

SOUTH AFRICA / JUDGMENT

Special Investigating Unit and Another v Lebelo and Others (GP06 /2022) [2022] ZAST 18 (8 August 2022) [2022] ZAST 18

COURT
Special Tribunal

BEFORE
L.T. Modiba

CASE / FILE NUMBER
GP06 /2022

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IN
THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE
SPECIAL INVESTIGATIONS UNIT AND
SPECIAL
TRIBUNALS ACT 74 OF 1996
(REPUBLIC
OF SOUTH AFRICA)
CASE
NO: GP06 /2022
In

the matter between:

Special
Investigating
Unit
First Applicant
Transnet
SOC
Ltd
Second Applicant
and
Zakhele
Ezekiel 'Thabo'
Lebelo
First Respondent
Zakhele
Ezekiel 'Thabo' Lebelo N.O.
In
his representative capacity as a Trustee

of
Second Respondent
The
Thabo Lebelo Family Trust
Alletta
Mokgoro Mabitsi
N.O.
Third Respondent
In
her representative capacity as a Trustee of
Transnet
Retirement
Fund
Fourth Respondent
Phathutshedzo
Brighton Mashamba
Fifth Respondent
Matlhodi
Phillicia
Mashamba
Sixth Respondent
Office
of the Deeds Registry –
Pretoria
Seventh Respondent
Aviwe
Ndyamara
N.O.
Eighth Respondent

JUDGMENT

Summary:

Application for a rule nisi to preserve property and appoint a curator bonis in terms of Tribunal Rule 24 - factors to be taken into account when exercising a discretion to appoint a curator bonis to take control of and preserve the value of immovable property in terms of Tribunal Rule 24 read with Tribunal Rules 27 and 2 –

Held: when exercising a discretion to appoint a curator bonis, the Tribunal ought to have regard to the circumstances of each case. The overriding consideration is the purpose for which the preservation order is sought and whether the appointment of a curator bonis gives effect to that purpose.

MODIBA J:

- [1] The main controversy that arises in this matter is what factors should the Tribunal take into account when exercising a discretion to appoint a curator bonis to take control of and preserve the value of immovable property in terms of Tribunal Rule 24 read with Tribunal Rules 27 and 28. It arises in an application by the Special Investigating Unit (SIU) and Transnet SOC Ltd (Transnet) jointly as applicants brought to preserve certain immovable property. The applicants also seek orders appointing the curator bonis to amongst other things take control of the preserved properties and restraining the Transnet Retirement Fund (TRF) from paying out pension benefits to Zakhele Ezekiel Thabo Lebelo (Mr Lebelo). Lastly, the applicants seek an order that the respondents pay the costs of the curator bonis.
- [2] The applicants issued the application and served it on the respondents on Tuesday 19 July 2022. They sought it heard on Friday 22 July 2022. In their notice of motion, they prayed that the orders operate as a rule nisi pending a return day to be set by the Tribunal. The respondents would, in accordance with Tribunal Rule 24, anticipate the return day on 24 hours' notice to the applicants when they would be afforded an opportunity to persuade the Tribunal not to confirm the orders granted under the rule nisi.
- [3] The applicants clearly brought the application on very short notice to the respondents. Having regard to the amount of time they took to prepare the application and the high volume of the papers, the period they afforded the respondents to oppose and the Tribunal to read the papers was extremely truncated. It is for that reason that I did not enrol the application for hearing as sought in the notice of motion, even on an unopposed basis.
- [4] I reserved Friday 29 July 2022 to hear the application on an unopposed basis. In the event that the respondents note an appearance to oppose, I undertook to convene a case management meeting within 24 hours to determine the further conduct of the matter, including the date of hearing.
- [5] Mr Lebelo cited both in his personal capacity and in his capacity as co-Trustee of the Thabo Lebelo Family Trust (the Lebelo Trust) together with his wife Alletta Mokgoro Mabitsi (Ms Mabitsi) and Phathitshedzo Brighton Mashamba (Mr Mashamba) and his wife Matlhodi Phillicia Mashamba (Ms Mashamba) oppose the granting of the rule nisi.
- [6] TRF did not enter the fray. The proposed curator bonis Aviwe Ndyamara N. O. (Mr Ndyamara) and the Office of the Deeds Registry, Pretoria also did not enter the fray.
- [7] TRF holds Mr Lebelo's pension benefit, valued on 1 June 2022 in the amount of R 1,816,656.67 (the pension benefit). It is this pension benefit the applicants seek to interdict TRF from paying to Mr Lebelo in these proceedings.
- [8] On 25 July 2022, I convened a case management meeting to issue directives for the further conduct of the application. During the meeting, based on the undertakings advanced on the respondents' behalf not to dissipate their immovable properties pending confirmation proceedings, I urged the parties to reach an agreement on the issuing of a rule nisi

preserving the immovable properties. The parties did reach an agreement regarding the preservation of the immovable properties essentially on the terms as prayed for in the applicants' notice of motion. They also agreed on a timetable for the exchange of papers and heads of argument and proposed dates for hearing of the preservation application. However, they did not agree on the appointment of the curator bonis, the costs of the curator bonis and the preservation of Mr Lebelo's pension benefit. They presented separate draft orders. The applicants' draft order sets out an order granted under a rule nisi as set out in the notice of motion.

- [9] The respondents' draft order excludes the opposed prayers. The respondents contended that the founding papers do not make out a case for the orders that they oppose and that the matter is no longer urgent. For these reasons, they seek an order as set out in the draft order proposed by them and the applicants, jointly and severally, to pay the costs of the hearing.
- [10] Unrelenting in their quest for these orders being granted pending the determination of the preservation application, the applicants sought to argue why they are entitled to orders in terms of their draft order. The parties agreed to argue the application for a rule nisi on the basis of their respective draft orders. I issued directives regarding the delivery of paginated and indexed papers and the

delivery of heads of argument and afforded the parties an opportunity to present oral argument in respect of the opposed prayers. The papers are well prepared and presented and were an absolute delight to read. The parties' heads of argument are comprehensive. They enabled me to study and reflect on the parties' legal submissions prior to the hearing. I am most grateful to the parties'

respective legal teams for their assistance.

FACTUAL

BACKGROUND

- [11] The SIU is a statutory investigative body established in terms of s 2(1)(a)(i) of the Special Investigating Units and Special Tribunals Act[1] (the SIU Act). By proclamation, the President of the Republic of South Africa may authorize the SIU to investigate conduct referred to in s 2(2) of the SIU Act including serious maladministration in connection with the affairs of any State institution, improper or unlawful conduct by employees of any State institution, unlawful appropriation or expenditure of public money or property and unlawful, irregular or unapproved acquisitive act. In terms of s 4(1)(c) read with s 5 (5) of the SIU Act, the SIU may institute civil proceedings in the Tribunal in its own name or on behalf of a State institution in matters emanating from its investigation for any relief to which a state institution is entitled.

[12] The President has mandated the SIU to investigate allegations of impropriety and illegality at Transnet.[2] As part of its investigations into Transnet, the SIU has investigated allegations of irregularities in Transnet Property, an operating

division of Transnet. Transnet furnished the SIU with a three-volume Forensic Report it had commissioned from Michael Bill Attorneys into various allegations of irregularities within Transnet Property dated April 2021 (the MBA report). Transnet also furnished the SIU with an Investigative Report it had commissioned from Ligwa Advisory Services into allegations of tender irregularities in Tender TPCCT/JHB/730 dated March 2017 (the Ligwa report). The SIU further investigated the findings and other matters in these reports that required further investigation. In these proceedings, the SIU relies on its findings and evidence it gathered during the investigation.

[13] It institutes this application in its own right and name, in the public interest and on behalf of Transnet and/or the State, in terms of s 4(1)(c) and 5(5) of the SIU Act. It asserts the Tribunals jurisdiction over the application in terms of s 2(1)(b) and 8(2) of the SIU Act, read with Regulation 5.2 of the Regulations of the Special Investigating Units and Special Tribunals (the Tribunal Regulations)[3]

[14] The respondents have opted to argue their case at this point on the basis of the founding papers as filed by the applicants. It is therefore on the applicants' version that I determine the rule nisi.

[15] Mr Lebelo was employed by Transnet Group Executive: Transnet Property. He resigned with immediate effect on 28 November 2018, pending a disciplinary enquiry. Mr Mashamba has held various positions in Transnet Property. Since 1 June 2014, he was the Regional Manager: Carlton Management Department. He held this position until 1 November 2018, when he was appointed as the Regional Manager: Coastal Region. He still holds the latter position. On 16 May 2022, Transnet suspended Mr Mashamba pending the SIU's investigation of the below allegations.

[16] The applicants intend to institute civil proceedings against Mr Lebelo and Mr Mashamba for the disgorgement of secret profits they earned from Superfecta Trading 209 CC or Superfecta Trading 209 (Pty) Ltd (Superfecta), a supplier to Transnet Property and BBDM Bros Advertising Agency (Pty) Ltd (BBDM), a tenant of Transnet Property. Both Mr Lebelo and Mr Mashamba were instrumental in Superfecta and BBDM being awarded Transnet contracts on terms extremely favourable to these entities and prejudicial to Transnet. The applicants also seek to recover damages Transnet endured as a result of Mr Lebelo and Mr Mashamba's breach of their employment duties with Transnet for their role in the awarding of contracts to Superfecta and BBDM.

- [17] Over the period February 2016 to August 2018, Superfecta earned over R 64 million (incl. Value Added Tax (VAT)) in payments from Transnet, as a result of its business with Transnet Property. Pursuant to its lease with Transnet, BBDM was paid tenant installation allowances totalling over R 73 million (incl. VAT) over the period March 2015 to June 2018.
- [18] Mr Lebelo and Mr Mashamba each received unlawful benefits from Superfecta. Superfecta gifted or donated to Mr Lebelo three apartment units and an exclusive-use balcony area situated in Rosebank, Johannesburg (the Rosebank properties), transferred to the Lebelo Trust. Mr Mashamba received R 2 million from Mr Khoncha, an erstwhile director in Superfecta. He used these funds to purchase a property in Farm Diepsloot (Diepsloot Property) through Ms Mashamba's company, Red Lip Communications (Pty) Ltd in June 2018. The Diepsloot property was transferred to a new owner in June 2022 based on a Sale Agreement concluded in March 2022. The Mashambas used R 1.5 million of the proceeds from that sale to buy a new property in Dainfern (the Dainfern property) and to pay the associated transfer costs. Since the Dainfern property was partially purchased with the proceeds of the Diepsloot property, the applicants contend that it is liable for preservation under the orders they seek.
- [19] Mr Mashamba also received (at least) R 4,5 million from BBDM. BBDM paid R 1 million towards the purchase by Mr Mashamba and his wife for a residential property at Beverley, Johannesburg (the Beverley property). This property was the Mashambas' main residence until they sold it to buy the Dainfern property. R 590 898.43 from the sale of the Beverley property was used to purchase the Dainfern property. In addition, BBDM made five payments over the period 25 June 2015 to 16 February 2016, totalling R 3,5 million, to Ms Mashamba's company, Eva Looks (Pty) Ltd (Eva Looks).
- [20] The properties and payments constitute and/ or were acquired with secret profits that Mr Lebelo and Mr Mashamba earned from a supplier of Transnet, for the benefit of themselves and/or their relatives, in conflict with their duties and relationships of trust as employees of Transnet; and bribes, kickbacks, gratification or gratuity that Superfecta and BBDM paid Mr Lebelo and Mr Mashamba (through Ms Mashamba's company) in return for their recommendation or approval of the appointment of Superfecta and BBDM as a service providers to Transnet Property for lucrative contracts. The properties constitute the proceeds of unlawful activities, as contemplated in rule 24(2) of the Tribunal Rules (read with the definition of 'unlawful activities' in rule 3 of the Tribunal Regulations).
- [21] Pending the intended civil proceedings, the applicants seek an order prohibiting the Lebelo and Mashamba respondents from selling, leasing, donating, transferring title in, disposing of, or otherwise hypothecating or encumbering, the Rosebank and Dainfern properties. They also seek ancillary relief as described earlier.

ISSUES TO BE DETERMINED

- [22] It follows that the following issues stand to be determined:

22.1 Whether the applicants make out a case for the appointment of a curator bonis.

22.2 Liability for the costs of the curator bonis.

22.3 Whether Mr Lebelo's pension benefits should be preserved.

THE APPOINTMENT OF A CURATOR BONIS

[23] The applicants seek to appoint a curator bonis in accordance with the terms set out in the Notice of Motion.

[24] The respondents argued on the authority in Van der Merwe^[4] that the applicants have not made out a case in their founding affidavit for the appointment of a curator bonis. In its founding affidavit in Van der Merwe, SARS expressed the reasonable belief that Mr Van der Merwe uses the respondents, other persons and entities to hide his assets. It contended that the appointment of a curator bonis will be required for the collection of the outstanding taxes. The Supreme Court of Appeal (SCA) found that it was imperative that a curator should investigate his tax affairs and that SARS' application for such an appointment should succeed.

[25] Here, the respondents further argued, the applicants do not make out a why a curator bonis should be appointed. They only rely on the vague experience of the SIU in matters such as these, that it is often necessary to appoint a curator to ensure that the preserved property is maintained in a manner that will allow for maximum recovery in due course should the property be forfeited to the State.

[26] But, in addition to the SIU's general experience, the applicants rely on the authority in Mngomezulu,^[5] where the SCA addressed the role of a curator bonis appointed under a restraint order issued in terms of section 28(1) of the Prevention of Organized Crime Act^[6] (POCA). In Mngomezulu, Theron AJA (as she then was) described the scheme of chapter 5 of POCA and recognised that a pivotal responsibility of the curator

bonis and the very purpose for which a restraint order is granted under POCA, is the preservation of property.^[7] As regards the preservation of immovable property, Theron AJA observed that the surrender of immovable property would ordinarily require the person in occupation of such property to hand over possession of the property to the curator bonis. Where surrendering possession of the property is not required, Theron AJA held that the impact of the restraint order would in most cases be minimal as there would be no reason, in such a case, why the defendant could not continue to live in the property.^[8] She further recognized, that the curator bonis may impose reasonable conditions on the defendants' right to occupy the immovable property – and would be derelict in his duties if he did not do so – in order to retain sufficient control over the property and ensure the preservation of the value of the property.^[9] These types of conditions would include ensuring that bond repayments were made, that the property is properly maintained, and that all the applicable rates and taxes on the property are paid up.^[10]

- [27] In Van der Merwe, when exercising a discretion to appoint the curator bonis, the SCA placed weighty emphasis on Mr Van der Merwe's conduct as a tax payer and his disposition to hide his assets using other persons and entities. Hence, the SCA deemed the appointment of a curator bonis necessary in those circumstances as an investigation into Mr van der Merwe's and his daughter's tax affairs was warranted.
- [28] Applying the same consideration here would set the bar too high when the appointment of a curator bonis is sought in the context of a preservation order granted in terms of Tribunal Rule 24. It would place too onerous a burden on the applicants under the present circumstances to place evidence before the Tribunal of the respondents' likelihood not to maintain the value of the properties, more so that in Van der Merwe, the SCA did not set a hard and fast rule regarding the circumstances under which a curator bonis may be appointed. It clearly appears in that judgment that the SCA only considered the appropriateness of the appointment of a curator bonis in the circumstances of that case.
- [29] Notably, in Van Der Merwe, with reference to Fraser[11] where a curator bonis was appointed in a restraint order granted under POCA, the SCA recognized the effect of a preservation order as being to place the respondents' property beyond his or her control into the hands of a curator bonis pending the outcome of criminal proceedings and held that its approach in Van der Merwe is consistent to that in Frazer.[12]
- [30] Thus, having regard to the dicta in Mngomezulu, Van der Merwe and Fraser, when exercising a discretion to appoint a curator bonis, the Tribunal ought to have regard to the circumstances of each case. The overriding consideration is the purpose for which the preservation order is sought and whether the appointment of a curator bonis gives effect to that purpose.
- [31] The applicants in the present case, as was the case in Van der Merwe (even though under a different statutory regime namely, POCA), seek a preservation order to retain sufficient control over the Rosebank and Dainfern properties and ensure the preservation of the value of the properties. The curator bonis' appointment would have minimum effect on the respondents' property rights. He will allow them to continue to occupy the properties. He will ensure that the value of the properties is maintained by ensuring that where applicable, bond repayments are made, that the properties are properly maintained, and that all the applicable rates and taxes and body corporate levies on the properties are paid. Therefore, the appointment of the curator bonis only serves to give effect to the purpose of the preservation order.

[32] In the present circumstances, the appointment of a curator bonis is further rendered necessary by the circumstances under which the respondents acquired the Rosebank and Dainfern properties which is at this stage not dispute, the fact that they face the risk of losing the properties in the intended civil proceedings and the real likelihood that they may as a result, lose the inspiration to continue laying out expenses to maintain the value of the properties.

[33] The respondents acquired the properties under circumstances described earlier. The applicants intend disgorging the secret profits referenced earlier in the intended civil proceedings either by having the secret profits forfeited to Transnet in terms of Tribunal Rule 26 on the basis that they constitute proceeds of unlawful activities or by executing against the properties to satisfy a judgment debt in respect of the secret profits and other damages it endured as a result of their conduct. Under these circumstances, there is an inherent risk that the respondents will lose the inspiration to continue maintaining the value of the properties. It is therefore important that the curator bonis is appointed to preserve the properties' value, thereby securing Transnet's prospects of satisfying the judgment debt from the intended civil proceedings.

[34] During oral argument on Friday 29 July 2022, to quell the opposing respondents' complaint that the applicants have failed to establish in their founding papers who the proposed curator bonis is and why he or she should be appointed in these proceedings, counsel for the applicants tendered this information in the event

that the Tribunal requires it. On 1 August 2022, I issued directives that the applicants file a further affidavit and supplementary heads of argument addressing the respondents' concerns and setting out why their failure to furnish this information in the founding affidavit is not fatal to prayers 2.7 to 2.12 of the notice of motion and why the Tribunal should admit the further affidavit and supplementary heads of argument in the interests of justice.

[35] Although the 1 August 2022 Directive also invited the respondents to file an answering affidavit responding to the applicants' further affidavit as well as supplementary heads of argument, they have opted not to do so. As a result, there is no opposition to the applicant's version and legal submission filed in response to the 1 August 2022 Directive. I therefore determine the proposed curator's suitability to be appointed as a such and the interests of justice in permitting the filing of the further affidavit on the SIU's version.

[36] In the further affidavit, the applicants provided details about Mr Ndyamara's expertise and prior experience acting as a curator including his professional background, qualifications and accreditation as a business restructuring professional and insolvency practitioner with SARIPA and his considerable experience as a curator bonis, including in three other matters in which he has been appointed by the Tribunal, on the recommendation of the SIU. The SIU attests of his diligent performance of his duties in these matters. He has accepted appointment as curator bonis in this matter.

- [37] I am satisfied of his suitability to be appointed as curator bonis pending the determination of the preservation application.
- [38] As submitted on behalf of the applicants, there is no hard and fast rule applicable when a court exercises a discretion to admit a further affidavit. Each case is considered on its facts, provided the applicant provides a reasonable explanation for not including the information in the first place and if admitting the further information will not be prejudicial to the respondents. Further, the court always retains a discretion in urgent matters to permit the filing of further affidavits because the parties prepare their affidavits in haste.[13] I am satisfied that the applicants' have made out a case for the admission of the further affidavit and supplementary heads of argument in the interests of justice.
- [39] The applicants have furnished a reasonable explanation for not including information on the curator bonis in their founding affidavit. They omitted the relevant information from their founding affidavit owing to the time pressure under which they launched the urgent application. As I have already found, the appointment of a curator bonis is necessary to give effect to the preservation order including ensuring that the value of the preserved assets is maintained.
- [40] The respondents will not be prejudiced by the admission of the applicants' further affidavit and supplementary heads of argument. They opted not to present a version, notwithstanding that it was due to their complaint that the applicants have not furnished this information that the 1 August 2022 Directive was issued. The preservation order recognises that there may be current inhabitants of the properties and permits their continued occupation of the properties subject to the other powers of the curator. The respondents' rights are further protected under prayer 2.10 of the notice of motion and rule 2.7 of the Tribunal Rules.

THE COSTS OF THE CURATOR BONIS

- [41] Since the purpose of the rule nisi is to preserve the status quo, it is appropriate that the respondents continue to pay the costs of maintaining the Rosebank and Dainfern Properties. They are

in any event liable for these costs as the owners of these properties. It is appropriate to reserve the costs in respect of the

curator bonis fees for determination during the confirmation proceedings. Both parties were comfortable with this approach to costs when I mooted it during oral argument.

THE PRESERVATION OF MR LEBELO'S PENSION FUND

- [42] As already mentioned, Mr Lebelo has not accounted to Transnet for the allegations set out above as he resigned with immediate effect when disciplinary proceedings were instituted against him. Pending further investigations into Mr Lebelo's conduct by the SIU, Transnet instructed TRF not to make payment of Mr Lebelo's pension benefits.

[43] The applicants seek an order interdicting the TRF from paying out or transferring any benefits it holds that stand to the credit of Mr Lebelo pending the final determination of the intended civil proceedings. They contend that upon obtaining an order in the intended civil proceedings, Transnet will be entitled in terms of Rule 12.3.4 of the TRF Rules, to deduct the full amount standing to the credit of Mr Lebelo's pension benefits, to compensate Transnet for losses it suffered as a result of misconduct, fraud and dishonesty on Mr Lebelo's part as alleged.

[44] Mr Lebelo resists the preservation of his pension benefits. He contends that there is no need to preserve his pension benefits because he has not been able to access them since he resigned in

2018. TRF is entitled to refuse to pay them as it has been doing.

[45] Rule 12.3.4 of the TRF Rules provides as follows:

“Any benefit payable to a Beneficiary in terms of these Rules upon a Member's termination of service for any reason, is subject to a deduction in respect of –

12.3.4 compensation (including legal costs recoverable from the Member) in respect of any loss suffered by the Fund or the Employer as a result of any theft, misconduct, fraud or dishonesty on the Member's part for which the Member has admitted liability in writing or in respect of which the Employer has obtained a court judgment.”

[46] The wording in rule 12.3.4 mirrors that in s 37D(1)(b)(ii) of the Pension Funds Act[14] which the SCA purposefully interpreted in *Highveld Steel*,[15] holding that the section entitles a fund to withhold payment of pension benefits pending an investigation into suspected misconduct.

The SCA recognised that employers only suspect dishonesty on the date of termination of an employee's service and fund membership with the consequence that pension benefits are paid before the suspected dishonesty can be properly investigated. Logically, it is only in a few cases that an employer will have obtained a judgment against its employee by the time the latter's employment is terminated because of the lengthy delays in finalising cases in the justice system.

[47] The discretion TRF exercised to withhold Mr Lebelo's pension benefits, is supported by the SCA authority in *Highveld Steel*. Although, as pointed out on behalf of Mr Lebelo, TRF did not need a court order to withhold Mr Lebelo's pension funds, Mr Lebelo has impugned TRF's right to withhold his pension benefit when he lodged a complaint with the Public Protector. As a result, there is a pending dispute in this regard. The applicants are entitled in these proceedings, to seek an order protect TRF's right to withhold Mr Lebelo's pension benefits.

[48] Otherwise, should the Public Protector issue a directive that TRF pay out Mr Lebelo's pension fund, further legal proceedings are likely to ensue. The applicants have expressed an intention to take the Public Protector's remedial action on review and interdict its

implementation. This will result in unnecessary and wasted legal costs. For this reason, the review does not constitute an appropriate alternative remedy. The applicants do not have to wait for the Public Protector's determination and only then, take her remedial action on review. They are entitled to seek a preservation of Mr Lebelo's pension benefits in these proceedings. Therefore, the contention advanced on behalf of Mr Lebelo that the applicants do not lack an alternative remedy is without merit.

[49] Granting the order will preserve the status quo in which no pension benefit is being paid to Mr Lebelo. The order is binding on the parties and cannot be circumvented by the Public Protector. It will affirm Transnet's right to withhold pension benefit pending the determination of the intended legal proceedings against Mr Lebelo.

[50] In the premises, the following order is made:

ORDER

1 The order below shall operate as a rule nisi until it is confirmed or discharged.

2 Pending the determination of this application and execution steps based on such outcome:

2.1 The first to third respondents and any other person with knowledge of this order are prohibited from selling, leasing, donating, transferring title in, disposing of, or otherwise hypothecating or encumbering:

2.1.1 a unit consisting of Section 407, as shown and more fully described on Sectional Plan No. SS 000000165/2016 in the scheme known as the Capital On Bath in respect of land and buildings situate at Rosebank Township, local authority: City of Johannesburg Metropolitan Municipality, of which section the floor area, according to the sectional plan is 127 (one hundred and twenty-seven) square meters in extent and an undivided share in the common property in the scheme apportioned to the said section in accordance with the Participation quotas endorsed on the said sectional plan, held by certificate of registered Sectional Title Number ST 000000165/2016 (407) (unit);

2.1.2 a unit consisting of a Section 408, as shown and more fully described on Sectional Plan No. SS 000000165/2016 in the scheme known as the Capital On Bath in respect of land and buildings situate at Rosebank Township, local authority: City of Johannesburg Metropolitan Municipality, of which section the floor area, according to the sectional plan is 28 (twenty-eight) square meters in extent and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quotas endorsed on the said sectional plan, held by certificate of registered Sectional Title Number ST 000000165/2016

(408) (unit);

2.1.3 a unit consisting of Section 511, as shown and more fully described on Sectional Plan No. SS 000000165/2016 in the scheme known as the Capital On Bath in respect of land and buildings situate at Rosebank Township, local authority: City of Johannesburg Metropolitan Municipality, of which section the floor area, according to the sectional plan is 45 (forty-five) square Meters in

extent and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the said sectional plan, held by certificate of registered Sectional Title Number ST 000000165/2016

(511) (unit); and

2.1.4 an exclusive use area described as Balcony B3 measuring 14 (fourteen) square meters, being as such part of the common property, comprising the land and the scheme known as the Capital on Bath in respect of the land and building or buildings situate at Rosebank Township, local authority: City of Johannesburg Metropolitan Municipality as shown and more described on Sectional Plan 000000165/2016 held by the Notarial Deed of Cession Number SK 000002594/2016, (collectively referred to as “the Rosebank properties”).

2.2 The fifth and sixth respondents and any other person with the knowledge of this order are prohibited from selling, leasing, donating, transferring title in, disposing of, or otherwise hypothecating or encumbering, Erf 2036 Dainfern Extension 19 (also known as 2 Mirabel Road Dainfern Ext 19) (referred to as “the Dainfern property”).

2.3 The Transnet Retirement Fund is interdicted and restrained from paying out or transferring any benefits it holds and standing to the credit of the first respondent pending the final determination of civil proceedings inter alia for recovery of damages or losses and disgorgement of secret profits, to be instituted by the applicants against the respondents within 60 days from the date of this order (“the main proceedings”).

2.4 Aviwe Ndyamara of Tshwane Trusts Co. (Pty) Ltd is appointed as the curator bonis in whom the rights, title and interest in the Rosebank properties and the Dainfern property, will vest with immediate effect.

2.5 The curator bonis is authorised in accordance with the provisions of Rule 27 of the Tribunal Rules and this order, forthwith to:

2.5.1 assume control of the immovable property and to take such property into his/her care (with the exception that the current inhabitants and other persons related to them are allowed access and uninterrupted use and enjoyment of the property);

2.5.2 take care of the said property;

2.5.3 administer the said property;

2.5.4 do any necessary act for the purposes set out in paragraphs 2.4 and 2.5 above or paragraphs 2.6 to 2.9 below.

2.6 No-one, except the curator bonis may deal with the said property subject to the conditions and exceptions contained in this order, save with the prior written consent of the applicants, which consent may not be unreasonably withheld.

2.7 The powers of the curator bonis will continue, subject to the provisions of this order, for as long as it is required to finalize the main proceedings.

2.8 The powers of the curator bonis may be amended, supplemented and/or terminated on application by the applicants or any interested party to the Special Tribunal.

2.9 The cost of the curator bonis, occasioned by and incurred in the implementation of this order and/or otherwise associated with the immovable property concerned, must be paid by:

2.9.1 the first to third respondents (jointly and severally, the one paying, the others to be absolved) in respect of the immovable property described in paragraph 2.2 above; and

2.9.2 the fifth and sixth respondents (jointly and severally, the one paying, the others to be absolved) in respect of the immovable property described in paragraph 2.3 above,

which costs will include (but will not be limited) -

2.9.2.1 payments made and costs incurred in the administration of the property, to keep the property in good standing with the Local Municipality and any Home-Owners or other Association concerned, to take care of the property and/or to protect the property;

2.10 The costs occasioned by the curator bonis in respect of the services rendered by him/her in the execution and implementation of this order are reserved. These costs include:

2.10.1 the fees charged by the curator bonis for his services in this regard;

2.10.2 costs occasioned by the curator bonis for monies disbursed by him/her in order to obtain support and advisory services in his/her capacity as curator bonis, in the execution and implementation of this order.

2.11 The curator bonis will be liable for any damages caused by him/her because of acting beyond his powers or unreasonably in executing his/her duties in terms of this order and the applicants will be responsible to ensure that any damage suffered as a result of the curator bonis not having put up security for compliance with his/her duties of this order, will be mitigated.

3 The first, second, third, fifth and sixth respondents should deliver their opposing affidavits, if any, on or before 9 September 2022.

4 The applicants should deliver their replying affidavit, if any, on or before 7 October 2022.

5 The applicants should deliver their heads of argument within two weeks of the filing of the replying affidavit and the respondents should file their heads of argument within one week thereafter.

6 The matter is postponed to the opposed motion roll on 28 & 29 November 2022.

7 The costs of the application are costs in the cause.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

APPEARANCES

Counsel for the applicant: Adv. K Hofmeyer SC, assisted by Adv. J Bleazard

Attorney for the applicant: Ms S Machado, Bowman Gilfillan Attorneys.

Counsel for 1st, 2nd, 3rd, 5th and 6th respondents: Adv. DT v R Du Plessis

Attorney for 1st, 2nd, 3rd, 5th and 6th respondents: Mr C Ramabulana, Ramabulana Attorneys.

Date of hearing: 29 July 2022

Date of judgment: 8 August 2022

[1] 74 of 1996.

[2] See Proclamation No. 11 of 2018 (published in Government Gazette 41561 of 6 April 2018) and Proclamation No. R. 3 of 2020 (published in Government Gazette 42979 of 31 January 2020). The latter proclamation extended the temporal scope of the investigations described in the 2018 Proclamation.

[3] Proclaimed in Government Notice No. R. 1263 of 2019, published in Government Gazette No. 42729 of 26 September 2019.

[4] Commissioner for the South African Revenue Service v Van der Merwe 2016

(1) SA 599 (SCA).

[5] Mngomezulu and another v Van Den Heever NO and another [2007] 2 All SA 357 (SCA).

[6] Act 121 of 1998

[7] Mngomezulu para 18.

[8] Mngomezulu para 12.

[9] Mngomezulu paras 14 to 18.

[10] Mngomezulu para 15.

[11] Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae) [2006] ZACC 24; 2007

(3) SA 484 (CC) at para 12.

[12] Van der Merwe at para 20.

[13] See Tribunal Rule 12(2) and (8). Also see Mathaba v Mdluli & Others 2017 JDR 0528 (GJ); [2017] ZAGPJHC 71 para 26

[14] 24 of 1956.

[15] Highveld Steel & Vanadium Corporation Ltd v Oosthuizen 2009

(4) SA 1 (SCA) para [17] to [19].

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