

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

Case Nos. 20303/10 and 20304/10

In the two matters between:

LUXOTTICA SOUTH AFRICA (PTY) LTD

Applicant

and

STANLEY BUILDING INVESTMENTS (PTY) LTD

First Respondent

INVESTEC BANK LTD

Second Respondent

JUDGMENT

MEYER, J

[1] These two cases – 20303/10 and 20304/10 – came before me in the unopposed motion court. Provisional sentence is in each instance claimed against the first respondent on a covering mortgage bond. The second respondent is cited by reason of its interest as the holder of mortgage bonds enjoying a preferent ranking to those held by the applicant.

[2] An action for provisional sentence is founded on a liquid document.¹ My concern was whether the covering mortgage bond on which provisional sentence is sought in each case complies with the requirement of liquidity. This requirement was formulated as follows in *Rich v Lagerway*:²

‘If the document in question, upon a proper construction thereof, evidences by its terms, and without resort to evidence extrinsic thereto, ... an unconditional acknowledgment of indebtedness in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted.’

[3] There appears in each covering mortgage bond a declaration of ‘... *the Mortgagor to be truly and lawfully indebted and held and firmly bound to and in favour of ...*’ the plaintiff in the sum of ‘*the capital*’ - R640, 000.00 in the covering mortgage bond on which provisional sentence is claimed under case no. 20303/10 and R9, 754, 531.00 in the covering mortgage bond on which provisional sentence is claimed under case no. 20303/10 – ‘... *arising from a consideration set out in the recital.*’ A wide variety of possible causes of indebtedness or considerations are recorded in the recitals of each covering mortgage bond, including ‘*a direct or indirect liability incurred by the Mortgagor individually or jointly with others*’, ‘*moneys lent and advanced*’, ‘*drafts or bills of exchange*’, ‘*any suretyship, guarantee or indemnity signed by the Mortgagor in favour of the Mortgagee, or given by the Mortgagee for and on behalf of the Mortgagor*’, ‘*any payment made by the Mortgagee pursuant to*’ each bond, ‘*including future debts generally from whatsoever cause arising*’.

1 A concise and, in my respectful view, correct exposition of the relevant legal principles and references to decided cases are to be found in FR Malan *et al*: *Provisional Sentence on Bills of Exchange, Cheques and Promissory Notes* (Butterworths), at p 16 *et seq*.

2 1974 (4) SA 748 (A), at p 754.

[4] When each covering mortgage bond is read as a whole and interpreted,³ it becomes clear that an acknowledgment in an ascertained amount of money is not what was intended. Each covering mortgage bond records that it was given as a continuing covering security for all and any sum or sums of money which might then or in the future be owing to or claimable by the plaintiff from any cause mentioned in each instrument and any other cause of whatsoever nature, and that each covering mortgage bond is to remain of full force and effect until cancelled in the deeds registry notwithstanding any fluctuation in, or temporary extinction of, the first defendant's indebtedness to the plaintiff from time to time. The first defendant, in other relevant provisions of the covering mortgage bond on which provisional sentence is claimed under case no. 20303/10, expressly acknowledges its indebtedness to the plaintiff for indeterminate amounts up to specified maximums of R640 000.00 together with interest thereon, which is referred to as 'the capital' and of R160 000.00, which is referred to as 'the additional sum',⁴ and the first defendant, in other relevant provisions of the covering mortgage bond on which provisional sentence is claimed under case no. 20304/10, expressly acknowledges its indebtedness to the plaintiff for indeterminate amounts up to specified maximums of R9, 754, 531.00 together with finances charges thereon ('the capital') and of R2, 438, 632.75 ('the additional sum'). An acknowledgment of indebtedness, not in an

3 Boshoff AJP in *Harrosmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (TPD), at p 732E, said this: 'Whether or not a clear and unconditional acknowledgement of debt, sufficient to support an interlocutory judgment of provisional sentence, is contained in an instrument is in each case essentially a matter of construction.'

4 The additional sums in both covering mortgage bonds *inter alia* include '... such other costs, charges, life assurance or endowment premiums, expenses and future debts generally ...'

ascertained amount of money, but up to a specific sum, does not render the instruments liquid.⁵

[5] It further becomes clear upon a construction of the covering mortgage bonds that the apparent unconditional acknowledgments of indebtedness relating to the capital sums and interest or finance charges thereon were made in respect of indeterminate amounts which might or might not already have been advanced and to advances which the plaintiff could make in the future. The extent of any indebtedness at the time of the execution of the instruments cannot be ascertained *ex facie* the covering mortgage bonds.

[6] A covering mortgage bond in which the acknowledgment was given in consideration of an undertaking by the mortgagee to make future advances could be liquid. The connection between the admission or acknowledgment and the concomitant obligation of the mortgagee must appear *ex facie* the instrument.⁶ An undertaking of an unconditional obligation on the part of the plaintiff does not, however, appear *ex facie* the instruments under consideration. The acknowledgments can therefore also not be said to have been made *in consideration* for the plaintiff's undertakings to make future advances or to comply with certain obligations. The apparent unconditional acknowledgment of

⁵ *Harrowsmith v Ceres Flats (Pty) Ltd* 1979 (2) SA 722 (T), at p 745; *Barclays Western Bank Ltd v Pretorius* 1979 (3) SA 637 (N), at pp 650 – 651; *Wollach v Barclays National Bank Ltd* 1983 (2) SA 543 (A), at p 552F - H.

⁶ *Wolach v Barclays National Bank Ltd* 1983 (2) 543 (A), at p 556A and at pp 556E – 559D, and *Inlestone v Pereira* 1939 WLD 55, at pp 64 – 65.

indebtedness is, on my interpretation of each covering mortgage bond, no more than 'merely a conveyancing form'⁷ or 'ceremonial admission'.⁸

[7] I am accordingly of the view that each covering mortgage bond does not comply with the requirement of liquidity and that provisional sentence in each case is incompetent.

[8] In the result the following order is made:

1. The application for provisional sentence in case no. 20303/10 is refused and no order as to costs is made.
2. The application for provisional sentence in case no. 20304/10 is refused and no order as to costs is made.

P.A. MEYER
JUDGE OF THE HIGH COURT

10 September 2010.

⁷ Per Bristow J in *Standard Bank v Perl* 1904 TS 768 at p 770.

⁸ Per Didcott J in *Barclays Western Bank Ltd v Pretorius* 1979 (3) SA 637 (NPD), at p 642F – H.