**FREE STATE HIGH COURT, BLOEMFONTEIN**
**REPUBLIC OF SOUTH AFRICA**

Case No.: 2382/2012

In the matter between:

**FARMSECURE GRAINS (EDMS) BEPERK**
**(REGISTRASIE NR 2004/006764/07)** Applicant

and

**JOHANNES PETRUS CORNELIUS DU TOIT** 1st Respondent
**IDENTITEITSNOMMER:**
**JOHANNA ELIZABETH DU TOIT** 2nd Respondent
**IDENTITEITSNOMMER:**

**JUDGMENT:** LEKALE, J

**HEARD ON:** 30 AUGUST 2012

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**DELIVERED ON:** 20 SEPTEMBER 2012

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**INTRODUCTION AND BACKGROUND**

[1] This is essentially an opposed application for confirmation of an interim order authorising the applicant to take possession of and keep certain specified movable properties belonging to the respondent with the assistance of the sheriff on the basis of a notarial bond registered in its favour by the respondents.

[2] On the 14th June 2012 a rule *nisi* issued at the instance of the applicant calling upon the respondents to show cause why:

> **"2.1 Die applikant nie gemagtig sal word om sy sekuriteit soos verleen kragtens die Notariële Verbandakte Nr BN7533/2010 te bevestig en perfek te maak deur die respondente se roerende goedere soos voorsien deur die gesegde Notariële Verband wat aangeheg sal word tot die applikant se funderende eedsverklaring as aanhangsel "C" in besit te neem en te hou nie;**
>
> **2.2 Die Balju te Kroonstad of sodanige balju binne wie se regsgebied die vermelde goedere soos vervat in Aanhangsel "C" hiertoe gevind mag word, nie gemagtig en gelas sal word om daarop beslag te lê;**
>
> **2.3 Respondente nie beveel sal word om die koste van hierdie aansoek te betaal nie."**

[3] The respondents have since delivered an opposing affidavit to which the applicant has replied.

[4] On the 11 October 2010 and the 15 December 2011 the parties

concluded written production agreements in terms of which the applicant appointed the respondents as joint independent contractors for the purposes of conducting farming activities on behalf of the applicant on the property leased by the applicant from them for that purpose.

[5] The essential terms of the agreements were, *inter alia*, that ownership in the crops planted shall, at all times, vest in the applicant as the principal and the respondents, as independent contractors, will keep the harvest for and on behalf of the applicant and they shall have no claim thereto.

[6] On the 3 November 2010 the respondents registered a Notarial Bond (bond) in terms of which they hypothecated specified and defined movable properties as well as all other movable property then owned or to be acquired by them in future in favour of the applicant as security for R3.5 million which they owed to it.

[7] In terms of Clause 14.4 of the bond the applicant is generally

entitled to immediately and without notice assume possession of and keep or sell the hypothecated property for the amount owing, whether payable or not, at the respondent's costs in the event that it, at any time, have reason to believe that its interests are placed in danger in any manner whatsoever as a result of any conduct or negligence of, *inter alia*, any creditor of the respondents.

[8] On the 22nd May 2012 the sheriff of Kroonstad attached some movable property belonging to the respondents in execution of a judgment granted against the first respondent in favour of his creditor.

[9] The applicant, thereupon, launched the present proceedings on the 8 June 2012 on an urgent basis citing the fact of the said attachment as giving cause for seeking to complete its security by taking possession of the hypothecated movables.

**ISSUES IN DISPUTE**

[10] In both the opposing papers and heads of argument submitted

the respondents contend that the relief sought by the applicant in the Notice of Motion is not supported by the founding affidavit and is, in fact, in conflict therewith insofar as the Notice of Motion prays for, *inter alia*, an order authorising the sheriff to attach the property and to hand same over to the applicant while the founding affidavit avers that the property is to be left on the farm so as to enable the respondents to continue with the farming operations.

[11] The respondents, further, contend that the bond on which the applicant relies is a special notarial bond which does not hypothecate general movable property and is, as such, limited to the specified and clearly recognisable movables in its operation.

[12] The respondents, furthermore, maintain that the fact that the applicant never, at any stage, approached the respondents with a request for their consent for it to assume control over the hypothecated movable property is fatal to the "draconian" relief it seeks in the light of the requirement for such a request within

the jurisdiction of this court.

[13] It is not necessary, according to the respondents, for the applicant to perfect its security in the light of the provisions of s1(1) of the Security by Means of Movable Property Act no 57 of 1993 (the Act).

**SUPPORT FOR RELIEF SOUGHT**

[14] It is common cause between the parties that in the Notice of Motion the applicant prays for an order authorising the sheriff to attach the specified property and to remove the same and hand it over to the applicant while, in the founding affidavit, the applicant undertakes only to assume control and oversight over the property without removing it from the site so as to enable respondents to continue with farming operations.

[15] In the respondent's view the aforegoing state of affairs exhibits conflict between the order prayed for and the founding affidavit and, as such, the interim order should not have been granted.

[16] The applicant, on its part, contends that it is entitled to the relief prayed for and that whether or not it removes the property from the site rests in its sole discretion. Mr Hefer for the applicant, further, correctly points out that the interim relief granted only authorises the sheriff to attach the property and is silent on removal and handing over of the same to the applicant.

[17] I am convinced that the order in question is in line with the deposition made in support thereof to the extent that it only authorises attachment by the sheriff.

[18] The aforegoing order, read together with the interim order authorising the applicant to take possession of the property in question and to keep it, effectively gives the applicant the possibility to assume control and oversight over the property without removing it in line with its undertaking. An undertaking made under oath suffices to sustain an order as the case was in **SENWES LIMITED v MULLER** 2002 (4) SA 134 TPD at 144 B – C where the court accepted an undertaking by the applicant not to sell property attached and handed over on the basis of

special notarial bond.

**SPECIAL NOTARIAL BOND AS OPPOSED TO GENERAL NOTARIAL BOND**

[19] In argument before the court the parties are effectively *ad idem* that the operation of the bond herein is limited to specified and identified items insofar as Mr Hefer submitted that the property attached is that which is identified in the bond.

[20] It is, therefore, in my view not necessary for the purposes of this application to decide whether or not the bond is a special and general notarial bond as its heading indicates.

**REQUEST OR DEMAND AS A PREREQUISITE FOR RELIEF**

[21] The parties are effectively in agreement that the present application was not preceded by either a request or a demand for the respondents to make the hypothecated movables available for the applicant to take possession of the same.

[22] The respondents contend that such a request or demand is a

*sine qua non* for the draconian relief claimed and relies, in this regard, on the unreported decision of this court in **SENTRAAL OOS (KOöPERATIEF) BPK v J H POTGIETER AND ANOTHER** case number 3870/94.

[23] On its part the applicant maintains that, in terms of the bond, it is not contractually obliged to give notice to the respondent before it can enforce its real right.

[24] A perusal of the Sentraal Oos decision reveals that the court was concerned with a general notarial bond in that matter as opposed to a special notarial bond which confers a real right. The applicant in Sentraal Oos was a holder of a general notarial bond which it sought to perfect and the court found, *inter alia,* that its contractual remedy is normally to first request or notify the respondents to release the hypothecated movables and to approach the court only as a last resort if the respondents refuse to oblige.

[25] I am convinced that the present matter is distinguishable from

the Sentraal Oos application insofar as the applicant herein is a holder of a special notarial bond which confers a real right on it *ex lege*. (See s1(1) of the Act).

[26] As correctly contended by the respondents, the holder of a real right is entitled, in law, to follow its property wherever it may be found and there and then to vindicate. (See **CHETTY v NAIDOO** 1974 (3) SA 13 (A) at 20 B.)

[27] A demand or request is, thus, not a condition precedent to the enforcement of a real right. The same applies, in my view, to claims for specific performance where the contract does not require a demand before legal proceedings may be instituted. In my judgment, the absence of a demand or request in a case of a claim based on a real right may in an appropriate case affect the issue of costs. (Compare **REICHMAN v YSEBRAND AND COMPANY** 1930 OPD 148 and **AMS MARKETING COMPANY (PTY) LTD v HOLZMAN AND ANOTHER** 1983 (3) SA 263 (W) at 270 C - D.)

**NECESSITY OR APPROPRIATENESS OF PERFECTION ORDER**

[28] The parties are in agreement that the legal effect of a registered special notarial bond is that the mortgagee, in the shoes of the applicant, acquires a possessionless pledge over the hypothecated movables. (See **SENWES LIMITED v MULLER** *supra* at 139 I – J.)

[29] The respondents contend that, in the light of the fact that the applicant has a real right in the hypothecated property, it is not necessary for it to be in actual possession or control of mortgaged movables in order to perfect its security. In this regard, Mr De Wet, for the respondents, relies on decisions emanating from the old Natal such as **BARCLAYS NATIONAL BANK AND ANOTHER v NATAL FIRE EXTINGUISHERS MANUFACTURING CO (PTY) LTD AND OTHERS** 1982 (4) SA 650 (D).

[30] The applicant, on its part, cites **SENWES LIMITED v MULLER** *supra*, in support of its contention that it is contractually entitled to have actual physical possession of the hypothecated

property once it has reason to believe that its interests are placed in danger as contemplated in the bond.

[31] A glance at **<u>BARCLAYS NATIONAL BANK AND ANOTHER v NATAL FIRE EXTINGUISHERS MANUFACTURING CO (PTY) LTD AND OTHERS</u>** *supra,* shows that the courts in Natal were, prior to the enactment of the Act herein, generally reluctant to allow a mortgagee in the position of the applicant to complete its security where the Natal Act, which was to the same effect as the Act herein, was applicable.

[32] The position of such a mortgagee was, however, aptly summarised by Ramsbottom J in **<u>MILNE, N.O. AND DU PREEZ, N.O. v DIANA SHOE AND GLOVE FACTORY (PTY) LTD AND ANOTHER</u>** 1957 (3) SA 16 (W) at 20F – H when he observed, in respect of the Natal Act, that:

> **"By accepting the security of a special bond of movables, the bondholder accepts something less than a pledge constituted by delivery of possession, and takes the risk which is inherent in the situation."**

[33] In my view a provision in the bond which allows the mortgagee to take actual possession of the hypothecated movables in specified circumstances in order to complete its security seeks to improve the position of such a mortgagee by removing or minimising the risk identified by the court in the **MILNE, N.O. AND DU PREEZ, N.O. v DIANA SHOE AND GLOVE FACTORY (PTY) LTD AND ANOTHER** matter.

[34] The present matter is, however, distinguishable on the facts from **SENWES LIMITED v MULLER** (*supra*) insofar as the respondents, in that matter, consented in the bond to the completion of the applicant's security in the event of the specified circumstances. The applicant in **SENWES LIMITED,** effectively, sought to enforce the relevant contractual provision which supplemented the legal position conferred by the Act. In the present matter no such agreement on perfection of security exists. The respondents effectively consent to enforcement of the applicant's rights as conferred by the bond. As correctly submitted by Mr De Wet, the applicant in a matter such as

**SENWES LIMITED** effectively prays for specific performance as against the respondent as was found in the unreported decision of this court in **THE STANDARD BANK VAN SUID-AFRIKA BEPERK v H C CALITZ** case number 572/2000 where Wright J emphasised at paragraph 4 that:

> "Wat in die waarheid in so 'n geval gevra word, is niks meer as 'n bevel vir spesifieke nakoming van 'n persoonlike reg waarop die verbandhouer geregtig is uit hoofde van die terme van die verbandakte. Soos in die geval van enige eis om spesifieke nakoming het die hof 'n diskressie om dit toe te staan met inagneming van al die omstandighede."

[35] The applicant, as a holder of a real right in the specially hypothecated movables, is contractually entitled to take possession of the said movables without notice upon the occurrence of any of the contractually specified events as a way of enforcing its real right as opposed to perfecting its security. To secure the relief it seeks herein, it has to prove that anyone of the agreed circumstances has eventuated and that it is, *ex contractu*, entitled to perfect its security. (Compare

**THE STANDARD BANK VAN SUID-AFRIKA BEPERK v H C CALITZ** *supra,* at para [9] in respect of refusal as a prerequisite for a court order.

[36] I am not persuaded by the circumstances in the present matter that the applicant is contractually entitled to complete its security as the case was in **SENWES LIMITED v MULLER** *(supra*). *In casu* the bond regulates, *inter* alia, when and how the bondholder is to enforce its real right by *inter alia*, taking possession of the hypothecated property for the purposes of selling them or keeping them for the money owing. The situation would, most probably, be different if the relief sought by the applicant was either an interdict or a vindicatory order. It is not necessary or appropriate, therefore, for the applicant to perfect its security regard being had to the provisions of section 1(1) of the Act.

**COSTS**

[37] In my view there exists no cause in this matter for a departure from the normal practice with regard to costs and no request to that effect is before the court.

**ORDER**

[38] In consequence the rule *nisi* is discharged.

[39] The applicant shall pay the respondents' costs.

**L. J. LEKALE, J**

On behalf of the applicant: Adv. S. Hefer
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of the respondents: Adv. P J T de Wet
Instructed by:
Symington & De Kok
BLOEMFONTEIN

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