

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2025-007209

DATE: 24 February 2025

In the matter between:

BLACK MOUNTAIN MINING (PTY) LIMITED

Applicant

and

LEAD ENGINEERING AND PROJECTS (PTY) LIMITED

Respondent

Neutral Citation: *Black Mountain Mining v Lead Engineering and Projects*
(2025-007209) [2025] ZAGPJHC --- (24 February 2025)

Coram: Adams J

Heard: 13 February 2025

Delivered: 24 February 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 24 February 2025.

Summary: Civil procedure – applications and motions – urgent application - application by respondent for reconsideration of order granted *ex parte* in urgent application in its absence – respondent in its application for reconsideration

entitled to place additional facts and matter before court which ought properly to have been placed before court when the matter was originally presented – on reconsideration of matter, court finding that court hearing original matter (perfecting of pledge) would have granted the order it did, but modified to cater for further information which ought to have been brought to its attention – Reconsideration application in terms of Uniform Rule of Court 6(12)(c) granted.

ORDER

- (1) The Order of this Court (per Wright J) dated 28 January 2025 be and is hereby reconsidered in terms of Uniform Rule of Court 6(12)(c) and is amended by the addition of the following sub-paragraph as sub-paragraph 2.3 after sub-paragraph 2.2: -
- '2.3. The relief granted as per prayers 1, 2, 2.1 and 2.2 above – in terms of which the applicant is granted leave to perfect its notarial general covering bond with registration number BN000002212/2024 – does not cover nor extend to the debtors' book of the respondent and the funds held on account of the respondent at Absa Bank, all of which have been ceded to Absa Bank Limited.'
- (2) Subject to the foregoing amendment / addition, the court order dated 28 January 2025 be and is hereby confirmed.
- (3) The attachment of the funds held on account of the respondent at Absa Bank and the respondent's Absa Bank accounts in terms of the writ of execution dated 3 February 2025, be and is hereby uplifted and the said funds are released from attachment and Absa Bank be and is hereby ordered and directed to unfreeze those funds and to allow the respondent access to them.
- (4) The costs of this reconsideration application are likewise reserved pending the determination in Part B.

JUDGMENT

Adams J:

[1]. On 28 January 2025 this court (per Wright J) granted an *ex parte* order, on an urgent basis, permitting the applicant to perfect a general notarial bond (GNB) executed by the respondent, in respect of the respondent's movable

property, in favour of the applicant for a capital sum of R100 million. The order reads as follows: -

'Pending the determination of Part B of this application:

- (1) The applicant is granted leave to perfect its notarial general covering bond with registration number BN000002212/2024.
- (2) The respondent is ordered and directed to deliver the mortgaged assets to the applicant, and in particular the applicant is granted leave:
 - (2.1) to enter in and upon all or any of the premises in which the respondent carries on business or in which the respondent at any time stores, repairs, sells or manufactures Movable Property, or any portion thereof and to take and retain possession as pledgee of all or any of the Movable Property, and to retain such possession for so long as the applicant deems fit, and/or at the option of the applicant; and
 - (2.2) to do any of the aforesaid things separately or conjointly and in such order and at such times as the applicant or the applicant's duly authorised agent thinks fit, and to add to the applicant's claim under the Bond any costs and expenses of doing any of the above things.
- (3) The costs of Part A of this application are reserved pending the determination in Part B.'

[2]. The respondent applies in terms of the provisions of Uniform Rule of Court 6(12)(c) for a reconsideration of the said order. Rule 6(12)(c) reads as follows:

'A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'

[3]. This court (per Farber AJ), in dealing with Rule 6(12)(c), held as follows in *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others*¹:

'The framers of Rule 6(12)(c) have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that a wide discretion is intended. Factors relating to the reasons for the absence of the aggrieved party, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in

¹ *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA 484 (W) at 487B.

determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress can be attained by virtue of the existence of other or alternative remedies. The convenience of the protagonists must inevitably enter the equation. These factors are by no means exhaustive. Each case will turn on its facts and the peculiarities inherent therein.'

[4]. In the same vein, Wepener J in *Oosthuizen v Mijs*² Wepener J held as follows: -

'I am of the view that a court that reconsiders any order should do so with the benefit not only of argument on behalf of the party absent during the granting of the original order but also with the benefit of the facts contained in affidavits filed in the matter.'

[5]. That takes me to the facts in the matter.

[6]. On the same day as the *ex parte* order was granted, the applicant caused three writs of execution to be issued, each of which identified specific premises of the respondent at which perfection of certain movable assets was to take place. The writs were executed in Vanderbijlpark, Aggeneys in the Northern Cape Province and in Secunda. On Wednesday, 5 February 2025, (some seven days later) a fourth writ of execution was served on Absa Bank Limited in terms of which the respondent's Absa bank accounts were attached.

[7]. The respondent contends that when the applicant moved for the urgent *ex parte* relief on 28 January 2025, it was aware that all sums standing to the credit of the respondent's Absa bank accounts had been ceded and pledged to Absa and that Absa held possession of those funds as principal / cessionary / pledgee. Therefore, so the contention continues, the applicant could not legitimately cause those Absa funds to be attached in purported perfection of its notarial bond.

² *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 269I-J.

[8]. In support of the foregoing assertion, the respondent points out that the bond was executed in favour of the applicant on 24 January 2024. It is a general notarial bond and the execution of the bond followed after the respondent had entered business rescue on 28 October 2022 and after a business rescue plan had been approved by the respondent's creditors on 19 May 2023. The significance of the approved plan, so the respondent alleges, is that it records, amongst others, that Absa's claim for approximately R40 million was secured by way of a cession of debtors dated 11 June 2014, together with a cession of the funds held in the respondent's various banking accounts and that Merchant Commercial Finance (with a claim against the respondent of approximately R101 million) held a reversionary cession of debtors securing a claim of approximately R61 million.

[9]. The Absa cession of debts is in the standard form and, amongst others, records that, for so long as the respondent is indebted to Absa, all monies it may collect and receive into its bank accounts are so collected and received as agent for and on behalf of Absa. Clause 17 of the cession records the respondent's undertaking not to pledge, dispose of or encumber any of its assets in any manner whatsoever other than in the normal course of its business, without first having obtained Absa's consent. The Merchant Commercial Finance cession of debtors is in similar terms but records an acknowledgement of the existence of the prior-ranking Absa cession of book debts.

[10]. The existence of both the Absa and Merchant Commercial Finance cessions of book debts were known to the applicant at the time of the execution and registration of the notarial bond on 31 January 2024, given that the applicant does not dispute that the business rescue practitioner 'informed (it) of all developments in the business rescue process and the development of the business rescue plan'. The business rescue plan records two cessions of debtors in Absa's favour, one dated 11 June 2014 and the other dated 22 February 2021. Those cessions secured the respondent's indebtedness to Absa in the amount of approximately R26 million. The business rescue plan

furthermore records the respondent's reversionary cession of debtors in favour of Merchant Commercial Finance to secure an indebtedness owing by the respondent to the said company in the sum of approximately R61 million.

[11]. The import of the foregoing is that during the currency of a pledge, the respondent, as a cedent, was divested of its ability to enforce its personal right as owner of the property and that such right vests in Absa Bank, as the cessionary. The cedent – the respondent in this instance – retains nothing other than a bare dominium in the asset. 'Bare dominium' is sometimes referred to as 'defective dominium' (*dominium minus plenum*), which is anything less than 'full dominium' (*dominium plenum*). Dominium minus plenum has been described to refer to a circumstance in which ownership may be wanting – in respect of the right to use the owned thing as the owner pleases (including to alienate or dispose of it) – because of the fact that there is a real burden imposed on the right of ownership, for example, by mortgage.

[12]. The respondent asserts that the notarial bond did not extend to incorporeal property – the respondent's Absa Bank accounts – owing to the fact that, at the time of the execution and registration of the bond, the respondent had no right to pass any real security to the applicant over the bank accounts.

[13]. I agree with these contentions on behalf of the respondent. More importantly, the applicant was well aware of such state of affairs, which, it ought to have disclosed to the court hearing the urgent *ex parte* application. The simple point is that a proper interpretation of the provisions of the bond must take place in the context in which it was executed and registered. That context includes the knowledge on the part of the applicant that the respondent was not legally capable of providing any real security over its book debts or the contents of its bank accounts, as those rights had been ceded / pledged to Absa Bank and, thereafter, to Merchant Commercial Finance.

[14]. Had the court been advised of the foregoing, it would, in my view, have authorised the applicant to perfect its notarial general covering bond subject to

the Cession of Debtors dated 24 February 2021 by the respondent in favour of Absa Bank Limited, in terms of which the respondent ceded and assigned to Absa Bank Limited any and all of the debts due to it 'from whatsoever cause arising'. That is exactly the approach this court adopted in *Absa Bank Limited v Go On Supermarket (Pty) Limited and Another*³.

[15]. I also find support for my foregoing finding in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 (SCA)⁴, in which the SCA (per Harms JA) held as follows at para 6: -

'Real rights are stronger than personal rights and in the case of conflicting real rights the principle *prior tempore potior iure* applies. The right in question, a pledge, is a real right, which is established by means of taking possession and not by means of an agreement to pledge. The bondholder who obtains possession first thereby establishes a real right. If I may be permitted some more Latin: *vigilantibus non dormientibus iura subveniunt*, meaning that the laws aid those who are vigilant and not those who sleep. (Both principles provide a safer guide to the correct answer than the Court below's "just and equitable" principle. The fact that it is "fortuitous" that the vigilant person perfects his rights first does not make the act either unjust or inequitable.) The fact that Chesterfin's bond contained a provision prohibiting Eurotile from pledging or hypothecating its movables without Chesterfin's consent also has no effect on Contract Forwarding's position unless the latter knows of it. In the absence of Contract Forwarding's knowledge, Eurotile's breach of its contract with Chesterfin does not affect the former's position.'

[16]. It is, as contended by the respondent, that Absa had possession of the funds in the respondent's bank account as principal / cessionary / pledgee. It had thereby acquired a real right to those funds. The applicant had knowledge of the Absa cession prior to the registration of its notarial bond and prior to it moving the order before Wright J on 28 January 2025. The applicant also knew that clause 17 of the Absa cession of debtors read as follows: -

³ *Absa Bank Limited v Go On Supermarket (Pty) Limited and Another* 2022 JDR 0656 (GJ).

⁴ *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 (SCA).

‘The cedent (the respondent in this instance) undertakes not to pledge, dispose of or encumber any of its assets in any manner whatsoever other than in the normal course of its business, without first having obtained the consent of Absa.’

[17]. Subject to the proviso relating to the cession of the debts by the respondent in favour of Absa Bank Limited, the order authorising the perfection of the applicant’s pledge by this Court on 28 January 2025, is, in my view, beyond reproach. The balance of the order should therefore be allowed to stand.

[18]. An order to that effect should therefore be granted.

Order

[19]. In the result, I make the following order:

- (1) The Order of this Court (per Wright J) dated 28 January 2025 be and is hereby reconsidered in terms of Uniform Rule of Court 6(12)(c) and is amended by the addition of the following sub-paragraph as sub-paragraph 2.3 after sub-paragraph 2.2: -

‘2.3. The relief granted as per prayers 1, 2, 2.1 and 2.2 above – in terms of which the applicant is granted leave to perfect its notarial general covering bond with registration number BN000002212/2024 – does not cover nor extend to the debtors’ book of the respondent and the funds held on account of the respondent at Absa Bank, all of which have been ceded to Absa Bank Limited.’
- (2) Subject to the foregoing amendment / addition, the court order dated 28 January 2025 be and is hereby confirmed.
- (3) The attachment of the funds held on account of the respondent at Absa Bank and the respondent’s Absa Bank accounts in terms of the writ of execution dated 3 February 2025, be and is hereby uplifted and the said funds are released from attachment and Absa Bank be and is hereby ordered and directed to unfreeze those funds and to allow the respondent access to them.

- (4) The costs of this reconsideration application are likewise reserved pending the determination in Part B.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	13 February 2025
JUDGMENT DATE:	24 February 2025 – Judgment handed down electronically
FOR THE APPLICANT:	J Peter SC
INSTRUCTED BY:	Tiefenthaler Attorneys Incorporated, Waterfall, Randburg
FOR THE RESPONDENT:	A R G Mundell SC
INSTRUCTED BY:	W J J Badenhorst Incorporated, Morningside, Sandton