

IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 20739/2011

In the matter between:

**ABSA Bank Limited**

**Applicant**

And

**Semi Conductor Services Export Division  
(Proprietary) Limited**

**Respondent**

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**JUDGMENT DELIVERED ON 1 MARCH 2012**

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**Baartman, J**

- [1] ABSA Bank Limited (**the applicant**) seeks to perfect a notarial bond over the respondent's, Semi Conductor Services Export Division Limited, moveable property.
- [2] It is common cause that a notarial bond, no.BN49988/2007, was registered over the respondent's immovable property in favour of the applicant. At the time, the respondent, on the applicant's version, operated a hotel, Hotel Formula 1, from 144 Donkin Street in Beaufort West, in the Western Cape (**the Donkin street property**).

The respondent was also the registered owner of Beaufort West Erf 303 over which 2 mortgage bonds were registered in favour of the applicant, B25133/1996 and B58872/2007.

- [3] The applicant alleged that the respondent had defaulted on its bond repayments and that it was entitled to perfect the notarial bond. The applicant, in response to the respondent's denial of default, put up the payment history of the account relevant to this application. The payment history indicated that an instalment of R7 442.27 was due. The respondent has not disputed the alleged instalment. The payment history further indicated that the respondent only paid R4 000 in January 2011, R3 000 in February 2011 and R3 000 in March 2011. I do not repeat all the payments as they appear from the payment history; suffice it to say, the trend of short payments continued with sporadic increases in payments in an apparent attempt to make up for the short payment of previous months.
- [4] The respondent has not disputed the correctness of the payment history. I therefore accept it as correct. It follows that the respondent defaulted as alleged by the applicant. I am persuaded that the respondent's denial of alleged default is such that it does not raise a *bona fide* dispute of fact and stands to be rejected on the papers. (See **Truth Verification Testing Centre CC v PSE Truth Detection CC** 1998(2) SA 689.)
- [5] That finding is relevant to an enquiry into the applicant's right to seek the perfection of the notarial bond. The terms of the notarial bond relevant for purposes of this judgment are as follows:

*"... The Appearer hereby declares to bind generally the Mortgagor's movable property both such as the Mortgagor already may or may in future become possessed of, without any exception, submitting them all and the choice thereof to constraint and execution as the law*

*directs as well as, without limiting the generality of the foregoing, the following movable property:*

***All Fixtures and Fittings***

*presently located at Hotel Formula 1, 144 Donkin Street, Beaufort West 6970*

*as well as the Mortgagor's right, title and interest in and to any exiting lease or hire or suspensive sole agreement in regard to any or all of the foregoing movable property. ....*

***Clause 10***

*That in the event of any defaults by the Mortgagor in the observance or Performance of any of the conditions of this Bond or the failure of the Mortgagor or discharge any obligation or liability to the said Bank on the due date thereof or to pay on demand any sum which may be legally claimable by the said Bank or in the event of any creditor seeking to take judgment in any competent court and/or to attach goods or any portion thereof, or if in the opinion of the said Bank its security hereunder requires to be perfected by possession, then and in such cases the said Bank shall at its sole option be entitled forthwith to consider the amount of the Mortgagor's indebtedness to be legally claimable and due without notice and the said Bank may forthwith proceed for the recovery thereof, ..." my emphasis*

[6] I am persuaded that the applicant was entitled to perfect the bond pursuant to the respondent's default.

[7] Even if I am wrong, the applicant has set out facts from which it could reasonably have inferred that it was appropriate to perfect the bond as it was entitled to do in terms of paragraph 10 of the notarial bond referred to above. Those facts are as follows:

(a) Gerrit Geyser Van Zyl (**Van Zyl**), the sole member of the respondent, is under debt review.

- (b) Van Zyl is also the sole trustee of the Moto Trust as well as the sole director and shareholder of Westgate Motors (Edms) Bpk.
- (c) The Moto Trust is indebted to the applicant and the applicant has issued summons, under case number 14978/2011, for the recovery of that debt. Westgate Motors is also a defendant in that action. The action is defended and pending.
- (d) The respondent stood surety for the Moto Trust debt but was unable to satisfy its indebtedness in respect of the surety when called upon to do so.
- (e) The applicant served a demand in terms of section 345 of the Companies Act, 61 of 1973 on the respondent. The respondent has not denied that the provisions are applicable to the debt, nor has it responded to the demand. It follows that the respondent is deemed to be unable to pay its debts.

[8] The respondent has alleged that the notarial bond was obtained in a fraudulent manner and therefore was invalid. The respondent has alleged the fraud as follows:

- (a) The respondent is the owner of the Donkin Street property, referred to in paragraph 2 above. It had entered into a 25-year lease with the Formula 1 Group and that group is operating a hotel from the premises.
- (b) The immoveable property at the Donkin Street property belongs to the Formula 1 Group. The respondent alleged that Fannie Erasmus, at the time an employee at the applicant's Oudtshoorn branch, was aware that the moveable property at the Donkin Street premises belonged to a third party. Therefore, so the respondent contends:

*"11.9 ...the notarial bond on which this application is based must have been acquired erroneously or fraudulently.*

*11.10 In order to follow the paper trail that resulted in the inception/existence of this notarial bond ...which at this point in time seems to have been created fraudulently as the respondent has no movables whatsoever that could have been given as security to the Applicant."*

- [9] The respondent has relied on the matter of **Bokomo v Standard Bank van SA Bpk** 1996 (4) SA 450 (KPA ) for the proposition that because the moveable property at the Donkin Street property belonged to a third party when the notarial bond was registered, the bond was invalid. The Bokomo matter is not authority for that proposition. Instead, Blignault AJ, as he then was, found at 454 paras F–I:

*"...Dit blyk uit die getuienis wat deur appellant aangebied is (wat ons vir doeleindes van die uitspraak aanvaar), dat Minassian op 29 September 1993 die eienaar van die toerusting geword het. Die notariële verband is egter reeds op 26 Mei 1993 geregistreer.*

*Namens respondent is voor ons betoog dat al het Minassian eers eienaar van die toerusting geword nadat die notariële verband geregistreer is, sodanige verkryging van eiendomsreg deur Minassian aan die pandgewing kragtens die notariële verband regswerking gegee het voordat appellant enige regte daarop gekry het. As ondersteuning vir die betoog is verwys na die volgende stelling in Wille's Mortgage and Pledge in South Africa 3de uitg (deur Scott an Scott) te 35:*

*'If a person mortgages the property of another without the latter's consent or authority, and the mortgagor subsequently acquires the dominium of the property, the acquisition of the dominium has the effect of making the mortgage valid."*

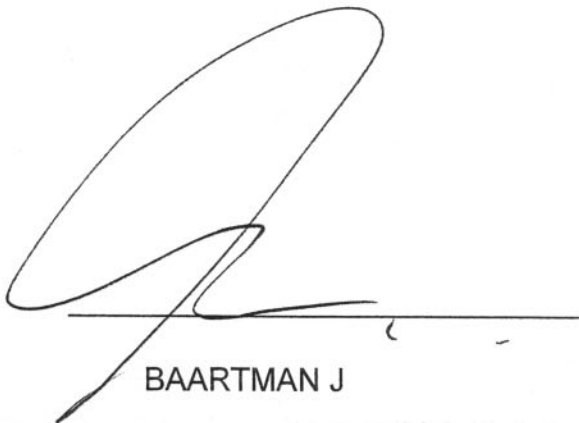
*Die gesag waarna die skrywers verwys ter staving van die stelling, te wete Codex 8.16.5, Digesta 13.7.41, Van Leeuwen Censura*

*Forensis 1.4.7.18, Voet Commentarius ad Pandectas 20.3.4, Pothier ad Pandectas 20.1 n 18 en Burge Colonial Laws band 3 te 172, handel natuurlik met gemeenregtelike pandgewing. Na my mening behoort dieselfde reël egter ook ten opsigte van die statutêre pandgewing kragtens art 1 van die Wet te geld. .."*

## CONCLUSION

[10] I am persuaded that the applicant is entitled to perfect its notarial bond over any moveable property belonging to the respondent. I, therefore made the following order.

(a) The application is granted in terms of the draft annexed hereto  
"X"



BAARTMAN J

IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)



**ON THURSDAY, 1 MARCH 2012**

**BEFORE THE HONOURABLE Ms JUSTICE E D BAARTMAN**

Case No: 20739/2011

In the matter between:

**ABSA BANK LIMITED**

Applicant

and

**SEMI CONDUCTOR SERVICES EXPORT  
DIVISION (PROPRIETARY) LIMITED**

Respondent

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**DRAFT ORDER**

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Having read the papers filed of record and having heard counsel for the parties, it is hereby ordered as follows:

1. The notarial bond BN49988/2007 held by the Applicant is perfected and the Respondent is ordered to point out and to hand over to the Sheriff of the High Court, all movable property owned by it and held at –
  - 1.1 144 Donkin Street, Beaufort West, Western Cape; and
  - 1.2 any other place.

2. All movable property ("*goods*") pointed out as aforesaid, or found by the Sheriff, shall be attached by the Sheriff who shall hand possession thereof to the Applicant, who shall hold such goods as security for payment of all monies due and payable by the Respondent to the Applicant, including interest, costs and expenses.
3. This order will not prejudice any real rights held by any other creditor of the Respondent.
4. The Applicant is authorised to –
  - 4.1 take possession of all goods attached by the Sheriff in terms of this order, and to take all such steps as may be required in order to sell or otherwise dispose of the goods in such manner and on such terms and conditions as the Applicant may deem necessary;
  - 4.2 transfer ownership of the goods sold as aforesaid to the purchaser(s) thereof;
  - 4.3 accept payment for the goods sold as aforesaid, and to apply set-off in respect of the amounts so received against the Respondent's indebtedness to the Applicant, and to pay to the Respondent any excess amount, or in the event of any shortfall to proceed against the Respondent for the payment thereof.



5. The Respondent shall pay the costs of this application on the scale as between attorney and client, as taxed or agreed.

**BY ORDER OF THE COURT**

**COURT REGISTRAR**