THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable /

CASE NO: 77/2003

In the matter between :

IKEA TRADING UND DESIGN AG Appellant

and

BOE BANK LTD Respondent

Before: **ZULMAN, FARLAM, NUGENT, LEWIS JJA & PONNAN AJA**

Heard: **18 MARCH 2004**

Delivered: **1 APRIL 2004**

Summary: ***Meaning of s 1(1) of the Security by Means of Movable Property Act 57 of 1993: description of property in a notarial bond must be such that it is readily recognisable from the description alone: resort to evidence that supplements the description is impermissible.***

J U D G M E N T

CH LEWIS JA

[1] The meaning of s 1(1) of the Security by Means of Movable Property Act 57 of 1993 is squarely in issue in this appeal. The section provides:

'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 recognizable, 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 of the bond; 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 had expressly been pledged and delivered to the mortgagee.'

The central issue is whether a bond registered under the section complied with its requirements such that the 'mortgagee' had security in the movable property referred to in the bond, and thus ranked as a secured creditor when the debtor was liquidated.

[2] The first respondent, BOE Bank, is the holder of a general covering notarial bond passed in its favour by Woodlam Industries CC ('Woodlam') over the latter's assets in 1991. Woodlam was placed in final liquidation on 28 October 1999. BOE Bank applied to the Eastern Cape High Court for an order that the liquidation and distribution account in respect of Woodlam Industries CC be redrawn so as to reflect its preference by virtue of that bond. At the time of liquidation Woodlam owed BOE Bank R2 403 852.20. The first and second respondents are the liquidators of Woodlam, the

first respondent having been responsible for the drawing of the distribution and liquidation account.

[3] The appellant, the third respondent in the court of first instance, is Ikea Trading und Design AG ('Ikea'), which in 1998 had had registered in its favour a special bond, purportedly under s 1(1) of the Act, over assets of Woodlam listed in a schedule to the bond. The basis on which BOE Bank has attacked this bond is that it did not comply with the requirements of the section in specifying and describing the assets referred to in the bond in a manner which rendered the assets readily recognisable, and that the bond accordingly did not confer on Ikea real security over the items listed. The liquidation and distribution account reflected the sum owing by Woodlam to Ikea as R2 619 951.44.

[4] BOE Bank succeeded before Mbenenge AJ in the court below in obtaining an order (1) directing the first respondent to redraw the liquidation and distribution account; (2) declaring that the descriptions of the assets referred to in Ikea's 'mortgage bond' did not specify the relevant assets in a manner that rendered them 'readily recognisable'; and (3) declaring that the bond registered in 1991 in favour of BOE Bank conferred a preference on it such that BOE Bank's claim was to rank ahead of Ikea's, and other preferent concurrent claims. Ikea now appeals against the order with the leave of this court.

[5] The principal contention of Ikea on appeal is that the property listed in the bond that was registered pursuant to s 1(1) of the Act can be identified with the aid of extrinsic evidence: thus, it

argues, it has a deemed pledge in them, and accordingly ranks as a secured creditor in the estate of Woodlam.

[6] BOE Bank contends, on the other hand, that the assets must be identifiable from the bond itself, and that extrinsic evidence cannot be led to establish what they are. If such evidence were admissible, then creditors of the pledgor, and of course prospective purchasers, might well be defrauded. The purpose of the section, argues BOE Bank, is to create a deemed pledge that gives to third parties the same notice as would a real pledge – one that requires actual delivery of the assets secured to the pledgee. If the bond does not constitute notice itself – but has to be read with reference to other documents or identification outside of the bond – then the object of the legislation would be defeated.

[7] It is clear that without reference to invoices and other documents in respect of the items enumerated, or without the intervention of some person who is able to say (with or without reference to Ikea's documentation) that the particular item listed is subject to the bond, the items cannot be identified as those listed in the bond. The assets allegedly bonded are set out in an annexure to the bond. It is a schedule with three columns. The schedule divides the assets into different categories: 'machinery', 'vehicles' and 'factory equipment'. The headings of the three columns for machinery are, respectively, 'Description', 'Date of Acquisition' and 'Supplier'. It is perhaps useful to give some examples, randomly chosen, at this stage.

'Grecon Optimiser: 1 Aug 1991: Grencor

Weinig Moulder and Infeed: 1 Aug 1990: Weinig

Nipples and Couples: 30 May 1991: Atlas Airpower

Rip Saw: 1 Aug 1990: Braun Woodwork.'

Vehicles include 'Mercedes Truck'; 'Forklift'; 'Uno X 2'; 'Truck with crane'. Factory equipment includes items such as '3 roller table trolleys', 'tube caps and steel plates', '10 T-bar cramps'. The list of all these items extends over 12 A4 pages.

[8] How, asks BOE Bank, does one determine what a 'Grecon Optimiser' is, let alone which one (if there is more than one item of the same name) is subject to the bond? How does one determine which Mercedes truck or Uno vehicle is bonded? Ikea responds by saying that one must have regard to the invoices for each item, which together constitute an asset register, and, where necessary, to the evidence of a former employee of Woodlam who is able to identify the machinery.

[9] However, it was clear from the evidence of the manager of BOE Bank and others that even where a machine could be identified, for example as *a* Grecon Optimiser, there was no way in which one could tell that it was the particular machine referred to in the bond. Reference to invoices, or to the suppliers or manufacturers, did not assist in this regard. Not a single item, contended BOE Bank, could be determined by reference to the bond alone. Not only were the descriptions in many instances vague, but there was no means of identifying even the most valuable of machinery and vehicles as the ones that had been bonded.

[10] The test for determining whether an item is 'readily recognisable' from the bond in terms of s 1(1), contends BOE Bank, is whether third parties can determine the identity of each

asset without regard to extrinsic evidence. This is essential, it argues, to avoid fraud and controversy, and leave no room for conflict.

[11] In my view, the correctness of this test is evident from the wording of the section itself: the property must be '*specified and described in the bond* in a manner which renders it *readily recognisable*' (my emphasis). Of course the description of the property in the bond must be related to the reality on the ground. In dealing with a contract for the sale of land, where the material terms are required by statute to be in writing, Watermeyer CJ said in *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 990:

'A contract of sale of land in writing is in itself a mere abstraction, it consists of ideas expressed in words, but the relationship of those ideas to the concrete

things which the ideas represent cannot be understood without evidence. . . . In a Court of law, of course, in every case evidence is essential in order to identify the thing which corresponds to the idea expressed in the words of the written contract. The abstract mental conception produced by the words has to be translated into the concrete reality on the ground by evidence.'

But evidence of that nature does not supplement the document. It simply correlates the description with the property.[1]

[12] In the present case Ikea seeks to interpose another source of identification of the property – a person who will say from his own knowledge, or from reference to Ikea's records, whether a particular item was acquired from a particular supplier on a particular date. That entails recognition by virtue of reference to a person or another document, and not recognition from the bond itself. That kind of extrinsic evidence is inadmissible because it

does not explain the bond or relate the description to the property, but seeks rather to supplement it.

[13] Where one is dealing not just with the interpretation of a contract between 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.

[14] This conclusion is reinforced by having regard to decisions of the erstwhile Natal courts that dealt with similar legislation applicable, until the passing of the Security by Means of Movable

[1] See also *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) paras 6

Property Act, in that province (the Notarial Bonds (Natal) Act 18 of 1932 (the 'Natal Act')). It is not necessary to deal with the history of that legislation here. Suffice it to say that in Natal the courts had recognised that a notarial bond could confer on the holder not only a preference on the insolvency of the debtor (as was assumed to be the case elsewhere in the country) but also a secured right in the assets bonded. The Natal legislation was passed in order to restore the rights that bondholders in Natal had held prior to an amendment to the Insolvency Act 32 of 1916. The development of the law relating to the Natal bondholder's position, and the legislation enacted to restore it, are fully discussed in several cases, including *In re Umlaas Wool Washing and Milling Co Ltd (in liquidation)* 1934 NPD 18; *Rosenbach & Co (Pty) Ltd v Dalmonte*

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and 14 and the cases there cited.

1964 (2) SA 195 (N) and *Nedbank Ltd v Norton* 1987 (3) SA 619 (N).

[15] The current Act was intended to extend the availability of the security made possible by the Natal Act to South Africa as a whole.[2] Case law dealing with the Natal Act thus remains of some relevance in interpreting s 1(1) of the current Act. It is significant, however, that the wording of the Natal Act is different. Section 1 provided that the Act applied 'only to movables situate within the Province of Natal, and shall apply to a notarial bond only in so far as such bond hypothecates movables *specially described and enumerated therein:* . . .' (my emphasis).

[2] The Act was passed pursuant to the recommendations of the South African Law Commission contained in a report entitled 'Report on the giving of security by means of movable property', published in February 1991. Paragraph 5.5.1 of the report expressly states that the notarial bond in Natal should be extended to the rest of the Republic. See also

[16] In the *Rosenbach* case, above, Caney J (delivering the judgment of the full court) stated that the Natal Act was 'concerned to prescribe safeguards in the interests of other creditors by requiring definition of the movables hypothecated 'in order to render identification as easy as possible with a view to shutting the door to frauds and reducing controversy to a minimum' (at 201H-202A). The learned judge thus held (at 204G-205A) that –

'[I]t 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 or kind of each of them, and also the number of them, (eg so many 1 lb tins of A make of 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 a stock list) described so that at any given moment they may be identified;

Bokomo v Standard Bank van SA Bpk 1996 (4) SA 450 (C) at 454E-F and 17 *Lawsa*

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

[17] In reaching this conclusion the court had regard to several English cases dealing with bills of sale, governed by a statute that required an inventory of chattels 'specifically described'. In *Carpenter v Dean* [1889] 23 QBD 566 Fry LJ said (in a passage quoted in *Rosenbach* at 205E-G) that the words 'specifically described' were used

' . . . to facilitate the identification of the articles enumerated in the schedule with those found in the possession of the grantor – that is to say, to render the identification as easy as possible, and to render any dispute as to the intention of the parties as rare as possible, and to shut the door to fraud and controversy, which almost always arise when general descriptions are used.

(reissue) para 516. Section 1(3) of the Act regulates the effect of any other notarial bond

That is to be done as far as possible; by which I mean, as far as is reasonably possible – so far as a careful man of business trying to carry the object of the Act into execution could and would do without going into unreasonable particulars.'

[18] 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 property is subject to another's right – that that particular thing is encumbered.

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registered before the commencement of the Act (7 May 1993).

[19] In my view the learned judge in the court below was correct in finding that the legislature, when enacting the Act, must be assumed to have been aware of the provisions of the Natal Act, and the cases that interpreted it. The introduction of the phrase 'readily recognisable', and the use of the words 'specified and described' (instead of 'specially enumerated', the term used in the Natal Act) indicate that the legislature intended a stricter test to be applied than did the Natal Act. It would thus not be sufficient to describe the property by reference to quantity and kind (as was suggested by Caney J in *Rosenbach*): the property itself must be 'specified'.

[20] 'Specify', according to the Shorter Oxford English Dictionary, means 'To mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly; to relate

in detail'. 'Describe' means 'To set forth in words by reference to characteristics; to give a detailed or graphic account of'. 'Readily' means 'Quickly, without delay; also without difficulty, with ease or facility'. 'Recognisable' means 'Capable of being recognised', and 'recognise' means 'To know by means of some distinctive feature; to identify from knowledge of appearance or character'.[3]

[21] In my view, therefore, for property to be pledged in accordance with s 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

[3] These definitions are appropriate samples of the meanings attributed in the Shorter OED

pledge and it is not enough to describe it only with reference to its generic characteristics. Nor is it sufficient to describe generic items with reference to the source or date of acquisition, as in this case, for then they are recognisable not from the description in the bond but rather from an 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).

[22] Section 1(1) states that the movable property bonded is 'deemed to have been pledged' as 'effectually as if it had expressly been pledged and delivered to the mortgagee'. In my view, therefore, the bond must, in so far as possible, have the same characteristics as does a pledge. Third parties must be able to tell,

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and are not exhaustive.

without reference to extrinsic evidence, that the creditor has a right in the property pledged. For a pledge to be valid the creditor (pledgee) must be in possession of the property. That is why a pledge cannot be effected by *constitutum possessorium*.[4] If the owner of the property were to remain in possession of the property, the likelihood that third parties, such as other creditors or prospective purchasers, would be deceived would be greatly increased. The fact of actual physical control of the pledged property constitutes notice to the world that someone other than the owner has a right in the property, and in particular, the power to control the property. Thus for property to be deemed to be pledged, under s 1(1) of the Act, the bond in question must, without reference to the owner or anyone else, make readily identifiable the property so pledged. Any person seeking to

[4] See, for example, *Goldinger's Trustee v Whitelaw & Son* 1917 AD 66 and *Vasco Dry*

establish, from information in a deeds office, whether a debtor's property is encumbered, must be able to do so from the bond itself.

[23] The importance of being able to determine the asset pledged from the bond itself was emphasised in relation to the Natal Act in *Durmalingam v Bruce NO* 1964 (1) SA 807 (D) at 812G-813B. In holding that the 'public generally' should be able to identify the property bonded, without recourse to extrinsic evidence, Friedman AJ stated that the purpose of requiring movables to be 'specially described and enumerated' was to 'give notice to the public generally of the movables specially hypothecated under the bond'. Thus, the court held, a term could not be implied into the bond in question since the implication would depend on the leading of

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Cleaners v Twycross 1979 (1) SA 603 (A) at 611G-612D.

extrinsic evidence of facts known only to the parties – and that would inevitably be to their prejudice.

[24] The consequence of that is that one cannot simply enumerate items in a bond and create a deemed pledge without more. The property must be so described that only it, and not other property of like kind, can be identified as that which is pledged. In my view there should be no difficulty in identifying machinery, vehicles, even furniture, that is bonded by reference to labels, numbers or bar codes. The Grecon Optimiser, or the Uno vehicle – each of the assets enumerated – could be given an identifying mark referred to in the bond. The third party would then readily be able to recognise the thing from the reference in the bond. What is essential is that each item pledged must be recognisable from its description in the bond.

[25] The notarial bond registered by Ikea over the movable property of Woodlam accordingly does not meet the requirements of s 1(1) of the Act. The assets enumerated are not specified and described in the manner required by the section. That some of them could be, and indeed were, identified with the aid of extrinsic evidence does not help Ikea. Third parties – indeed even the liquidators – were not able to take the bond and correlate the so-called descriptions with the assets on the factory floor. In the circumstances the bond did not create a deemed pledge over the property of Woodlam, and Ikea was not a secured creditor.

[26] The appeal is accordingly dismissed with costs.

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C H Lewis
Judge of Appeal

Concur:
Zulman JA
Farlam JA
Nugent JA
Ponnan AJA