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COMMERCIAL BANK OF NAMIBIA LIMITED vs RoSSING STONE CRUSHERS LIMITED

-MORTGAGE

*Frank_J_*

Security - General Notarial Bond - Holder in worse position than a bondholder over specific movables - Need for law reform - Need to attach to secure claim - Overlapping of "general covering" and "business bond" - Third party with knowledge aquiring goods other than stock in trade not protected - Zimbabwean view not accepted - Possession only possible if provided for in bond - Need not demand possession prior to approaching Court but may be advisable Fictional delivery may offer sufficient protection claim for possession claim for specific performance and Court has discretion - goods covered by bond far in excess of debt due - order granted but postponed to future date subject to certain conditions.

IN THE HIGH COURT OF NAMIBIA

CASE NO.

In the matter between

COMMERCIAL BANK OF NAMIBIA LTD **APPLICANT**

versus

ROSSING STONE CRUSHERS LTD **RESPONDENT**

CORAM: FRANK. J

Delivered on: 1993/03/10

JUDGMENT

FRANK. J.: This is the return date of a rule NISI, which called upon the respondent to give reasons as to why:

> "1.1 The High Court's sheriff or his appropriate deputy should not be authorised to take possession of and to deliver into the possession of the applicant all the movable property and effects of the respondent, situate at the registered office of and principle place of business of respondent, where ever else such assets may be found.
>
> 1.2 The applicant should not retain such possession for as long as it's necessary to give effect to prayers 1.3 an 1.4, below.
>
> 1.3 An appraiser should not be appointed to determine the value of the aforesaid property at expense of the respondent.
>
> 1.4 The applicant should not be authorised to sell the property, or to have the right to purchase the property itself at the highest price

tendered by a purchaser, if any, provided the purchase price is not less than the valuation determined in terms of prayer 1.3 above, up to an amount of R 900 000.00. In such manner and on such term as the applicant might decide and to convey valid title to the purchaser(s), and credit the respondent's account held with applicant with the proceeds of such sale.

1.5 The costs of this application should not be born by the respondent.

1.6 An order should not be granted directing and restraining the respondent from dealing with, disposing in any way, or removing all or any of the assets referred to without the written consent of the applicant first being had and obtained.

2. That prayer 1.6 above shall operate as an interim interdict pending the return date."

Paragraph 3 only dealt with the manner in which the matter would be heard and time limits, as to when to oppose it, and I do not quote it.

Respondent is indebted to the applicant according to the application in an amount of R 507 034.28 plus interest, which amount, despite being due and payable, respondent has failed to pay. Applicant is the holder of a registered general notarial covering bond, executed by respondent in it's favour, covering the respondent's "movable property of every description whatsoever..."

The applicant fearing respondent's imminent financial collapse, approached the Court on an urgent basis for the order set out above, so as to secure it's claim in the event

of respondent being liquidated. Applicant as bondholder is not a secured creditor in the event of the insolvency of the respondent, and is entitled only to a preference over the concurrent creditors of the respondent with respect to the proceeds of assets subject to the bond in so far as they fall into the free residue of the estate. Should applicant however be able to take possession of the bonded property prior to the insolvency of the respondent it will have a secured claim as it then holds the property subject to a pledge. (See Barclays National Bank v. Comfy Hotels (Pty) Ltd. 1980 (4) SA 174 (E), Barclays National Bank v. Natal Fire Extinguishers Manufacturing Company (Pty) Ltd. 1982 (4) SA 650 (D), International Shipping Company (Pty) Ltd. v. Affinity (Pty) Ltd. 1983 (1) SA 79 (C)).

The fact that the bondholder over specific movables may be in an even a worse position is not relevant to this judgment, but does point to a need for law reform in this area. (See Cooper N.O. en andere v. Die Meester en ander 1992 (3) SA 60 (A). And a discussion in this connection by Prof. Sonnekus: Die Notariele Verband 1993, Vol 1, Journal of SA Law (TSAR) at p. 110.)

Prior to insolvency the applicant's position is not that clear at all. Where a third party acquires the bonded property, without knowledge of the bond (i.e.innocently), the bondholder has no claim against him. Also, where one is dealing with a "business-bond" and it is clearly intended that the business be allowed to sell it's stock in trade

such stock cannot be subject to a claim by the bondholder. A bond such as the present one under consideration is a combination of "business-bond" and a "general covering" bond. It would seem that this overlapping has caused some misunderstanding. Thus in Zimbabwe it has been held that even where a third party acquires property subject to the bond with knowledge that it was subject to the bond, such property would be protected against any action by the bondholders. (See Rhostar (Pty) Ltd. v. Peake N.O. 1978 (1) SA 603 (R) and Atmor N.O. v. Tobacco Sales Warehouse 1978 (3) SA 215 (R)). Insofar as these two cases deal with property other than stock in trade subject to a "business-bond", they are in my view wrong. (See in this regard the discussion by P.Sacks: Notarial Bonds in South African Law 1982 SALS 605).

Bond-holders taking into account their legal position are therefore much better of if they can take possession of the bonded properties so as to realise their security as pledgees rather than bondholders. They can however only take possession of such property if this is specifically provided for in the bond. (See Boland Bank v Spies en 'n ander 1993 (1) SA 402 (T)).

The question that now arises is where the bond specifically provides that the bondholder can take possession of the bonded goods in certain circumstances how this is to be done. Of course the happening entitling the bondholder to take possession must have occurred, (eg. non-payment of an amount due and payable). The question as to whether the

bondholder must first demand possession before it can approach the Court for relief, must be considered. A dicta in the Natal Fire Extinguisher's case, supra, suggest this need to be done. Didcott, J. specifically qualifies a previous statement by him in this regard at 657 D to E. Taken together his statement as qualified reads as follows:

> "... it's failure to distinguish between the pledge deemed by the Natal Act to have come into force without the property's delivery, which needed no judiciary enforcement and the actual possession of the property, to obvious advantages such carried, which did reguire the Court's intervention once the property was not relinquished voluntarily." (my underlining)

This was however said in a context where the bond did not make specific provision for the taking possession of the bonded goods and where possession was sought in it's own and not to perfect security. In the present matter, the event entitling the bondholder to take possession (i.e. non-payment) has taken place. Demand is thus not necessary to complete this cause of action. (See Blandell v Mc Lawley 1948 (4) SA 473 (W) and Teron v Teron 1973 (3) SA 667 (C)). This does not mean that it is not advisable to approach the debtor first in this regard. If the debtor voluntarily relinquishes possession there is no need for litigation and the costs of the application is saved. It seems clear that where an application is launched in circumstances where the debtor was prepared to give possession, the bondholder will have to pay the costs thereof. The failure to first approach the debtor may also be relevance in determining

"urgency" in urgent applications. There are two other reasons which comes to mind and which also render it advisable to approach the debtor prior to launching an application.

Firstly, possession may be taken and given by way of constructive or token delivery which in certain circumstances may be ideal to secure the creditor's claim while allowing the debtor to carry on with his business.

Secondly, and in conjunction with the first factor mentioned, agreement can be reached between the parties as to what bonded goods can be taken possession of where the value of the bonded goods far exceed the debt owing to the bondholder.

These two considerations mentioned need some further exposition.

As is clear from the Natal Fire Extinguisher's case supra, a claim for possession is a claim for specific performance and the Court does have a discretion in the granting of such an order. It is in view of this discretion that the above two considerations need further amplification.

Where a bondholder's main concern is to "perfect" it's security through possession (as in the present instance) it might be of some importance to have information as to the exact nature of the goods bonded so as to be fair to all parties concerned. As is stated in the Natal Fire

Extinguisher's case at 656 E;

> "Usually, no doubt, the Court will tend in a case like that to exercise it's discretion in the mortgagee's favour by letting him have the hypothecated property. No other way to complete the security he was promised is open to him. Nor need the hardship to the mortgagor inevitably be severe. With a little ingenuity the Court can keep this to a minimum, in many instances at least, by insisting on some token of delivery which does not deprive the mortgagor altogether of the property's use or disrupt his activities unduly, but goes far enough at the same time to transfer possession and thus achieve the mortgagee's object"

For the Court to do this the exact nature of the movables involved are important as different forms of constructive delivery may apply to different kinds of movables. Because of the way the papers were phrased in this matter counsel on both sides conceded that only delivery by way of constitutum possessorium would be apposite. The problem with this is that this kind of delivery to effect a pledge was held not to be permissable. (See Vasco Dry Cleaners v Twycross 1979 (1) SA 603 (A) at 612 (A)). Although this was seemingly obiter and based on considerations of public policy rather than on principle I do not see my way open to disregard it without the benefit of full argument. Prima facie there are strong views to be expressed, both for and against the decision. Why can one transfer ownership in this manner but not something less? On the other hand physical possession and ownership are often separated in law but to divide possession into physical possession and legal possession can

cause problems as the person in physical possession is in law not the "possessor". Furthermore the security lies in the physical possession or control. No third party can take it, because it is in the possession or control of the pledgee. To change this could lead to an increase in litigation between third parties and pledgees. Taking present day commercial realities into consideration where virtually all enterprises are "financed" in some way or other it seems that some reform by legislation in this regard is needed.

In the present matter, as pointed out earlier, the bond covers all the movable property of the debtor. The bond is intended to cover a total indebtedness of R900 000.00. As also already mentioned the actual alleged indebtedness was R507 034.28 on the 27 January 1993. The value of the movables bonded are approximately R 4 million according to Respondent. This excludes another approximately R 1,5 million in fixed property owned by the Respondent. These estimates were not really disputed by the Applicant and must therefore be accepted for present purposes. (See Tamarillo (Pty) Ltd v B.N. Aitken (Pty) Ltd 1982 (1) SA 376 (A) at 430 A.). The total indebtedness of Respondent including the claim by Applicant is in the region of R 1 million according to the papers. It is clearly desirable in such a case to avoid closing down the business of the Respondent at the behest of the Applicant. This once again shows the importance of first approaching the debtor to arrange for possession of goods to "perfect" the security without closing down the business and failing which the importance

of furnishing enough particulars to the Court so as to enable it to exercise it' s discretion in a manner that would be fair and proper in the circumstances.

The general rule that a Court will as far as possible give effect to a party's choice to claim specific performance also applies in matters like the present (See International Shipping Case, supra and Natal Fire Extinguishers Case, supra). It thus follows that it is for the Respondent to prove facts and circumstances as to why specific performance should not be granted (See Tamarillo Case, supra). The Respondent can off course rely for his contentions in this regard on facts and circumstances appearing from the Applicant's own papers.

Turning to the facts of the present matter the following appears. Respondent is indebted to Applicant in approximate amount of R 500 000.00. This is covered by notarial bond over all the movables of Respondent. The maximum amount mentioned in the bond is R 900 000.00. The unburdened movable assets of Respondent is in the region of R 4 million. Together with the fixed assets Respondent's total asset value is in the region of R 5Jj million . The total liabilities of Respondent is in the region of R 1 million. The Respondent's assets thus far outvalues its liabilities. The Respondent is a going concern with current contracts. The Respondent has raised a loan of R 2.5 million which will be sufficient to repay Applicant. This money is to be available within 4 months according to Respondent. To this question of the loan, the Applicant replies that it has no

knowledge thereof. These allegations must therefore by accepted as far as this proceedings are concerned. It is further common cause that Respondent does at present have a liquidity problem and is probably commercially insolvent. This is what prompted this application so as to enable the applicant to perfect its security. The Respondent has however, in the meantime arranged a moratorium with his other creditors, probably awaiting the money form the loan already granted.

From the papers it appears that Respondent will be able to continue doing business if it gets the money pursuant to the loan it negotiated. It is currently a running concern. It's assets greatly outvalues it's liabilities. This means that the chance of Applicant being prejudiced even if Respondent is liquidated and it is not a secured creditor is remote. The prejudice to the Respondent if all it's movables are seized will be severe. It will probably destroy it for good and let the loan promised not materialise. This is so because the non-performance of respondent will lead to the cancellation of existing contacts leaving Respondent with no income generating capacity and thus no means to repay any loan.
What Respondent does not do is to state what movables can be given to Applicant which will least disrupt its business operations or what movables can be delivered by way of constructive delivery which will also not disrupt its business. This was not very helpful in a matter such as the present where many different types of movables are involved. Respondent had to give reasons as to why specific

performance should not be granted and their all or nothing approach was a very risky one to take. The only alternative was not to give up any possession but to ask for the extension of the present return day for 4 months.

In the result I am not inclined to confirm the present rule but to grant an order which will allow Respondent to continue with his business while at the same time, hopefully awarding Applicant some protection. Furthermore should Applicant circulate copies of this order amongst the current creditors of the Respondent it will be difficult for them to acquire any rights to the bonded goods which will take precedence of the rights of the Applicant.

The following order is thus granted:

1.1 The High Court Sheriff or his appropriate deputy is authorised to take possession on the 9 July 1993 and to deliver into the possession of the Applicant all the movable property and effects of the Respondent situate at the registered office of and the principal place(s) of business of Respondent and wherever else such assets may be found.

1.2 That the Applicant shall retain such possession for as long as it is necessary to give effect to prayers 1.3 and 1.4 below.

1.3 That an appraiser shall be appointed to determine the value of the aforesaid property at the expense of Respondent.

1.4 That the Applicant is authorised to sell the property or to have the right to purchase the

property itself at the highest price tendered by a purchaser, if any, provided the purchase price is not less than the valuation determined in terms of prayer 1.3 above up to an amount of R900 00.00 in such manner and in such terms as the applicant might decide and to convey valid title to the purchaser(s) and credit the Respondent's account held with the Applicant with the proceeds of such sale.

2. That the Respondent is interdicted and restrained from dealing with, disposing in any way or removing all or any assets referred to, other than in the ordinary course of business, without the prior written consent of the Applicant until 9 July 1993.

3. That the Applicant is authorised to approach this Court for an order altering the date in paragraph 1.1 supra to an earlier date on these papers duly amplified, with 24 (twenty-four) hours notice to the Respondent, in the event of:

3.1 Applicant ascertaining that Surdec International cc cannot or will not advance the amount of R 2.5 million to Respondent;

3.2 Respondent acting in breach of paragraph 2 of this order supra.

3.3 Liquidation proceedings being launched against Respondent by a third party.

4. That Respondent is to pay the costs of this application.