

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION**

**CASE NO: 25501/2014**

**DELETE WHICHEVER IS NOT APPLICABLE**

**(1) REPORTABLE: YES / NO.**

**(2) OF INTEREST TO OTHER JUDGES: YES / NO.**

**(3) REVISED.**

**DATE**

**SIGNATURE**

In the matter between:

**IDENTITY DEVELOPMENT FUND (PTY) LTD**

Applicant

And

**GREENOVATE CONSULTING AND PROJECTS**

**PRIMARY CO-OPERATIVE LIMITED**

Respondent

In re:

**ENSEMBLE HOTEL HOLDINGS (PTY) LTD**

Applicant/Intervening Party

In re:

**IDENTITY DEVELOPMENT FUND (PTY) LTD**

Applicant

**GREENOVATE CONSULTING AND PROJECTS**

**PRIMARY CO-OPERATIVE LIMITED**

Respondent

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**LEAVE TO APPEAL**

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**WEINER J:**

- 1) Identity Development Fund (“IDF”) had sought and obtained an order (“the perfection order”) for the notarial bond registered in favour of IDF, over the assets of Greenovate Consulting and Projects (“Greenovate”) to be perfected. The order was granted with the consent of Greenovate.
- 2) On 4 November 2014, Ensemble Holdings (“Ensemble”) sought leave to intervene in the rescission application (“the rescission application”) to rescind the perfection order. I granted both leave to intervene and the rescission.
- 3) It is common cause, that IDF was cited as the applicant in the perfection application, but that the notarial bond was registered in favour of Identity Isivandi Development Fund (“Isivandi”) and not IDF. This was conceded by IDF during the prior hearing before me.
- 4) As a result of this apparent error in citation, it appeared that the perfection order was granted in favour of a party which did not have the requisite *locus standi*. As a result of this, I granted a rescission of the perfection order on the basis that it was erroneously sought and/or granted.

- 5) Leave to appeal is now being sought by IDF against both the order granting Ensemble leave to intervene and the rescission order. According to IDF's senior counsel, the common cause concession (referred to in 3 above) was incorrectly made, in that the loan agreement refers to both IDF and Isivandi as the lenders. It also provides that either of them may sue for the debts, either separately or together, that they may each exercise any of the rights including any right arising in terms of any security given.
- 6) The security was the notarial bond registered in favour of Isivandi. In the body of the bond document, it is however stated that the mortgagee is IDF. IDF now argues that the perfection order was not erroneously sought and granted because the loan agreement refers to both parties (IDF and Isivandi) being lenders and provides that they could sue separately or together and either could perfect the security. It is common cause that this argument was not submitted at the hearing before me. IDF now submits that I should not have granted leave to Ensemble to intervene in the matter, because the perfection order was correctly granted prior to Ensemble exercising its rights to its landlord's hypothec. Therefore, Ensemble had no legal right to intervene.
- 7) IDF argues that in terms of authority, such as *Webster v Ellison*<sup>1</sup> it is trite that a hypothec, before attachment, has no force against third parties. The tacit hypothec is a right which is always subject to defeat by the removal of the goods from the leased premises (as occurred in this

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<sup>1</sup> 1911 (AD) 73 at 79

matter).

- 8) IDF submits that the law is clear that the hypothec is lost as soon as the goods are removed<sup>2</sup>
- 9) There might be instances where fraud or collusion is involved and a court would order the guilty party to return the goods. However, Mr Shakoane, for IDF, argued that, on the papers, it has not been shown that there was collusion or fraud. Therefore the fact that the goods were removed means that Ensemble has no interest in the proceedings, in that it's tacit hypothec has been lost.
- 10) The point arises, however, as to whether either of these two issues (the leave to intervene and the rescission) are appealable. In terms of section 17(1) of the Superior Court's Act<sup>3</sup>:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that-  
...(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”
- 11) In this matter it would appear to me that the rescission order is not appealable in that it is not a final order and it does not dispose of any of the issues in the case.
- 12) However, the order granting Ensemble leave to intervene

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<sup>2</sup> Ibid at 94

<sup>3</sup> No. 2013

appears to be appealable. If that appeal succeeds, then it would lead to a prompt resolution of the real issue between the parties. If Ensemble had no right to intervene, as it had no interest in the proceedings, because it had lost the right to its tacit hypothec that issue would be disposed of in the appeal.

13) Accordingly the application for leave to appeal to the Full Bench of the Gauteng Local Division against the order in prayer 1 and prayer 5 is granted. The application for leave to appeal against the balance of the prayers is refused. These prayers remain in force.

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**WEINER J**

**APPEARANCES:**

<i>For Appellant:</i>	H.A Venter Instructed By Shapiro-Aarons Inc
<i>For Respondent:</i>	G Shakoane (Sc) Instructed By Ezra Matlala Attorneys
<i>Date of Hearing:</i>	26 January 2015
<i>Date of Judgment:</i>	26 January 2015