, and that if the case required postponement for whatever reason, the entire matter had to be postponed and that 'piecemeal adjudication is not competent'. The 'entire case' contemplated in this paragraph appears to be the case for a money judgment together with an order of special executability. **I have explained why I do not read the rules as compelling the bank to seek an order of special executability and why failure to do so does not cause the bank to lose its security or preclude it from later seeking to levy execution on the mortgaged property.**

[30] I also do not agree that it is 'not competent' to grant a money judgment while refusing (or deferring) an order of special executability. It must follow, **from the fact that the mortgagee can seek a money judgment without claiming an order of special**

executability, that if the mortgagee claims both forms of relief it is competent for the court to grant the money judgment while refusing {or deferring} the claim for special executability.

[31] I do accept, though, that **where an order of special executability is claimed**

{as it generally is in bond foreclosure cases}, the claims for the money and for special executability should ordinarily be disposed of together. Indeed, it has hitherto been the almost invariable case for such claims to come before court at the same time. **If, at such hearing, the court requires further information in order to make the assessment required by rule 46A, it may well be desirable to postpone the claim for the money judgment together with the claim for special executability.**

[32] ...

[33] In *Mokebe* the banks evidently argued that, even though the money judgment and the order of special executability should be brought forward as part of the same proceedings, it did not necessarily follow that the court was precluded, pursuant to such hearing, from granting a money judgment but refusing or postponing the application for special executability. In that regard, the full court said the following in para 23: 'It was argued that rules 46 and 46A anticipate the possibility, though not necessarily, of a money judgment preceding an order of executability. However, the submission of rule 46(1)(a)(i) presupposes that a money judgment may be obtained separately from, and prior to, an order of executability cannot be upheld. The very fact that both the money judgment and the order for executability are given at the same time is not in conflict with the rule which requires certain steps against movables prior to execution against the

immovable property. It is purely a prior procedural step before a writ against the immovable property is issued. It is a step separate from the monetary judgment and the order declaring the immovable property executive.'

[34] I have several difficulties with this passage. In the first place, the contemplation in the rules (that a money judgment may be obtained before an order of executability) is not located only or even mainly in rule 46(1)(a) but in the new rules 46A(2)(a)(ii) and 46A(8)(d). These rules require the court to consider whether there are alternative or other satisfactory means by which the 'judgment debtor' may satisfy the 'judgment debt'. These expressions envisage that there may be a judgment debt without an order of special (or ordinary) executability. The judgment debt contemplated in these rules is self-evidently the money judgment.

[35] Even before the introduction of rule 46A, our courts had held that in deciding whether to grant or refuse an order of special executability, the question whether the judgment debtor could satisfy the debt in some other reasonable way had to be judicially considered (*Gundwana v Steko Development & others* [2011] ZACC 14; 2011 (3) SA 608 (CC) paras 53-54; *FirstRand Bank Ltd v Fo/scher & another, and similar matters* [2011] ZAGPPHC 79; 2011 (4) SA 314 (GNP) para 41). These statements clearly envisaged that a money judgment might be granted but an order of special executability refused or deferred. **And If a mortgagee, at the time of issuing summons, reaches the view that the circumstances are such that a court will probably not grant an order of special executability, the mortgagee must be entitled to Issue summons for the money alone.**

[36] In the second place, and flowing from the first point, **the excussion of movables (which is the default position, absent an**

order of special executability) can only take place if there is a money judgment. The excussion of movables is not 'purely a prior procedural step', if by this the full court meant something that could happen without a money judgment. And this 'prior procedural step', for which a money judgment is a pre-requisite, only has to be observed by the judgment creditor if it has not obtained an order of special executability.

[37] ...

[38] At least in Gauteng, *Mokebe* appears to stand as authority for the proposition that a court cannot grant a money judgment without simultaneously granting an order of special executability. If it refuses or defers the latter, it must refuse or defer the former. See, for example, *Changing Tides 17 (Pty) Ltd NO v Mabiletsa & others; Absa Bank v Montwetsana* [2018] ZAGPJHC 605; [2019] 1 All SA 619 (GJ) paras 2 and 29. For reasons set out above, I respectfully regard that conclusion as wrong; It appears to me to be inconsistent with earlier authority, inconsistent with the wording of rule **46A**, and inconsistent with the range of options open to the court in terms of rule 46A(8).

[39] Accordingly, and subject to any binding authority in this division, I **do not accept that a court may not grant a money judgment without granting an order of executability (special or otherwise) against the mortgaged property. I do accept, though, that where a bank in fact seeks an order of special executability as contemplated in rule 46(1)(a)(li), it is desirable that such claim and the money claim should be considered together.** In the absence of grounds to believe that the debtor will be able to regularise the delinquent account within a reasonable period of time or satisfy a judgment debt from other resources, there is no benefit to anyone in 'postponing the evil day' by granting the money judgment but deferring the application for special

executability. This will simply lead to delay and additional cost.

[40] The full court judgment of this division is *Standard Bank of South Africa Ltd v Hendricks & another and related cases* [2018] ZAWCHC 175; 2019 (2) SA 620 (WCC). As I read the court's judgment, it adopted a more nuanced approach than *Mokebe* and did not associate itself with the propositions in *Mokebe* with which I have expressed disagreement. The full court in *Hendricks* was asked to address nine questions, of which questions 3, 4 and 5 are relevant for present purposes...

[41] In question 3 the court was asked to consider the circumstances under which it may be appropriate to grant a money judgment but postpone the application to declare the mortgaged property specially executable, given the impact on costs and the potential for attachment and execution of movables in the meantime...

[42] In relation to these questions, the full court held, in the first place, that the claims for the money judgment and for an execution order should be sought and heard together (para 40). Having regard to the formulation of question 3, **the full court was evidently considering the case where the mortgagee in fact seeks an order of special executability**. The principal reasons given by the full court for requiring the money claim and a claim for special executability to be brought and heard together were that it 'creates predictability and certainty, reduces costs and avoids overburdening the court' (para 38). This procedure not only had cost advantages but would limit 'piecemeal adjudication' (para 40).

[43] **The full court did not state that a mortgagee is obliged to seek an order of special executability, failing which it loses its security and/or is precluded from later seeking leave to execute against the mortgaged property**. However, the full court

held that the loan agreement itself, and not merely the mortgage bond, has the potential to impact the debtor's right of access to housing guaranteed by s 26 of the Constitution (para 48). **It follows that even if a mortgagee were to seek a money judgment without asking for an order of special executability, the court considering the application for the money judgment would still have to consider the implications of s 26 of the Constitution. Although rule 46A would not yet apply, the court would be entitled to insist, and should, I venture to suggest, insist, on personal service of the application for judgment, just as would be required if an order of executability were being sought at that stage.**

[44] Although the full court said that the claim for the money and the claim for special executability **(assuming there is such a claim)** should be brought and heard together, **the court did not, as in *Mokebe*, say that it was not competent for a court, after hearing both claims, to grant the money judgment and dismiss or postpone the application for special executability."**
(own emphases)

10.2 I respectfully agree with the aforementioned reasoning and interpretation of the rules by the learned judge. There is in my view no merit in the contention by the defendants that the plaintiff is barred from claiming a money judgment without simultaneously claiming an order of executability against moveable properties with the resultant judicial oversight as envisaged by Rule 46(A) in relation to a property which is the primary residence of a defendant.

[11] Although the parties have held a meeting in terms of Rule 37, it would appear that no trial dates have been allocated nor has the matter been enrolled in terms of Rule 37(8) for case flow management. The matter is therefore not close to trial yet. The possibility of prejudice to the defendants is therefore remote. On allowing the amendment the defendants will be entitled to file a consequential plea thereto. I

cannot see how I can compel the plaintiff to proceed and prove mortgage bonds where it chooses not to proceed therewith. After all the plaintiff is *dominis litis* and at its own peril chooses not to proceed therewith. I might mention that it is difficult to understand why the defendants object to plaintiff not proceeding with those claims where the defendants in any event seek a dismissal of those claims in its present plea.

[12] I therefore am inclined to allow the amendments sought by the plaintiff. The plaintiff seeks an indulgence and is to pay the costs of the defendants in my view. In respect of the counter-application I see no reason why it should not be granted. The response in respect of the request for further particulars and further discovery in terms of Rule 35(3) has been outstanding since 2020.

[13] Both parties made use of two counsel of which one is a senior counsel and move for cost orders which would include the cost of the employment of two counsel.

[14] I therefore make the following orders:

1. Leave is granted to the plaintiff in the main action (case no 3955/2019) to effect the amendment to its existing particulars of claim in the respects and to the extent contained in plaintiff's notice of intention to amend dated 23 December 2021.
2. The reference to the word "second" in paragraph 68 of the plaintiff's notice of intention to amend dated 23 September 2021 is removed and substituted with "third".
3. Plaintiff is ordered to furnish a reply to defendant's notice in terms of rule 35(3) dated 27 October 2020, within 20 days of this order.
4. Plaintiff is ordered to furnish a reply to defendants' request for further particulars dated 27 October 2020 within 20 days of this order.
5. Failing compliance by plaintiff with the orders in paragraphs 3 and/or 4 above, leave is granted to defendants to approach this court on

the same papers duly supplemented for an order dismissing plaintiff's claim/claims.

6. Plaintiff is ordered to pay defendants' costs of the application on a party and party scale, such costs to include the costs of two counsel where so employed.

C. REINDERS, ADJP

On behalf of the applicant:

Adv DJ van der Walt SC

Instructed by:

Adv S Tsangarakis

Symington & De Kok

BLOEMFONTEIN

On behalf of the respondent:

Adv H van Eeden SC

Adv B van der Merwe

Instructed by:

Lovius Block

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