IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***10th DECEMBER 2015*** Signature: _____

CASE NO: 2014/32635

In the matter between:

THE INDUSTRIAL DEVELOPMENT BANK OF SA LIMITED Applicant

and

BROODKRAAL LANDGOED (PTY) LIMITED Respondent

JUDGMENT

ADAMS AJ:

[1]. On the 4th November 2015, I made an order confirming the *Rule Nisi* issued by this court on the 11th September 2014. I undertook to furnish reasons for the order at a later stage. The following are the reasons.

[2]. The order which I confirmed on the 4th November 2015 was granted *ex parte* on an urgent basis on the 11th September 2014 by this court (Weiner J) against the respondent in favour of the applicant, calling upon the respondent to show cause, if any, why the following order should not be made final:

2.1 That the applicant and its agents, employees or nominees or the Sheriff are authorised to enter upon the premises, situated at the *Mooikelder Estate,* Noord Paarl Road, Paarl and other premises at which the movable assets of the respondent may be found, to take possession of the movable assets, to hold and retain the movable assets as security in terms of General Notarial Bonds registered in favour of the applicant on 12 March 2001, *viz:-*

2.1.1 The General Notarial Covering Bond Number: BN12286/2001 at the offices of the Registrar of Deeds, Cape Town, for the payment by the respondent of the loan amount in the sum of R6,000,000.00 (six million Rand) *("the capital")* plus the

additional amount of R1,800,000.00 (one million, eight hundred thousand Rand) *('the additional amount').*

2.2 That the applicant is authorised to remove and hold the movable assets in accordance with the provisions of the General Notarial Bond as described above as security for the respondent's indebtedness to it and to dispose of the movable assets in accordance with the provisions of the General Notarial Covering Bond.

2.3 That the above par [2.1] above shall operate with immediate effect pending the return date and the finalisation of this application.

2.4 That the respondent shall pay the costs of this application on the scale as between attorney and own client.

[3]. The return day, after being extended on several occasions by order of this court, was the 2nd November 2015, that is the day on which I granted the order confirming the *rule nisi*.

[4]. The order of the 11th September 2014 was duly served on the respondent by the Sheriff of the Court, Morreesburg / Hopefield, on the 2nd October 2014. On the same date the Sheriff prepared an inventory of certain immovable property belonging to the respondent, and he placed the movables listed in the inventory under *'judicial attachment'*. The Sheriff

was in fact able to itemise and *'attach'* the movable property of the respondent with the assistance of the respondent, who gave the Sheriff the list and confirmed with him that the property enumerated, including a number of trucks and motor cars, were in fact on the farm.

[5]. On the 7th of October 2014, the respondent delivered notice of its intention to oppose the application and on the 27th October 2014, the respondent's answering affidavit was delivered. On the 15th December 2014, the applicant's replying affidavit was delivered somewhat out of time but the late filing of the said affidavit was condoned by me on the 4th November 2015.

THE FACTS

[6]. By all accounts, the respondent is indebted to the applicant in an amount of at least R78,200,420.65, together with interest thereon at the rate of 20% per annum on the capital outstanding as from 1 October 2006 and interest on overdue interest at the rate of 3% above the prime rate of interest of the First National Bank Of Southern Africa Limited. The interest portion of the respondent's liability to the applicant was previously in dispute. However, it was the subject of an application by the respondent in the Western Cape Division of the High Court and on the 13th August 2015, that Court (Nuku AJ) decided the dispute in favour of the applicant. The effect of the aforesaid judgment is that the respondent's indebtedness to

the applicant as and at the time that I confirmed the *rule nisi* amounted in total to a sum in excess of R140,000,000.00.

[7]. The respondent's liability to the applicant for the aforesaid sums arises from the following facts.

[8]. On the 28th July 1999, the applicant and respondent entered into a written loan agreement *('the loan agreement'),* in terms of which agreement the applicant loaned to the respondent an amount of R90,000,000.00 (Ninety Million Rand), subject to certain terms and conditions.

[9]. On the 23rd February 2006, the loan agreement was amended. In terms of the amended loan agreement, the parties agreed to a consolidation of all of the debt facilities granted by the applicant to the respondent in terms of the loan agreement, into a single facility for R90,000,000.00 (Ninety Million Rand). The capital of loan amount was payable, in terms of the amended loan agreement, in instalments as follows:-

9.1 R5,000,000.00 by the 30th September 2006.

9.2 R7,000,000.00 by the 30th September 2007.

9.3 R9,000,000.00 by the 30th September 2008.

9.4 R12,000,000.00 by the 30th September 2009.

9.5 R15,000,000.00 by the 30th September 2010.

9.6 R19,000,000.00 by the 30th September 2011.

9.7 R23,000,000.00 by the 30th September 2012.

[10]. The loan was secured by a general notarial covering bond *('notarial bond')* in the amount of R7,800,000.00 (Seven Million, Eight Hundred Thousand Rand) registered in favour of the applicant over the movables of the respondent on the 12th March 2001. The purpose of the notarial bond was to secure the respondent's present and future indebtedness to the applicant.

[11]. The notarial bond provides that in the event of a breach of the loan agreement, the applicant shall be entitled to forthwith take possession of the movable assets of the respondent and thereby perfect its pledge of the assets. The applicant furthermore has the right, in terms of the notarial bond, to hold the assets as security for payment of all amounts owing by the respondent to the applicant and to retain such possession for so long as the applicant may deem fit.

[12]. With a view to perfecting the notarial bond, the applicant has, in terms of the notarial bond, the right to make an election either to bring an application *ex parte* or on notice to the respondent.

[13]. The respondent is in breach of the loan agreement in that it failed to pay on time, or at all, any of the instalments payable as per par [9] above in liquidation of the capital of the loan account. The breach by the respondent and its liability to the applicant is undisputed. The only payments made by the respondent, presumably on account of and in part liquidation of the capital sum of the loan, was an amount of R12,000,000.00 paid on the 24th October 2011, as well as certain payments commencing during 2014 in respect of interest payable as calculated by the respondent.

[14]. On the 14th October 2014 and after service on the respondent of the 11th September 2014 Court Order, the respondent tendered to pay the whole amount of the bond, being R7,800,000.00, on condition that the bond is cancelled. This conditional tender was rejected by the applicant on the 20th October 2014 because, so it was reasoned by the applicant, the debt due by the respondent to the applicant, after payment of the amount of R7,800,000.00, would still amount to a sum well in excess of R140,000,000.00. This would defeat the purpose of the notarial bond.

POINTS IN LIMINE

[15]. The respondent raised two points *in limine.*

[16]. The respondent had raised a point *in limine* that the deponent to the applicant's founding and replying affidavits was not authorised to depose to these affidavits on behalf of the applicant. The respondent abandoned this point *in limine* and it became unnecessary for the court to determine this issue,

[17]. The second point *in limine* relates to the certificate of indebtedness. It is submitted by the respondent that the author of the certificate was not authorised to issue the said certificate. This point was not pursued with any conviction during arguments before me by the respondent's Counsel and, in my view, for good reason. In any event, if regard is had to the above factual matrix in this matter, the correctness of the certificate of indebtedness has no bearing on the final outcome of this matter.

[18]. Therefore, the second point *in limine* also has no merit and should fail.

THE ISSUES & RESPONDENT'S DEFENCES

[19]. The defences of the respondent are twofold.

[20]. Firstly, the respondent opposed the application for confirmation of the *rule nisi* on the basis that the *rule nisi* should not have been granted. The fact that the initial application was brought *ex parte* and on an urgent basis, so

it was argued on behalf of the respondent, amounted to an abuse of the court processes. The applicant also omitted, according to the respondent, to make full disclosure to the court in its founding affidavit. So, for example, the respondent points out that in its founding affidavit, the applicant omits to disclose to the court that on the 22nd May 2014 and on the 11th June 2014, a full and final settlement was made to the applicant. However, if regard is had to the judgment of Nuku AJ, then it has to be accepted that this tender was inadequate and rightfully rejected by the applicant.

[21]. The approach of the respondent in that regard is similar to the approach adopted by the respondent in the matter of *Hassan v Berrange NO,* 2012 (6) SA 329 (SCA). At pg 335 Zulman JA comments as follows relative to the issue of material non – disclosure:

> *'[14] As regards the alleged material non-disclosures, it is plain from cases such as* Schlesinger v Schlesinger *that in an ex parte application all facts must be disclosed by the applicant which might influence the court in coming to a decision and a failure to do so may be visited by a court subsequently setting aside the ex parte order. (See also* Phillips v National Director of Public Prosecutions, *2003 (6) SA 447 (SCA)).*

[22]. In the end, the SCA rejected the contentions that the *rule nisi* would not have been granted if full disclosure was made.

[23]. The difficulty I have with the respondent's submissions is that, even if I am to accept them as correct, these submissions make no difference to the facts of the matter as and at the time the provisional order was granted by Weiner J. Neither would they have any effect on the considerations which I would have regard to when I confirmed the *rule nisi* The point is this: All things considered, was the applicant entitled to a provisional order when it was granted and was it entitled to have the rule nisi confirmed subsequently? In my view, the answers to both these questions should be in the affirmative.

[24]. Secondly, Mr Coetzee, who appeared on behalf of the respondent, argued that during October 2014, shortly after service of the *rule nisi*, the respondent tendered the full amount of the general covering notarial bond, being R7,800,000.00, on condition that the applicant agreed to a cancellation of the notarial bond. This argument, in my view, loses sight of the fact that the respondent's indebtedness to the applicant at that point amounted to a sum of not less than R140,000,000.00. The notarial bond itself provides that:

24.1 *'As a continuing covering security for every such present and / or future indebtedness or obligation as aforesaid … …, the [respondent] hereby declared to bind and hypothecate all of the [respondent's] movable property and effects …'*

24.2 *In the event of default, the applicant shall be entitled forthwith to take possession of the assets and thereby perfect its pledge of the assets, and to hold the assets as security for the payment of all amounts owing by the [respondent] to the [applicant] and to retain such possession for so long as the [applicant] may deem fit.*

THE LAW

[25]. In *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd*, 2003 (2) 253 (SCA), the nature of the *General Notarial Covering Bond* is discussed. At pg 253 Harms JA has this to say:

'[3] Their effect is trite and I shall content myself by paraphrasing the relevant section from Joubert (ed), The Law of South Africa, *vol 17 (1st re-issue) para 517. The holder of a general notarial bond does not enjoy a real right of security in the assets subject to the bond. There is nothing to prevent the owner from dealing with and disposing of assets subject to the bond, or of bonding them to another creditor. The creditor cannot prevent an alienation or pledge*

of the assets subject to the bond, cannot follow up the property in the hands of the acquirer and cannot prevent a judicial attachment.

[4] 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.

[26]. As regards confirmation of a rule nisi, the SCA commented as follows at pg 259:

[8] I am prepared to assume that the order of Roux J was interim in nature. Nevertheless, it permitted Contract Forwarding to take possession of the pledged goods pending the return day. This Contract Forwarding did and its bond was thereby perfected. On the return day the Court was required to revisit the original order by determining whether it had been granted properly. If it had not, for instance, because there was no outstanding indebtedness, or the bond was for some reason bad, the rule would have been discharged ex tunc, *meaning retrospectively. Contract Forwarding's possession would then not have created any security and would have had no legal effect. In this sense the order was interim or conditional. If, on*

the other hand, the order was granted properly, its confirmation would declare or confirm that fact. The order did not give Contract Forwarding possession but permitted it to take possession legally. The position would have been no different had Eurotile handed the goods to Contract Forwarding willingly. In this regard I wish to highlight two passages from the majority judgment in Development Bank:

> *'The purpose of the application was clearly to obtain possession of the movable property in order to convert the appellant's rights to that of a secured creditor. The interim order, therefore, authorised the appellant to take possession of the movable property and assets covered by the notarial bond "in order to perfect its security".'*

> *'The fact that the order authorising the appellant to take possession of the movables was provisional therefore does not detract from the fact that the moment the appellant obtained possession of the movable property hypothecated in terms of the notarial bond it was in the position of a pledgee who had obtained possession of the movable property before the commencement of the winding-up of Serious Mills.'*

[27]. Then, and importantly so, Harms JA says this at pg 260:

'[10] With respect, I do not perceive the problem. The rule can only be discharged on grounds that go to the root of the creditor's entitlement to possession. 'New facts' which the Court can take into account have to be of that class and not extraneous facts such as those introduced in this case. I also do not understand the reference to the Court's discretion. Although aware of dicta by Didcott J to the effect that there is a discretion, I cannot see how a Court, in the exercise of its discretion, can refuse an order to an applicant who has a right to possession of a pledged article to take possession. The principles relating to the limited discretion to refuse specific performance apply only where the creditor has another remedy, such as a claim for damages, at its disposal. A claim for damages cannot replace a claim for real security. In the absence of a conflict with the Bill of Rights or a rule to the contrary, a Court may not under the guise of the exercise of a discretion have regard to what is fair and equitable in that particular Court's view and so dispossess someone of a substantive right'.

APPLYING THE PRINCIPLES TO THE FACTS *IN CASU*

[28]. Having regard to the principles set out above, I now turn to consider their application to the facts of this case.

[29]. On the 11th September 2014 when Weiner J granted the interim order, the applicant was entitled to perfect the pledge by taking possession of the

assets of the respondent. The respondent was in breach of the loan agreement, as it was in arrears with the instalments due in terms of the said agreement.

[30]. On the extended return day, the respondent was not entitled to a discharge of the rule because, at that stage, the applicant remained entitled on the facts of the matter to possession. There were no *'new facts'* before me which would have warranted an order other than confirmation of the rule.

[31]. After considering all the facts before me, as well as applicable legal principles, the relevant case authorities and the arguments on behalf of both parties, I am satisfied that on the facts before me that the applicant made out a case for the confirmation of the rule nisi.

[32]. For all the above considerations, I made the order referred to in para [1] above.

L ADAMS
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	5th November 2015
JUDGMENT DATE:	10th December 2015
FOR THE APPLICANT:	Adv J E Smit
INSTRUCTED BY:	Edward Nathan Sonnenberg Incorporated
FOR THE DEFENDANT:	Adv P Coetsee SC
INSTRUCTED BY:	Marais Muller Yekiso Incorporated