

In the matter between:

CONTRACT FORWARDING (PTY) LTD
Appellant

and

CHESTERFIN (PTY) LIMITED

1st

Respondent

HARRY KAPLAN NO

2nd

Respondent

NORMAN KLEIN NO

3rd

Respondent

EUROTILE CC

4th

Respondent

(In provisional liquidation)

Coram: HARMS, SCHUTZ, SCOTT, BRAND JJA and HEHER
AJA

Heard: 21 NOVEMBER 2002

Delivered: 27 NOVEMBER 2002

Subject: General notarial bond; perfection in terms of interim order;
effect.

JUDGMENT

HARMS JA/

HARMS JA:

[1] This is an appeal against a judgment of Moseneke AJ, reported as *Chesterfin (Pty) Ltd v Contract Forwarding (Pty) Ltd and Others* 2002 (1) SA 155 (T). Since then this Court, in a majority judgment (per Streicher and Navsa JJA, Nienaber JA dissenting), had occasion to consider the main issue and came to a conclusion inimical to that of the Court below: *Development Bank of Southern Africa Ltd v Van Rensburg and Others NNO* 2002 (5) SA 425 (SCA).¹ This issue relates to the effect of a supervening liquidation upon a provisional order permitting a creditor to perfect a general notarial bond over movables in the light of the working of a *concursum creditorum*, which crystallises the insolvent's position by preventing a creditor from advancing its own position to the detriment of other creditors.²

[2] The debtor, Eurotile CC ('Eurotile'), passed four general covering notarial bonds over its movables in favour of, amongst others, the first respondent 'Chesterfin', and afterwards in favour of the appellant ('Contract Forwarding'). Contract Forwarding, on an urgent basis, obtained an *ex parte* order (per Roux J) perfecting its bond and permitting it to take possession of Eurotile's movable assets. The terms of the order were these: 'It is ordered that:

¹ Also reported in [2002] 3 All SA 669 (SCA).

² *Walker v Syfret* NO 1911 AD 141 at 166, *International Shipping Co (Pty) Ltd v Affinity (Pty) Ltd and Another* 1983 (1) SA 79 (C) 85.

1. The notarial bond BN 71188/2000 be perfected.
2. The attorney for the applicant be authorised to dispatch this order per facsimile to the Sheriff of Randburg.
3. The applicant be authorised and ordered to take into possession the movable assets of the respondent, . . . to take possession of such movable assets for the purposes of safekeeping in its possession, for as long as the respondent's indebtedness to the applicant exists.
4. That the respondent be ordered to adhere to this order for possession of the said movable assets.
5. The Sheriff of Randburg be ordered to take all necessary steps to ensure the execution of the contents of this order by locking the premises and to hand over the keys of the business of the respondent to the applicant or to deal with the situation as the applicant sees fit.
6. That a rule nisi be served on the respondent, to give reasons why . . . an order in the following terms may not be executed:
 - (a) that the applicant be authorised to take possession of the movable assets as taken over in terms of the rights through the . . . notarial covering bond BN71188/2000;
 - (b) that the respondent be ordered to adhere to this order for possession of the said movable assets pending the institution of an action against the respondent within 30 days from date of this order;
 - (c) that the respondent be ordered to pay the cost of this application on an attorney and client scale;
 - (d) that this application, the pleadings and order be served on the respondent.'

The Sheriff executed the order by securing the premises, making an inventory and handing the keys to Contract Forwarding's attorneys. It may be accepted for purposes of argument at this stage of the judgment, that Contract Forwarding thereby took possession of Eurotile's movables and remained in possession thereof. Thereafter, but before the return date of the rule *nisi*, Eurotile applied for and obtained a provisional order for its liquidation. Subsequently, Chesterfin lodged an application for leave to intervene in Contract Forwarding's application, which was granted. The quoted order was set aside, the rule *nisi* was discharged and Contract Forwarding's application was dismissed. Moseneke AJ granted leave to appeal these orders to this Court.

[3] The general notarial bonds in question do not fall within the purview of the Security by Means of Movable Property Act 57 of 1993. Their effect is trite and I shall content myself by paraphrasing the relevant section from 17 LAWSA (reissue) par 517. The holder of a general notarial bond does not enjoy a real right of security in the assets subject to the bond. There is nothing to prevent the owner from dealing with and disposing of assets subject to the bond, or of bonding them to another creditor. The creditor cannot prevent an alienation or pledge of the assets subject to the bond, cannot follow up the property in the hands of the acquirer and cannot prevent a judicial attachment. The rights of the bondholder are of importance mainly upon insolvency. The bondholder is not a secured creditor and is only entitled to a preference over the concurrent creditors of the insolvent 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.

[5] A bondholder enjoys the protection of the doctrine of notice.³ For instance, a later bondholder who has knowledge of the existence of a prior bond will not be entitled to perfect the bond in disregard of the prior bond, this being regarded as a species of fraud⁴ or an intentional interference with contractual relationships.⁵ However, constructive knowledge is not enough to bring the doctrine into play.⁶ Though it can be said that the registration of a notarial bond amounts to notice to the world of the existence of the claim,⁷ the world is not bound to take notice or deemed to have notice.⁸ I mention this aspect because the Court below apparently held that the earlier notarial bondholders were entitled to some precedence above later bondholders.⁹

[6] Real rights are stronger than personal rights and in the case of conflicting real rights the principle *prior tempore potior iure* applies.¹⁰ 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

³ *Coaton v Alexander* 1879 Buch 17, *Cato v Alion and Helps* (1922) 43 NLR 469.

⁴ *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20B-F.

⁵ *New Kleinfontein Company Ltd v Superintendent of Labourers* 1906 TS 241 at 254. NJ van der Merwe *Die Beskerming van Vorderingsregte uit Kontrak teen Aantasting deur Derdes* (1959).

⁶ *Grant and Another loc cit.*

⁷ *Hare v Trustee of Heath* (1884-1885) 3 SC 32 at 34.

⁸ *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) 583E-G.

⁹ At 167B-D.

¹⁰ CG van der Merwe *Sakereg* 2ed p 64.

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.¹¹ The fact that it is 'fortuitous' that the vigilant person perfects his rights first does not make the act either unjust or inequitable.) There is no evidence that Contract Forwarding had knowledge of Chesterfin's prior bond when it took possession of the pledged goods. 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.

[7] The Court below spent some time on the question of whether the order of Roux J was final or interim and came to the conclusion that it was an interim order. Having come to that result, it felt entitled to reconsider the matter and concluded that to confirm the order would have amounted to a disposition by the company after the grant of the provisional liquidation order contrary to the provisions of s 341(2) of the Companies Act 61 of 1973. This provision is to the effect that a company may not dispose of its assets after the commencement of a winding up. But an act pursuant to an order of court does not amount to a disposition.¹² The Court probably had the provisions of ss 348 and 359(1)(b) in mind¹³ which provide that any attachment or execution put in force after the commencement of a winding up is void, and I will proceed to deal with the matter on that basis.

[8] I am prepared to assume that the order of Roux J was interim in nature. Nevertheless, it permitted Contract Forwarding to take possession of the pledged goods pending the return day. This Contract Forwarding did and its bond was thereby perfected. On the return day the Court was required to revisit the original order by determining whether it had been granted properly. If it had not, for instance, because there was no outstanding indebtedness, or the bond was for some reason bad, the rule would have been discharged *ex tunc*, meaning retrospectively. Contract Forwarding's possession would then not have created any security and would have had no legal effect. In this sense the order was interim or conditional. If, on the other hand, the order was granted properly, its confirmation would declare or confirm that fact. The order did not give Contract Forwarding possession but permitted it to take possession legally. The position would have been no different had Eurotile handed the goods to

¹¹ At 169H-I.

¹² *International Shipping Co* 85E-F.

¹³ Cf *Development Bank* par 8.

Contract Forwarding willingly. In this regard I wish to highlight two passages from the majority judgment in *Development Bank*:

‘The purpose of the application was clearly to obtain possession of the movable property in order to convert the appellant’s rights to that of a secured creditor. The interim order, therefore, authorised the appellant to take possession of the movable property and assets covered by the notarial bond “in order to perfect its security”.’¹⁴

‘The fact that the order authorising the appellant to take possession of the movables was provisional therefore does not detract from the fact that the moment the appellant obtained possession of the movable property hypothecated in terms of the notarial bond it was in the position of a pledgee who had obtained possession of the movable property before the commencement of the winding-up of Serious Mills.’¹⁵

[9] Counsel for Chesterfin submitted that we should rather follow Nienaber JA’s judgment. The approach of this Court to *stare decisis* is well known and we are not here merely in order to pay lip service to it. It suffices to underscore the formulation in *Bloemfontein Town Council v Richter* 1938 AD 195 at 232:

‘The ordinary rule is that this Court is bound by its own decisions and unless a decision has been arrived at on some manifest oversight or misunderstanding that is there has been something in the nature of a palpable mistake a subsequently constituted Court has no right to prefer its own reasoning to that of its predecessors — such preference, if allowed, would produce endless uncertainty and confusion.’

[10] In any event, I disagree with Nienaber JA’s point of departure that an interim order of attachment has a mere holding effect.¹⁶ Even if it has, it does not dispose of the fact that once the creditor obtains possession lawfully, the pledge is perfected. The learned Judge also held that had it been otherwise,

‘it would mean that in all kindred cases a real right supposedly vesting in a bondholder on the execution of a provisional order of attachment would thereafter be abrogated

¹⁴ Par 21.

¹⁵ Par 22.

¹⁶ Par 40 of the judgment.

should the provisional order be discharged on the return date, be it at the instance of the liquidator or a third party or because the court for good reasons resolved to exercise its discretion against the bondholder.’

With respect, I do not perceive the problem. The rule can only be discharged on grounds that go to the root of the creditor’s entitlement to possession. ‘New facts’ which the court can take into account have to be of that class and not extraneous facts such as those introduced in this case.¹⁷ I also do not understand the reference to the court’s discretion. Although aware of dicta by Didcott J¹⁸ to the effect that there is a discretion, I cannot see how a court, in the exercise of its discretion, can refuse an order to an applicant who has a right to possession of a pledged article to take possession.¹⁹ The principles relating to the limited discretion to refuse specific performance apply only where the creditor has another remedy, such as a claim for damages, at its disposal. A claim for damages cannot replace a claim for real security. In the absence of a conflict with the Bill of Rights or a rule to the contrary, a court may not under the guise of the exercise of a discretion have regard to what is fair and equitable in that particular court’s view and so dispossess someone of a substantive right.

[11] It may be mentioned that Roux J’s order, which followed the terms of the applicant’s notice of motion, was not happily framed and gave rise to

¹⁷ Cf *Weare v ABSA Bank Ltd* 1997 (2) SA 212 (D) 217B-G.

¹⁸ *Barclays National Bank Ltd and Another v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd and Others* 1982 (4) SA 650 (D).

¹⁹ Cf the tentative observations in *International Shipping Co* at 84F-H.

some debate. A better formulation would have been to authorise the applicant to perfect its pledge by taking possession of the goods instead of ordering that the pledge is perfected by the order (which it is not) and then permitting attachment of those goods. However, by permitting the applicant to take possession, Roux J allowed it to perfect its pledge. Any other interpretation of the order does not do justice to the order read as a whole.

[12] My conclusion thus far is that the intervening liquidation of Eurotile did not stand in the way of a confirmation of the rule nisi. There are, however, two further matters that have to be mentioned. The first concerns the provision in the bond that entitled Contract Forwarding to effect *parate executie*, which, according to longstanding authority is valid in relation to movables.²⁰ However, Froneman J²¹ found that this common-law rule offends against the Constitution. The judgment was trenchantly criticised by Prof Susan Scott.²² The issue need not be pursued here because, by agreement between all concerned and by a court order, the relevant assets have been sold and the proceeds kept on deposit pending the determination of this case.

[13] The rule *nisi* cannot be confirmed unless the pledge was perfected in good time. Chesterfin squarely raised this issue on the papers, albeit as an alternative, as a ground why the rule should not be confirmed. Since the joint liquidators have been joined in these proceedings, we are entitled and bound to pronounce on the issue. The matter was not seriously raised during argument on behalf of Chesterfin and it will suffice to deal with it cursorily.

[14] On serving the order, the Sheriff secured the premises and made an inventory and thereafter handed the keys of the premises to Contract Forwarding's attorneys. Contract Forwarding exercised effective control over the business, placed security guards around it and placed a candidate attorney in charge of the business (the business formed part of the movables pledged). The high watermark of Chesterfin's written submissions is that this possession amounted to symbolic possession or *constitutum*

²⁰ *Osry v Hirsch Loubser & Co Ltd* 1922 CPD 531 at 547.

²¹ *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (E).

²² 'Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds' 2002 *THRHR* 656.

possessorium, which cannot perfect a pledge. Both submissions are devoid of any merit. There is no rule that provides that symbolical transfer of possession (like the handing over of keys) is not sufficient to constitute a pledge.²³ It is different with *constitutum possessorium*, a method of delivery that presupposes that the goods remained under the physical control of the debtor. That simply did not happen in this case.

[15] It follows that the appeal stands to be upheld. Because of the lapse of time and the intervening events it appears to be inappropriate simply to confirm the rule *nisi*. A suitable declaratory order to cater for the present circumstances would be more apposite.

[16] The following order is made:

- (a) The appeal is upheld with costs, including the costs of two counsel.
- (b) The order of the Court *a quo* is set aside and substituted with an order –
 - (i) declaring that Contract Forwarding (Pty) Ltd perfected its notarial bond BN 71188/2000 by taking possession of the movables therein mentioned before the advent of a *concursum creditorum*;
 - (ii) ordering the intervening creditor (Chesterfin (Pty) Ltd) to pay the costs occasioned by its opposition and its intervention application, including the costs of two counsel.

JUDGE OF APPEAL

L T C HARMS

²³ CG van der Merwe *Sakereg* 2ed 656-657.

Agree:

SCHUTZ JA
SCOTT JA
BRAND JA
HEHER AJA