

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: 60959/2011

DATE: 8 APRIL 2013

REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

LAND & AGRICULTURAL DEVELOPMENT BANK OF SA

Applicant

and

MASTER OF THE NORTH GAUTENG HIGH COURT

First Respondent

DEON MARIUS BOTHA NO

Second Respondent

BRIAN ST CLAIR COOPER NO

Third Respondent

FIRST RAND BANK LIMITED

Fourth Respondent

JUDGMENT

Tuchten J:

1. This is an application to review and set aside the decision by the first respondent, the Master of the High Court, to reject the applicant's objection to the allocation by the second and third respondents, the liquidators of Rubaco Boerdery (Pty) Limited (in liquidation), which I shall call Rubaco, of the amount of R1 905 836,76 of the free residue to the fourth respondent as a preferent creditor. The review is brought under the provisions of s 151 of the Insolvency Act, 24 of 1936. It is not in dispute that this court is empowered to enter upon and decide the matter *de novo*¹

2. The fourth respondent opposed the application. The Master did not Nor did Rubaco's liquidators, although the liquidators appeared through counsel to make certain submissions on costs.

3. The issue relates to the proceeds of certain old order mineral rights which belonged to Rubaco. The

mineral rights were sold by the liquidators on 5 March 2003 for R2 501 000. The nett proceeds formed part of the free residue because the mineral rights were not encumbered assets as that term is used in *Mars*, Law of Insolvency in South Africa, ninth ed (2008), para 22.1, ie the mineral rights did not serve as security for the claim of a creditor.

4. The fourth respondent is the holder of a duly registered notarial bond over Rubaco's movable property. The bond is a special bond in relation to certain of Rubaco's cattle and a general bond in relation to all the rest of Rubaco's movable property. It is common cause that the mineral rights were immovable property and thus not encumbered by the fourth respondent's notarial bond.

5. During November 2001, before the liquidation of Rubaco commenced, the fourth respondent perfected its notarial bond by taking possession of the movable assets covered by the bond. The fourth respondent submitted a claim in the liquidation in the amount of R3 849 230,57 and relied for security on its notarial bond.

6. The movables subject to the notarial bond were sold by the liquidators and an amount corresponding to the nett proceeds of the sale were awarded by the liquidators to the fourth respondent. This award is uncontentionous. However, the account framed by the liquidators also provided for the payment of the balance in the free residue to the fourth respondent as a preferent creditor.

7. The applicant objected to the allocation of the balance in the free residue to the fourth respondent as a preferent creditor. The Master dismissed the objection. Thus, ultimately, the present application.²

8. The applicant contends that the fourth respondent is entitled to preference only in respect of the proceeds in the free residue constituted by the sale of movable property and enjoys no preferent right in relation to the proceeds of immovable property. The fourth respondent, on the other hand, argues that its claim is secured to the extent of the value of the movables encumbered by its notarial bond and preferent to the extent of the balance of its claim. The case for the fourth respondent is that there is no provision in the 1936 Insolvency which limits the preferent claim of the holder of a general notarial bond to that portion of the free residue constituted by the proceeds of movable property.

9. I think that the true enquiry is this: is the extent of the notarial bond holder's security (if any) plus its preference restricted under the 1936 Insolvency Act to the value of the movables encumbered by the notarial bond or does the notarial bond holder enjoy a preference to money forming part of the free residue unrestricted by and unrelated to the value of those movables?

10. The rights of a general notarial bond holder to preference derive from s 102 of the 1936 Insolvency Act³ Sections 96 to 103 prescribe the order of preference in which certain claims must be defrayed from the free

residue. Section 102 provides:

Thereafter any balance of the free residue shall be applied in the payment of any claims proved against the estate in question which were secured by a general mortgage bond, in their order of preference

11. I think it is helpful to trace the development of the security and preference afforded by a notarial bond. This subject was comprehensively dealt with by Joubert JA in *Cooper NO en Andere v Die Meesteren 創/ Ander*.⁴ For present purposes, one may begin with the position in South Africa immediately before the coming into force, on 1 January 1917, of the Insolvency Act, 32 of 1916. Up till then, a general clause in a notarial bond created a general bond over all the goods and rights, existing as well as future, of the mortgagor.⁵ Between competing bond holders of the same class, the earlier bond enjoyed preference over the later in accordance with the principle *qui prior est tempore potior est jure* (the earlier right is stronger in law).

This preference was enjoyed by such a bondholder whether or not he had perfected his bond by taking possession of the goods subject to the bond. His preference was to the extent of the value of the mortgaged articles in the possession of the debtor or his trustee in insolvency.⁶

12. This position was changed by s 87 of the 1916 Insolvency Act. General bonds registered after the 1916 Act came into operation conferred a preference, as against concurrent creditors, without delivery of the debtor 痴 property, *only* over the proceeds of his movable assets and had no operation over the proceeds of immovable property.⁷ Under the 1916 Insolvency Act, a special bond without delivery conferred no greater value than a general bond. A special bond hypothecating movables conferred a preference in respect of the movables so specially hypothecated on their realisation by the trustee in insolvency.⁸

13. In *B Ebrahim Ismail & Co v Khan 痴 Trustee*,⁹ a creditor held a notarial bond over movables which had not been perfected by possession. The question before the Natal court was whether the creditor enjoyed any preference, having regard to the fact that he had not been in possession of the assets referred to in the bond. The court held, after mentioning that counsel conceded the point, that under common law, the creditor was entitled to a preference as

... consists of the net proceeds of the property intended to be covered by the bond;...

The court proceeded to investigate the question whether the 1916 Insolvency Act had changed the common law position and concluded that it had not.

14. Section 86 of the 1936 Insolvency Act perpetuated the abolition of any preference in respect of immovable property as conferred by a general mortgage bond. The same Act draws a distinction between creditors whose claims are secured and creditors whose claims are preferent. The concept of preference in insolvency relates to the order in which claimants participate in the free residue and contemplates a hierarchy in which claims higher in the hierarchy are to be defrayed in preference to those lower in the hierarchy. Thus, eg, funeral and death bed expenses of the insolvent enjoy priority over all other claims on the free residue.

15. Although the present question does not appear squarely to have come before the courts, it was referred to in a number of reported cases to which counsel for the applicant drew my attention. In *Ninian & Lester (Pty) Ltd v Perry NO and Others*,¹⁰ Shearer J found that a creditor who held a special lien ranked in insolvency above a the preference conferred by s 102 on the holder of an unperfected general notarial bond. The learned judge held¹¹ that the preference arising in terms of s 102 arose

... in respect of the free residue above concurrent creditors insofar as such free residue might consist of the proceeds of movable property generally hypothecated to the mortgagee.

16. In *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd*,¹² the court per Harms JA contrasted the positions of a general notarial bond holder before and after perfection and held as follows:

[3] The bondholder is not a secured creditor and is entitled to a preference over the concurrent assets of the insolvent only with respect to the proceeds of assets subject to the bond.

[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.

17. In *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd and Another*,¹³ Grosskopf J addressed the position of the holder of a general notarial bond who had obtained a rule *nisi* calling upon the debtor and all other interested persons to show cause why the bond should not be perfected. Before the return day of the rule, the debtor was provisionally wound up. The learned judge held as follows:¹⁴

As the holder of a notarial general bond, the applicant was not a secured creditor. On the insolvency of the mortgagor, the assets covered by the mortgage, or their proceeds, would fall into the free residue, and the only preference which the mortgagee would have in respect of such assets or proceeds would be to take precedence over ordinary concurrent creditors. However, once the mortgagee obtained possession of the mortgaged articles, his position is much strengthened.

He would then be in the position of a pledgee, with all the security attaching to a pledge.

18. And finally, on this point, the issue in *Cooper A/O, supra*, was formulated as follows:¹⁵

... of Sentraalwes as verbandhouer van die geregistreerde spesiale notariële verband van die bepaalde roerende sake wat in die besit van die verbandgewer Aldrich gebly het totdat sy boedel gesekwestreer is, 'n preferensie het bo konkurrente skuldeisers ten aansien van die opbrengs van die bepaalde roerende sake wat die vrye oorskot uitmaak.

This formulation clearly excluded any possibility that the bond holder as holder of a special bond could rank preferent for any amount in excess of the proceeds of the specific goods subject to its bond.

19 Section 102 of the 1936 Insolvency Act perpetuated the common law position in relation to a general notarial bond that the holder was entitled to preference whether or not he had perfected. But in *Cooper NO, supra*, the Appellate Division held that an unperfected *special* notarial bond conferred no preference above concurrent creditors.¹⁶

20. The legislature moved swiftly to alleviate this disadvantage suffered by the holders of special notarial bonds by the enactment of the Security by Means of Movable Property Act, 57 of 1993. Section 1 provided that property 都pecified and described in the bond in a manner which renders it readily recognizable • and which had not been delivered to the mortgagee was to be deemed to have been pledged to the mortgagee as effectually as if it had expressly been pledged and delivered to the mortgagee. The security enjoyed by the holder of a pledge is limited to the value of the proceeds of the pledged articles. The effect of this measure was thus to render the holder of a special mortgage bond a secured creditor for the nett value of the goods specified and described in his bond. I think that the legislative policy underlying the enactment of the measure was to extend to holders of special notarial bonds protection equivalent to that enjoyed by virtue of s 102 by the holders of general notarial bonds, with one significant exception.

21. The exception between the protection enjoyed by holders of general and special notarial bonds is that the holder of the latter is, under the Security by Means of Movable Property Act, on insolvency a secured creditor whether or not the special bond has been perfected. But the holder of a general notarial bond is not in such circumstances a secured creditor unless he has perfected.¹⁷

22. It is therefore manifest that for more than 120 years our case law has been consistent in the approach that any preference enjoyed by the holder of a notarial bond was limited to the value of the mortgaged property. The legislative trend has been to extend protection to holders of both forms of notarial bonds to the extent of the value of the goods encumbered by the bond.

23. Against this background, I proceed to evaluate the contention of the fourth respondent that its claim under

the general clause in its notarial bond is secured to the extent of the value of the movables properly subject to its bond and preferent to the extent of the balance of its claim. The first point to be made against the contention is that the proposition finds no support in our case law and there is a considerable body of authority which goes the other way.

24. Counsel for the fourth respondent submitted that the wording of s 102 is dear in conveying the meaning for which counsel contends and referred to the definition of *free residue* in s 1 of the Insolvency Act of 1936 in support of his proposition. In relation to insolvent estates, unless inconsistent with the context *free residue* is defined to mean that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention; *preference* to mean the right to payment of that claim out of the assets of the estate in preference to other claims and *preferent* to have a corresponding meaning; and *security* to mean property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention.

25. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹⁸ the present state of the law in relation to the interpretation of words used in documents was laid down:

Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

26. Because security means property over which the creditor has in certain circumstances a *preferent* (as defined) right, it therefore seems clear that a secured claim is a kind of preferent claim. Section 102 confers in terms preference on general notarial bonds *in their order of preference*. Viewed against the development

of the protection conferred on notarial bonds as I have described, this language, in my view is indeed clear. It conveys that protection is extended to the extent of the preference. It therefore follows, in my view, that the claim of the holder of a general notarial bond can never be greater in amount as a preferent claim in the strict sense (ie when the bond has not been perfected) than it will be as a secured claim in the strict sense (ie when the bond has been perfected). In either case the protection enjoyed by the holder of a general bond is limited to the value of the goods covered by the bond.¹⁹ It thus follows that once an award is made to the holder of a general notarial bond as a secured creditor, his preference under s 102 is extinguished to the extent of the nett value of his security and he will only recover as a preferent creditor to the extent, if any, of the nett value of other movables than those in respect of which he has perfected. The same end result will operate, in my view, where the bond is both (as in this case) special in relation to specific goods and general. Whether or not there has been perfection in relation to the goods specified in the bond, the claim will be secured pursuant to s 1 of the Security by Means of Movable Property Act to the extent of the nett value of such specified goods. If there has been perfection in relation to other goods, ie those unspecified goods covered by the bond *qua* general bond, the same will apply and the claim will be secured to the extent of the value of such unspecified goods. Where there has not been perfection in relation to such unspecified goods, the claim will not be secured in relation to such goods or their value but will be preferent under s 102.

In any of these cases, the sum total of the security and preference cannot exceed the nett value of the goods covered by the bond.

27. Even if the meaning for which counsel for the fourth respondent contends is one of the possible meanings, which I do not think it is, I would find against the fourth respondent. Counsel for the fourth respondent accepted that the consequence of his argument was that the holder of a general bond who was owed several million rands by his debtor would rank preferent even though the goods encumbered by his bond were realised for a trivial amount. I would add that in logic, counsel's submission would have to remain the same even if no movables at all were realised in insolvency. It is in my view simply not conceivable that s 102 of the Insolvency Act, 24 of 1936 privileges holders of general notarial bonds in contradistinction to holders of special notarial bonds to the extent that the former would enjoy a preference entirely independent of the value of the security held under the general notarial bond. I would regard that as subversive of good commercial practice, which would be at variance with the purpose of the Act. The interpretation for which counsel for the fourth respondent contends would constitute a radical and (because subversive of good commercial practice) irrational departure from a common law and legislative scheme going back many years.

28. In my view, therefore, s 102 extends protection to the holder of a general notarial bond only to the extent of the nett value of the goods secured by the bond, whether or not he qualifies as a secured creditor as well as or instead of being a preferent creditor.

29. I think I should say something about the controversy in the books about whether the preference of the holder of a general notarial bond is restricted to the proceeds within the free residue only of movable property or whether his preference extends also to the proceeds of immovable property.²⁰ If one accepts, as in my view one must, that the total of any security and preference conferred by a notarial bond cannot exceed the value of the nett proceeds of the goods covered by the bond, whatever form the bond may take, then it follows that the question cannot arise. *Ex hypothesi*, in my view, the preference is limited to the nett proceeds of the movable property encumbered by the bond less any amount awarded to the bond holder as a secured creditor. Because the holder of a notarial bond ranks below other preferent creditors, he may in some cases get less than these nett proceeds but he can as preferent and/or secured creditor never get more.

30. Finally, I must deal with an argument raised by counsel for the liquidators who prefaced his submissions by assuring me that his clients did not appear to oppose the application but merely to protect their position. Counsel asked that the liquidators be awarded certain costs incurred by them in considering their position. What the position may be as between the liquidators and the creditors to whom they may be answerable is not known to me and I say nothing about such costs as costs of administering the affairs of Rubaco. As between the liquidators and the applicant and fourth respondent as litigants, however, I do not think the liquidators are entitled to an order for costs. Costs were not sought against them by the applicant save only if they opposed the application, which they did not. Once the liquidators had decided that they would not oppose the application, they did not need to come to court to protect their position.

31. It follows accordingly that the application must succeed. I make the following order:

1 It is declared that the fourth respondent is not entitled to any allocation from the free residue of Rubaco Boerdery (Pty) Limited (in liquidation) (“Rubaco”) in excess of the value of the nett proceeds of the goods mortgaged under notarial bond BN 20986/97 (at pp22-32 of the papers) less the amount awarded to the fourth respondent as a secured creditor in relation to such goods.

2. For avoidance of doubt, it is declared that because the fourth respondent was awarded, as a secured creditor, the value of the full nett proceeds of such goods, the fourth respondent is accordingly entitled to no allocation at all from the free residue of Rubaco.

3. The decision of the first respondent on 1 August 2011, in terms of which the first respondent rejected the objection by the applicant to the allocation of the amount of R1 905 836,76 in the free residue of Rubaco to the fourth respondent as a preferent creditor, is hereby reviewed and set aside.

4. The objection of the applicant is upheld. The amount of R1 905 836,76 in the free residue of Rubaco must be distributed among the concurrent creditors of Rubaco.

5. The second and third respondents are directed to revise their second and final liquidation account of Rubaco in accordance with this order.

6. The fourth respondent must pay the applicant's costs which are to include the costs of both senior and junior counsel.

NB Tuchten

Judge of the High Court

8 April 2013

For applicant:

Adv DM Fine SC and Adv JM Hoffman

Instructed by

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For second and third respondents:

Adv Z Schoeman

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For fourth respondent:

Adv DM Leathern SC

Instructed by

Rorich Wolmarans & Luderitz Inc

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- 1 Compare *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 117
 - 2 The applicant initially sought the review of the Master's decision on other grounds but amended its notice of motion. No point was made of this in argument.
 - 3 As made applicable to the liquidation of companies.
 - 4 1992 3 SA 60 AD
 - 5 71G-H
 - 6 *Hare v Trustee of Heath* (1884) 3 SC 32 33-34
 - 7 *Mars*, The Law of Insolvency in South Africa, third ed (1936) 343.
 - 8 *Mars*, The Law of Insolvency in South Africa, third ed (1936) 344.
 - 9 1930 NLR 136 at 142
 - 10 1991 1 SA 66 N
 - 11 72H-I
 - 12 2003 2 SA 253 AD
 - 13 1983 1 SA 79 C
 - 14 84 C-E
 - 15 84C-E
 - 16 82D-E
 - 17 *Mars*, The Law of Insolvency in South Africa, third ed (1936) para 22.11.
 - 18 2012 4 SA 593 SCA para 17
 - 19 So too, in the case of a special bond.
 - 20 See *Mars*, The Law of Insolvency in South Africa, third ed (1936) para 22.11.