



**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 number: 1656/2021

In the matter between:

WILHELMINA CATHARINA BEUKES MEYER

First Applicant

ERIC FRED MEYER

Second Applicant

and

CHARL JOHANNES VAN DER RIET

Respondent

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 5 AUGUST 2021

DELIVERED ON: 13 SEPTEMBER 2021

- [1] It is common cause that a Special General Notarial Bond (“the bond”) was registered on 10 September 2019 in favour of the applicants and passed as security for the respondent’s indebtedness towards the applicants. The indebtedness of respondent arose from an Acknowledgement of Debt (the “AOD”) concluded between the parties on 11 July 2019. This application is brought by applicants to have the bond perfected by enforcing the real rights held by them in terms of the bond.

- [2] On the day of hearing this matter the respondent appeared in person. The application was postponed twice before on his request to obtain legal representation. Respondent indicated that he was unable to secure legal representation due to financial constraints and elected to proceed in person. Mrs Ferreira, appearing on behalf of applicants herein, alluded to several instances of respondent's non-compliance with a court order (amongst others the filing of heads of argument) and the Rules of Court, but requested the matter to be dealt with and finalised. I condoned all non-compliance and allowed respondent to oppose the application orally under oath.
- [3] Respondent elected to present his case in his mother tongue Afrikaans, and the proceedings were so conducted. He confirmed however that he understood English well and all papers served on him, including the applicant's heads of argument, did not pose any constraints in this respect.
- [4] I was assured by respondent that he had full knowledge of the terms of the bond (worded in Afrikaans) and understood the same, but *ex abundante cautela* the applicable terms were dealt with comprehensively in court when Mrs Ferreira presented applicants' case as set out in their founding affidavit.
- [5] I deem it appropriate at this stage to deal with respondent's case in opposition as it appears from his opposing affidavit. He submitted that applicants are not entitled to the relief claimed as he had duly performed with the terms of the AOD. In terms hereof respondent had to make payment in yearly instalments to liquidate the debt. The source of these payments is derived from rental income from the lessee who rents his property. In his view, the applicants are malicious in bringing the application to take control and possession of his movable property if it has been established that the applicant received the agreed payments in terms of their payment arrangement. During the hearing of the application respondent persisted with the afore mentioned opposition and presented a banking statement reflecting payment as was due to applicants for 2019, 2020 and 2021. In his answering affidavit respondent failed to respond

to any of the applicants' averments in respect of the alleged breaching of the terms of the bond.

- [6] The applicants in their replying affidavit submitted that its case was not premised on non-compliance with the terms of the AOD, but rather that respondent failed to comply with the provisions of the bond and had breached the terms thereof in several respects.
- [7] I do not intend quoting verbatim the applicable clauses of the bond relied upon by applicants. The bond provides, amongst others, that:
- [7.1] The respondent registers the bond in favour of applicants as security for the respondent's indebtedness towards the applicants.
- [7.2] The assets which forms the subject matter of the bond is located at the farm Eureka, district Ficksburg.
- [7.3] The respondent is indebted to the applicants in the amount of R 794 000.00 and an additional amount of R 150 000.00 interest.
- [7.4] The aforesaid indebtedness is secured by way of the bond.
- [7.5] The respondent binds the assets (as listed in clause 3.3 of the bond) in favour of the applicants.
- [7.6] Save in the normal course of business, the respondent shall not:
- Sell, alienate, dispose of or transfer the assets or possession of the assets;
 - Pledge, assign or otherwise dispose of, or grant any option with respect to, hypothecate or in any manner burden the assets;
 - Allow any pledge, assignment, hypothecation or registration of any security interest of whatsoever nature, either by law or otherwise, to vest in the assets.
- [7.7] The respondent must at all times *inter alia*
- Allow the applicants to inspect the assets when and where it was agreed;

- Keep the assets in good working order and well maintained and, in the event of losses or shortage in the numbers thereof, replace the assets;
- Conduct his business in a proper fashion and in strict compliance with all applicable legislation

[7.8] In the event of non-performance by the respondent the applicants shall be entitled to the relief sought in the present application which includes:

- attend at the premises occupied by the respondent, enter same and take possession of the assets held there, or elsewhere;
- retain the assets for security of repayment of the indebtedness;
- sell the assets by means of public auction or in the open market;
- have the assets attached and removed by way of execution proceedings.

[8] In their founding affidavit applicants set out the factual averments and documentary evidence in support of their contention that respondent has breached the terms of the bond in several ways.

[9] Applicants aver that it conducted several inspections pertaining to the assets. It had come to their knowledge that some of the assets had been removed from the possession and premises of respondent contrary to the provisions of the bond. Furthermore, respondent allowed the assets to be kept at different premises and concluded a sale agreement in respect of certain of these assets. The bonded assets referred to are a TA John Deere 6610 Tractor as specified ("the John Deer tractor"), a Case MX230 tractor as specified ("the Case tractor"), a 6.4 metre (60 Skottel) Off-Set ("the Skottel") and a 13 Meter Beiteploeg ("the Tiller"). Attached to the founding affidavit is correspondence from applicants' attorneys alerting the respondent (initially through his attorney of record at the time) to instances of breach in respect of the assets as set out in the applicants' founding affidavit.

[10] According to applicants the John Deer tractor was removed from the farm Eureka and was at that stage located (without the engine) at the farm Daskop, whilst the engine thereof was located at an engineering business. Respondent

explained that he had an agreement with one Mr SJ Swanepoel, a qualified diesel mechanic to do repairs to the tractor. He handed up a letter from Mr Swanepoel confirming that he had such an agreement with respondent since 2020 on the basis that he (Mr Swanepoel) would repair the tractor in exchange for respondent doing contract work for the repairs done.

- [11] Applicants aver that the Case tractor was removed from the farm Eureka and at that stage located at Hillside Boerdery Trust. The tractor had not been maintained and kept in good condition. A sale agreement ("the Sale Agreement") to purchase the tractor (annexed to the founding affidavit) had been negotiated between the respondent and Hillside Boerdery Trust without the prior written consent of the applicants. The Skottel was likewise removed from the farm and was in fact at that stage utilised by Hillside. Respondent did not deny this and indicated that the said Skottel had been included in the purchase price of the sale agreement. Mrs Ferreira alluded to the fact that the intended sale had not been finalized and respondent had been duly informed that the bond would be called up.
- [12] Respondent did not dispute that the Tiller was removed from Eureka and was located at one of the various farms of a certain Heelbo Boerdery. According to him, he does not own a tractor to utilise the said implement and accordingly had an agreement with Heelbo to make use thereof. In a letter from Heelbo Boerdery handed up by respondent an employee of Heelbo confirmed an agreement with respondent since 2016 that the Tiller can be used without any hire component on condition that the costs of any repair be bore by Heelbo. It was confirmed that the Tiller was on a farm in Rosendal.
- [13] Respondent submitted that first applicant had full knowledge of the whereabouts of the assets, did not indicate her displeasure therewith and even the sale agreement was concluded with her knowledge. Mrs Ferreira in reply hereto submitted that respondent's contention in this regard is gainsaid by the correspondence from applicants to respondent mentioned herein before, alluding respondent of his breach of the terms of the bond.

[14] Despite acknowledgement of applicants' averments in respect of the whereabouts (in all events not on the farm Eureka), condition and utilisation of the assets as mentioned, respondent insisted that he did not forego any of these assets, he has full knowledge of the whereabouts thereof and is in fact endeavouring to have same repaired in order to keep it in a good condition as he should in terms of the bond. His intention had always been to sell the Case tractor and Skottel to Hillside with the aim of paying off the outstanding debt. According to correspondence on 18 April 2020 the said purchase price would have been paid on 15 August 2020. Nothing materialised up until the day of hearing the application. Respondent submitted that the intended purchase price would be paid by 1 October 2021 and undertook to secure another buyer should same not materialise. His only source of income is derived from rendering certain farming services to clients on a contract basis. Payment of the purchase price in terms of the sale agreement would enable him to more swiftly settle the outstanding debt owed to the applicants.

[15] Harms JA (as he then was) explained the purpose and effect of notarial bonds in **Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others [2003] 1 All SA 267 (SCA)** at para [4] as follows:

"A perfection clause entitles the holder of the bond to take possession of the movables over which the bond has been registered. Such a clause amounts to an agreement to constitute a pledge and will be enforced at the instance of the bondholder, whereupon the creditor obtains a real right of security."

[16] The sole purpose of the bond was for the respondent to have it passed over the assets as security for the due and proper repayment of the loan capital (with interest) advanced by applicants. At the time of the hearing of this application it seemed that the respondent repays the loan in terms of the AOD and is not in arrears, leaving three payments due respectively on 1 July 2022 in the amount of R 138 915.00, on 1 July 2023 in the amount of R 145 861.50 and on 1 July 2024 in the amount of R 130 923.50. I have to accept that the respondent complies with the terms of the AOD therefore. From the evidence it would

appear that the respondent is in breach of the terms of the notarial bond under which he bound the assets stated therein as security.

- [17] In principle it is therefore possible that the respondent might in future make the outstanding payments in terms of the loan agreement and that the applicants might not need to make use of the security afforded by the notarial bond. As no amount (according to the case pleaded before me) is at present due and payable, the relief sought and formulated in the notice of motion cannot be granted.

The relief is formulated as follows:

- “1. That the Applicants be authorised and ordered to enter in and upon the premises of the Respondent at the Farm Eureka, district Ficksburg, Province Free State, or any other premises where the assets set out in the in the Special Notarial Bond registered on 10 September 2019 may be found, to exercise the rights of the Applicants in terms of Clause 5.1 and 6.3 of “ANNEXURE C” to the Applicants’ founding affidavit, including the right to take and retain possession of the assets for as long as the Applicants may deem fit;
2. That the Applicants be authorised to remove the Assets from the premises of the Respondent or any premises where it may be found, for the purpose of dealing therewith in terms of this order;
3. That the Applicants be authorised to sell and dispose of the Assets by way of public auction or by private treaty, or otherwise, or in such a manner and on such terms as the Applicants may deem fit and to convey a valid title to the purchasers of such Assets;
4. Should it be necessary, that the Sheriff of the High Court be authorised to execute the terms of prayers 1 to 3 above on behalf of the Applicants should it be necessary to do so.
5. Cost of the suit on a scale as between attorney and client.”

- [18] In my view I cannot authorise the applicants to sell and dispose of the property of the respondent at a time when he is not in arrears with his payments - after all the whole purpose of the bond was to obtain security in the event of non-payment. I am however prepared in the circumstances to allow the Sheriff to attach so much of the assets as is necessary to secure the outstanding debt until full payment thereof.
- [19] As stated in respect of outstanding amounts the total amount at present outstanding amounts to R 415 700.00. The assets as mentioned in paragraph [9] above are in possession of Mr AJ Swanepoel, Hillside Boerdery Trust and Heelbo Boerdery respectively. In my view these parties/entities should have knowledge of any orders finalized herein. I do not have further particulars of these parties/entities but it is evident that the parties before me have knowledge of who they are. I intend therefore to issue a *rule nisi* and to further order service of the papers and order upon the afore mentioned.
- [20] It is trite that cost should follow the event. Mrs Ferreira pressed on me to grant a punitive cost order against respondent in view of his flagrant disregard for the rules of court and even a court order. I do not intend granting such an order. However, my condonation for non-compliance with the Rules of Court, including granting the respondent the opportunity to present evidence orally, should not be viewed as setting a precedent in this regard.
- [21] Wherefore I make the following order:
1. A *rule nisi* is issued returnable 14 October 2021 at 09h30 calling upon respondent and/or any other affected parties to show cause, if any, why the following orders should not be made final:
 - 1.1 The Sheriff of the court is ordered and directed to:

1.1.1 Attach assets to the value of R 415 700.00 until full payment of the amount is made by respondent to applicants, alternatively until the Sheriff is ordered otherwise by court.

1.1.2 The Sheriff, in attaching assets as in 1.1.1, must attach all or select from the following assets:

- (a) Case MX 230 Tractor (JAZ 132567)
Registration Number: CPW 329 FS
- (b) Buffel 6.4 Metre Offset – 60 skottel
Serial Number: C65T Part 3 MTP
Marked CJ002RBM
- (c) John Deere 6410 Tractor
VIN Number: AAC6410FN1V000069
- (d) JC Tilage 32 Skottel Offset
Marked: CJ004RBM
- (d) V Balk John Deere 11 Tand Ripper
Marked: CJ005RBM
- (e) John Deere 545 Baler
Marked: CJ006RBM
- (f) 2 x Monosem 540 Vierry Planters
Marked: CJ007RBM
- (g) John Deere 6610 Tractor
VIN Number AAC6610FWZV0000073
- (h) John Deere 952 Stroper
Number: 0290247
- (i) John Deere 965 Stroper
Serial Number: 0081172
- (j) 13 Meter Beiteploeg
Marked: CJ0011RBM

1.2 The afore mentioned attachment is authorised for purposes of perfecting the applicants' pledge and perfecting their notarial bond over the attached assets.

1.3 Each party to pay their own costs.

2. The orders in 1.1.1, 1.1.2 and 1.2 will serve as interim orders with immediate effect pending finalization of this application.
3. A copy of the papers and this order to be served on:
 - 3.1 Mr AJ Swanepoel (ID: 6405135147085)
 - 3.2 Hillside Boerdery Trust (IT: 165/98)
 - 3.3 Heelbo Boerdery


C. REINDERS, ADJP

On behalf of the Applicants

Adv J Ferreira

Instructed by:

Adrian's & Claasen Attorneys

c/o Claude Reid

BLOEMFONTEIN

On behalf of the Respondent:

Mr C J van der Riet

Farm Eureka

Ficksburg

(In person)