

In the HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT – PRETORIA)

CASE NO. 35420/08

1/4/2010

DELETE WHICHEVER IS

(1) REPORTABLE: YES ☒

(2) OF INTEREST TO OTHER JUDGES: YES ☒

(3) REVISED.

22/07/09/09
DATE

In the matter between:

SCHELTEMA BELEGGINGS CC

Plaintiff

and

COMMERCIAL TRUCK & TRAILER SALES CC

Defendant

JUDGMENT

LEGODI J.

1. One old built-up TOYOTA HINO TRUCK with a Matching Grain Trailer, registered on the 1 January 1970 and the 1 January 1980 respectively are the subjects of the dispute before me.
2. When they were both sold to the defendant, Commercial Truck and Trailer Sales cc, during April 2006, they were registered in the names of a third party, one Mr Joseph Robertze. By that

time, there was already a special notarial bond registered on the 12 April 2005, in favour of Engen Petroleum Limited. In the notarial bond aforesaid, there is a mention of both the truck and the trailer. The mentioning of both the truck and the trailer is the subject of a further dispute as it would appear later in this judgment.

3. On the 31 May 2006, at or near Germiston, both the truck and the trailer were sold *voet stoets* to the plaintiff (Scheltema Beleggings CC) in the amount of R110 000 plus vat in the amount of R15 400 and thus totalling to R125 400. During or about June 2006, a total amount of R28 212 was paid to J D Els Truck Repairs towards the repairs effected on the truck and the trailer in question.
4. Later during or about 2007, the truck and the trailer in question, were attached and seized from the plaintiff by the Sheriff, subsequent to a court order that was obtained during March 2007, by Engen against Mr Robertze. It was these attachment and seizure that prompted the plaintiff to institute the present action against the defendant claiming R125 400 being in respect of the purchase price and R28 212 being in respect of repairs that were effected on the truck and trailer.
5. After having heard evidence adduced on behalf of the plaintiff, the defendant closed its case without leading evidence. Counsel for the defendant identified the issues that had to be determined in this case as follows:

- 5.1 Whether goods that are in fact the subject matter of a notarial bond are capable of being sold by the debtor?
- 5.2 Whether the requirements in terms of section 1 of Security By Means of Movable Property Act 37 of 1993 have been complied with?
- 5.3 What is meant by the words “ordinary course of business” as referred to in clause 6 and 18(5) of the notarial bond?
- 5.4 What the plaintiff is entitled to if successful?
6. The following portions of the notarial bond and case law are of relevance to the issues raised herein.

*“WHEREAS the said Mortgagor acknowledges itself to be truly and law indebted to: ENGEN PETROLEUM LIMITED
NO. 1989/003 754/06(hereinafter referred to as
the Mortgagee)*

in the sum of R200 000 (TWO HUNDRED THOUSAND RAND) in respect of monies lent and advanced, any credit granted on supplies by the Mortgagee to the Mortgagor or any other case whatsoever.

AND WHEREAS the Mortgagor has agreed to bind itself for the due payment of the aforesaid sum and interest thereon and for the compliance with all the terms and conditions hereof, mortgaging as security for the fulfilment of the said obligation, hereinafter mentioned property as well as its right and interest in

1. 1 X BUILT-UP TOYOTA HINO TRUCK WITH MATCHING GRAIN TRAILER with registration number CKN 638 NW and HENRED TRAILER with registration number CKN 637 NW.

NOW THEREFORE THE APPEARER DECLARED THAT:

- A.
- B.
- C.
- D. As security for the due and punctual payment by the aforesaid amounts or any position thereof and for all other sums of money with may at any time become due and owing to the Mortgagee from any cause of debt whatsoever and for the fulfilment by the Mortgagor of all and any terms and conditions of this notarial bond, the Appearer declared that the Mortgagor hereby mortgagor to and in favour of the Mortgagee generally the Mortgagor's movable property of every description both corporeal and incorporeal which shall include book debts to the Mortgage such as the Mortgagor now has and such as in failure he may become possessed wheresoever situation including any lease in respect of the promises in which the business of the Mortgagor is presently carried on or may in future be carried on or may in future be carried on (the property). If the Mortgagor is a farmer then his growing crops shall be deemed to be movable and the subject to the provisions of this special notarial bond.

The Mortgagor undertakes that as long as long as this bond subsists he shall not, save only in the ordinary cause of business, alienate, sell, transfer, hypothecate, dispose of or in any way give up possession in my way of any of the movable assets mortgaged hereunder or any other movable assets of which he may in the future become possessed without the prior written consent thereto of the Mortgagee.

18.5 *In the event of the Mortgagor advertising or making known its invitation to sell or dispose of all or any of its movable assets other than in the normal course of business,*

18.8 *...then notwithstanding anything herein contained, the full amount of the then indebtedness of the Mortgagor to the Mortgagee shall immediately become due and payable and recoverable without any notice"*

7. The provisions of section 1 of Security By Means of Movable Property Act 57 of 1993 is also relevant to some of the issues raised herein. Section 1 of the Act provide as follows:

"1. *(Legal consequences of special notarial bond over movable property)*-(1) *If a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it readily recognisable is registered after the commencement of this Act, in accordance with the Deeds Registries Act, 1937 (Act 47 of 1937), such property shall,*

- (a) *subject to any encumbrance resting upon it on the date of registration, and*
- (b) *notwithstanding the fact that it has not been delivered to the mortgagee be deemed to have been pledged to the mortgagee as effectually as if it has expressly been pledged and delivered to the mortgagee.*

8. Where one is dealing not just with the interpretation of a contract between the parties, but with an instrument creating a real right, which avails against third parties, there cannot be anything more added to the instrument. The third party must be able to take the document and identify the reality on the ground by reference to the document alone, correlating the description in it and the property that fits the description. (See *Ikea Trading UND Design Ag v Boe Bank Ltd* 2005 (2) SA 7 SCA at 12 par 13).
9. In *Rosenback & Co. (PTY)Ltd v Dalmonte* 1964 (2) SA 195 (N), the full court dealing with the Natal Act stated that it is not a compliance with the statute to describe the assets to be hypothecated in wide general terms as “goods, wares, merchandise, stock in trade, fixtures, fittings, furniture and appliances. It is necessary to know what are the goods, wares, merchandise and so on, the nature of them and the types of kind of each of them and also the number of them (e.g. so many 1 lb tins of A make of a jam, so many of B make, so many 5 lb tins of C make biscuits, so many rolls of suiting material and of dress material and so on, as in stock list) described so that at any given moment they may be indentified, so also with the

fixtures fittings furniture and appliances and any other movables. It is necessary to know the particulars of them, of what they consist in detail.

- 9.1 All the more so should this be the case where the written document is not merely a contract, but also an instrument hypothecating property. The need for certainty from the instrument itself is not only to achieve clarity for the parties. An instrument that gives rise to a real right of security also constitutes notice to third parties that the assets are bonded. For such notice to be effective, third parties must be able to determine from its terms that the parties is subject to another's right that particular this is encumbered. (See *Ikea Trading MD Design Ag's case supra* at 14 paragraph 18).
10. For the property to be pledged in accordance with section 1(1) of the Act, the unique item of property must be readily recognisable from its description in the bond. Whether or not expertise is required in order to correlate the property and the description is not the point. It must be capable of being done merely from the description in the bond. Where a generic item is sought to be pledged, it is the unique item that is the subject of the pledge and it is not enough to describe it only with reference to its generic characteristic. Nor is it sufficient to describe generic items with reference to the source or date of acquisition as in the case for them they are recognisable not from the description in the bond but rather from external source. A member of the public must be able to establish from

the information lodged at the deeds office whether particular assets of a debtor have been pledged (whether or not he requires expert knowledge to do so). (See *Iake Trading UND Design Ag* at 14-15 par. 14).

11. The purpose of requiring movables to be specifically described and enumerated is said to give notice to the public generally of the movables specifically hypothecated under the bond. A term could not be implied into the bond in question since the implication would depend on the leading of extrinsic evidence of facts known to the parties and that would inevitably be to their prejudice. (See *Durmlingam v Bruce* No 1964 (1) SA 807 (D) at 812 G-813B, see further *Ikea Trading and Design AG* at 15 par. 23).
12. Preambles or recitals in a written contract present more of a problem. The general principle is that, they should be regarded as a subordinate to the operative part which, if its meaning is clear, must be taken as expressing the common intention of the parties and so must prevail over anything to the contrary in the preamble. If the operative part is not clear, recourse may be had to the preamble to assist in deciding it. (See *Bekker v Total South Africa (PTY) Ltd* 1990 (3) SA 159 (T) 171 H – 173 D, see also RH Christie in his book *The Law of Contract in SA* 5th Edition at 211).
13. It is said that, it is not always possible to draw a sharp distinction between the preamble and the operative part, as draftsman do not always bear the distinction in mind. So, it has

been required that what bears the form of a recital may operate as a term of the contract. (See **Woodburn Mansions (PTY) Ltd v Dowell** 1961 (3) SA 893 D, see also RH Christie's book page 211-212).

14. As to what is covered by the term "ordinary course of business" must of necessity depend on its own special circumstances. (See **Est van Schalkwyk v Hayman & Lessein** 1947(2) S 1095 cpd AT 1044 2nd Paragraph). The test for determining whether a transaction was in the ordinary course of business is an objective one, namely, whether having regard to the terms of the transaction and was entered into would normally have been entered into by the solvent business men. (See **Hendricks NO. V Swanepoel** 1962 (4) SA 338 AD at page 345).
15. The test to be applied is to determine whether an alienation by a trader of goods forming part of his business was in the ordinary course of that business is, whether regard to all circumstances, the alienation was one which would normally have been transacted by a solvent business than carrying on a business of that kind. (See **Joosab v Ensor NO** 1966 (1) SA 319 at 326 D).
16. For an alienation to be "in the ordinary course of that business" it must be made during the continuance of that business. (See **Ensor No v Rensio Motors (PTY) Ltd** 1981 (1) SA 815 AD at 825 C).

DISCUSSIONS, SUBMISSIONS AND FINDINGS

17. At the start of the hearing of this matter, I requested the parties to make a short opening statement with a view to identify the issues that had to be determined in this case. It became apparent that counsel for the plaintiff was uncertain as to what the defendant was actually putting in dispute. The pre-trial conference did not appear to have resolved this uncertainty. For example, it was still not clear to the plaintiff whether the validity of the court order that led to the attachment and seizure of the truck and trailer in question was admitted or not. It later transpired that two aspects were placed in issue by the defendant. It questioned whether the order was valid and if so, whether it was executed before the plaintiff surrendered the truck and the trailer. The latter issue was abandoned along the way after evidence was tendered on behalf of the plaintiff.
18. The two issues aforesaid, were left to remain unresolved despite the fact that in the pleadings, they did not appear to have been the real issues. For example, in paragraph 8 of the particulars of claim, the averments relating to the court order and the execution thereof are made. The defendant pleaded not to have had knowledge of the allegations in paragraph 8 of the particulars of claim. This was however, despite the fact that the court order was attached to the particulars of claim. However, the defendant having pleaded no knowledge of the averments in paragraph 8 of the particulars of claim it sought in its plea, to allege that the plaintiff should not have parted with possession of the truck and or trailer. Alternatively, it alleges that the

plaintiff should have taken immediate steps to recover the possession and use thereof.

19. Eventually, during the proceedings, it transpired that there was only one issue that had to be determined. That is, whether the claim by Engen was unassailable or not. The defendant sought to allege that the claim was not unassailable. To this, it sought to argue that in registering the notarial bond there was no compliance with the provisions of section 1(1) Security by Meaning of Movable Property Act 57 of 1993. This submission which was made during the opening statement was met with surprise and opposition by counsel on behalf of the plaintiff.
20. The basis for the opposition was that, such a defence had not been pleaded. I persuaded the plaintiff to run the plaintiff's case as if such an averment has specifically been raised in the defendant's plea, particularly, that non-compliance with the provisions of section 1(1) would not change how the plaintiff intended to conduct its case. For example, it was already intimated that an official from the office of Registrar of Deeds would be called as a witness.
21. I am mentioning all of these simply to show that, the defendant did not conduct its case in a manner that suggested a strong point or case to argue. It was some kind of "playing by the ear to the plaintiff's case". It was particularly of no surprise that no evidence was tendered on behalf of the defendant.

22. The issues raised in paragraphs 5.1 to 5.4 of this judgment have a bearing on whether or not the claim by Engen regarding the court order and the execution thereof was unassailable? I now turn to deal with these issues.

Whether the requirements in terms of section 1 of the Security by Means of Movable Property Act 37 of 1993 have been complied with?

23. This issue was raised in paragraph 5.2 above. The provisions of section 1 were quoted in paragraph 7 above.

23.1 I see the objectives of section 1 as having to create a presumption of delivery to the mortgagee of the movable property which is hypothecated, in terms of the notarial bond, once such a bond is registered in terms of the Act and the property in question is described therein in a manner that is readily recognisable. Secondly, the objective is to enable the third parties who may not necessarily be parties to the bond agreement to be able to know whether the property that is offered to them is hypothecated or not. Effectively, as I see it, this is to enable a third party to raise as a defence that the rights of the mortgagee are not supreme to the third party's rights. In the present case, the defendant seeks to allege the unassailability of Engen's claim to the truck and trailer. This was done without leading any evidence.

23.2 As it was said earlier in this judgment, where one is dealing not just with the interpretation of a contract between the parties, but with an instrument creating real right which avails against

a third party, there cannot be anything more added to the instrument. The third party must be able to take the document and in it identify the reality on the ground by reference to the document alone, correlating the description in it and the property that fits the description. The defendant aligned itself with these sentiments. Having done so, it sought to argue that other portion of the document should be ignored or that such other portion had no bearing to the rights and obligations created in the document or has no relevance to the description of the goods under the discussion.

23.3 In seeking to argue this point, counsel for the defendant relied on what was said by R H Christie in his book, (The Law of Contract in South Africa, 5th Edition) and the authorities referred to therein, under paragraphs 13 and 13.1 of this judgment.

23.4 Counsel for the defendant, sought to dismiss; *“AND WHEREAS the Mortgagor has agreed to bind itself for the due payment of the aforesaid sum and interest. Theron and for the compliance with all the terms and conditions hereof, mortgaging as security for the fulfilment of the said obligations, the hereafter mentioned property as well as its right and interest in:*

1. 1X Built-Up TOYOTA HINO TRUCK WITH MATCHING
GRAIN TRAILER with registration number CKN 638 NW and
HENRED TRAILER with registration number CKN 637 NW)” as

nothing else than a mere preamble or recital which has no legal standing and which cannot be considered in deciding whether or not the description of the bonded property accords with the provisions of section 1(1).

- 23.5 I find this submission to have been without basis to say the least. “Mortgaging as a security for the fulfilment of the said obligations, hereinafter mentioned property as well as its right and interest in” followed by the description of the property in question can leave no one in a doubt that the truck and trailer as described is the subject of the security referred to therein and subsequently registered as such.
- 23.6 As indicated earlier in this judgment, the test applicable to a third party is an objective one. That is, what a reasonable man would have understood from the document on the reading of it. The defendant adduced no evidence of that reasonable man. Firstly, the plea itself did not raise the issue under discussion pertinently and as a defence. Secondly, as I said, it left no doubt on the reading of the notarial bond that the truck and trailer are easily recognisable as forming part of the bond. Lastly, the truck and trailer having being registered as such, created a real right to the Engen in respect of the truck and the trailer that made its claim thereon unassailable.
- 23.7 The other contention by counsel on behalf of the defendant is of course founded on the wrong premise. That is, because what he referred to as “preamble” created no right and obligation, the only description that has to be considered should be as in clause D of the notarial bond. Clause D was quoted earlier in paragraph 6 of this judgment. The entire document must be read and be given effect thereto. Selective reading of the document as suggested by counsel on behalf of the defendant

would offend against his own submission. That is, only the document in its entirety has to be considered.

- 23.8 The dispute is not about goods or property that are described in general terms in clause D, quoted above. The dispute is about a truck and trailer which is described in detail in the document, both of which have been mentioned as “a security for fulfilment of the said obligations”. The contention that there has not been compliance with the provisions of section 1(1) for lack of proper description of the Truck and Trailer is in my view, without basis. I now turn to deal the other two issues identified by counsel on behalf of the defendant.

Whether goods that are in fact the subject matter of notarial bond are capable of being sold by the debtor?

24. This issue has a bearing on the issue raised in paragraph 5.3 of this judgment. In fact, much of the discussion revolved around what is meant by “in the ordinary course of business”. This seems to have been prompted by the fact that the mortgagor Mr Robetze, indicated that he was not entitled to sell the truck and trailer to the defendant without the mortgagee, that is, Engen’s consent.
25. The contrary view taken by the defendant was that, the mortgagor did not require the mortgagee’s consent in selling the truck and trailer to the defendant for they were disposed in the ordinary course of the Mortgagor’s business. This

submission was based mainly on the wording of clause 6 of the notarial bond quoted earlier in paragraph 6 of this judgment.

26. To recap on the background, Mr Robertze was in the business of transportation. He was conveying mealie meal from one place to the other and in turn he would be paid for the transportation. He had only the truck and trailer in his business. There was also a bakkie which was not used for the transportation of the mealie meal. There came a time when he could not sustain the business. He owed several people and was unable to meet his obligations. As a result, he decided to dispose of the truck and trailer and close down the business. The truck and trailer was then sold to the defendant in the sum of R75 000, which money he used to pay part of his debts and the other part was used for his personal needs. He had no mandate from Engen to sell the truck and trailer.
27. I was urged to find that, the conduct of Mr Roberze in selling the truck and trailer to the defendant was done in the ordinary course of his business. Again, the test is objective. Remember, the question is whether having regard to all circumstances, the alienation was the one which would normally have been transacted by Mr Robertze in his transport business. For an alienation to be “in the ordinary course of that business” it must be made during the continuance of that business.
28. It is clear from Mr Robertze’s evidence that when he sold the truck and trailer to the defendant, he did not intend to sustain or continue with his transport business. Immediately after he

had sold the truck and trailer, he closed down shops and he was employed elsewhere.

29. The plaintiff having been served with the court order attaching and seizing the truck and trailer investigated the matter. Having found that the order was perfection of the notarial bond, decided not to find the attachment and seizure. He regarded the claim by Engen on the truck and trailer as having been unassailable. That is, there could not have been any bona fide defence to Engen's claim.
30. The plaintiff initially sought to claim from the defendant payment of over R8 000 being for alleged registration fees spent by the plaintiff. This was abandoned along the way and rightly so, as there was just no sufficient evidence in this regard. I now turn to deal with the claim for repairs effected on the truck and trailer. The issue is raised in paragraph 5.4 above.

What the plaintiff is entitled to if successful?

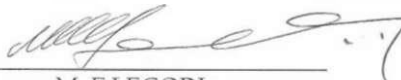
31. In this regard, counsel for the defendant contended that the claim by the plaintiff in the amount of R125 400 was not a claim for the return of the purchase price, but rather a claim for damages. In making this submission, counsel for the defendant relied on paragraph 13 of the particulars of claim which reads in Afrikaans as follows:

"As gevolg van die beslaglegging en noutwinning op die genelde voertuig, eiser skade en varder eiser vanaf verweerder". by

32. Based on this, the contention was that, the plaintiff did not prove that it suffered damages. I do not intend wasting much time on this issue. It is clear from paragraph 5 of the plaintiff's particulars of claim that the amount of R125 000 is for the purchase price. That is, R110 000 plus vat in the sum of R15 400. Secondly as the defendant persisted with its contention, the defendant at the end sought to amend its prayer 13.1 to read "*betaling van die koopson van R125 400*". Amendment was accordingly granted as I saw no basis for any prejudice. I do not think that the defendant could have been under any apprehension that the amount of R125 400 was not for the purchase price or return thereof. It is immaterial whether the plaintiff used the truck or not. The crux of the matter is, it paid money to the defendant for the truck and trailer, and it is now without them.
33. Of course there was a concession that the plaintiff claimed refund of R15 400 from SARS. For this reason, the amount claimed as the purchase price ought to be reduced.
34. As regard the claim for the repairs, in the amount of R28 212, the contention was that inasmuch as this was a claim for damages, the plaintiff can only recover if it adduced evidence to show that the value of the truck and trailer was increased. The problem with this submission is that, the plaintiff was obliged to repair the truck and trailer for without such repairs no roadworthy, certificate could have been issued. The point of the matter is that, having spent money in repairing the truck and trailer the plaintiff is now without the truck and trailer and

any part that forms part of the sum of R28 212. It is a complete waste that would not be recovered by whatever means, as the truck and trailer having been taken by operation of the law or valid court order.

35. In the amount of R28 212 vat is included. Such amount as it appears from the quotation is R3 394.86. This amount should also be deducted
36. Consequently a judgment is hereby granted against the defendant as follows:
- (a) The defendant to pay to the plaintiff the sum of R110 000,
 - (b) The defendant to further pay to the plaintiff the sum of R24 817.14,
 - (c) The defendant to pay interest a tempore on the amounts aforesaid,
 - (d) Costs of the action.


M FLEGODI
JUDGE OF THE HIGH COURT

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