IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case No: 490/2000

In the matter between:

THE DEVELOPMENT BANK OF SOUTHERN AFRICA LIMITED Appellant

and

J H J VAN RENSBURG N O
F ZONDAGH N O
N SIMON N O Respondents
(in their capacities as joint provisional liquidators of
SERIOUS MILLS (PTY) LTD (IN LIQUIDATION)

Coram: Nienaber, Streicher and Navsa, JJA

Heard: 8 March 2002

Delivered: 14 May 2002

Cession *in securitatem debiti* – general notarial bond - cessionary may enforce ceded rights upon default of mortgagor - mortgagee who acquired possession before commencement of winding-up of mortgagor a secured creditor as if a pledgee.

J U D G M E N T

STREICHER, JA/

STREICHER JA:

[1] On 24 August 2000 the Bophuthatswana Provincial Division ('the court *a* quo') discharged a rule *nisi* in terms of which Serious Mills (Pty) Ltd ('Serious Mills') was called upon to show cause why a provisional order made against it should not be made final. The order provisionally authorised the appellant, 'in order to perfect its security under notarial bond BN 770/99' ('the notarial bond') to take 'possession of all the movable property and assets covered by the said notarial bond'. On the return day the court *a quo* discharged the rule *nisi* because subsequent to the granting of the rule *nisi,* a provisional winding-up order had been granted against Serious Mills. With the necessary leave the appellant appeals against the order by the court *a quo* and contends that the rule *nisi* should have been confirmed.

[2] On 10 March 1999 the appellant, the Agricultural Bank and Serious Mills entered into a number of related transactions. They included:

1 An agreement between appellant and the Agricultural Bank in terms of which the appellant lent and advanced to the Agricultural Bank an amount of R7 200 000.

2 An agreement between the Agricultural Bank and Serious Mills in terms of which the Agricultural Bank agreed to lend and advance R7 200 000 to Serious Mills ('the agreement of loan'). The agreement provided that, in the event of Serious Mills failing to make payment of any amount on due date, the Agricultural Bank would be entitled to demand immediate payment of all amounts outstanding in terms of the agreement.

3 A power of attorney by Serious Mills to an attorney to register the notarial bond in favour of the Agricultural Bank, hypothecating all its movable property to the Agricultural Bank, as security for the performance by it of its obligations in terms of the agreement of loan. The notarial bond provided that, in the event of Serious Mills failing to make payment of any amount, the full amount payable in terms of the agreement of loan would become payable and the Agricultural Bank would become entitled to foreclose the bond and to take possession of the property hypothecated.

4 An agreement between the Agricultural Bank and the appellant in terms of which the Agricultural Bank, as security for the

performance by it of its obligations to the appellant, pledged and ceded to the appellant, among others, all its rights in terms of the notarial bond ('the deed of pledge and cession').

[3] Serious Mills failed to make payment of the interest instalment payable on 31 March 1999 or to make any other payments in terms of the agreement of loan. On 9 September 1999 it came to the appellant's notice that an application for the winding-up of Serious Mills would be moved the following day. The appellant, thereupon, on the same day, pursuant to an urgent application by it, obtained the aforesaid rule *nisi* and interim order which, *inter alia,* provided as follows:

'2 In order to perfect its security under notarial bond BN770/99 the Applicant is provisionally declared to be entitled and authorized to take possession of all the movable property and assets covered by the said notarial bond, which assets are situate at the premises of Serious Mills (Pty) Ltd, corner of Aerodrome Crescent and Agro Road, Industrial Sites, Mafikeng, or wherever else they may be found.

3 The applicant is authorized to hold the assets as security for the payment of all amounts owing by the Respondent to the Applicant and to retain possession thereof until such time as all amounts so owing have been paid.

4 The applicant is authorized to deal with the asets in terms of powers conferred upon it by the said notarial bond and in accordance with law, save that prior to confirmation of the Rule Nisi the Applicant shall not sell, alienate or otherwise dispose of any of the assets.

5 The Respondnet is ordered to deliver all the assets in its possession to the Applicant.

6 The Deputy Sheriff is authorized to attach and remove all assets and place them in the possession of the Applicant.

7 That a Rule *Nisi* do issue returnable on Thursday the 30th September 1999 at 10:00 or so soon thereafter as Counsel may be heard calling upon the Respondent to show cause why:

7.1 the Orders contained in paragraphs 1 to 6 above should not be made final; and

7.2 the Respondent should not be ordered to pay the costs of this application.'

[4] Instructed by the appellant, the Sheriff, on 10 September 1999, attached the movable property of Serious Mills. After such attachment an application for the winding-up of Serious Mills was served at its premises. The application was

subsequently issued by the registrar of the court *a quo* and a provisional winding-up order was granted on the same day.

[5] On the return day of the rule *nisi* the respondents, who had been appointed as joint provisional liquidators of Serious Mills, opposed the confirmation of the rule.

[6] The court *a quo* held that inasmuch as the provisional order of attachment and the grant of the provisional winding-up order took place on the same day (which did not happen) the provisional winding-up order had to take precedence over the order of attachment. Furthermore, that the rule had to be discharged in the light of the decisions in *International Shipping Company (Pty) Ltd v Affinity (Pty) (Ltd) and Another*[1] (‘*International Shipping’*) and *Trisilino v De Vries*[2] (‘*Trisilino’*).

[1] 1983 (1) SA 79 (C).
[2] 1994 (4) SA 514 (O).

[7] The grant of the provisional order of attachment and of the provisional winding-up order did not take place on the same day. The court *a quo* probably meant to say that inasmuch as the attachment of the movable property of Serious Mills took place on the day on which the provisional winding-up order was granted, the provisional winding-up order had to take precedence over the attachment. In their heads of argument the respondents contended that this finding of the court *a quo* was correct. Before us they did not press this submission but did not abandon it either.

[8] Sections 348 and 359(1)(b) of the Companies Act 61 of 1973 provide as follows:

> ‘348 A winding-up of a company by the Court shall be deemed to commence at the time of presentation to the Court of the application for the winding-up.’
>
> ‘359 (1) When the Court has made an order for the winding-up of a company . . .
>
> (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void.’

The attachment took place before the presentation to the court of the application for the winding-up of Serious Mills. However, the respondents submitted that the phrase ‘at the time’ in s 348 should be interpreted to mean ‘on the date’. They submitted that to interpret the phrase as referrring to the specific time of the day would lead to insurmountable disputes. In my view the ordinary meaning of the phrase ‘at the time’ is ‘at a specific point in time’ and there is no reason to interpret the phrase as used in the section, differently. If the intention was that the winding-up should commence on the day of the presentation of the winding-up it could easily have been said. Furthermore, the section should be interpreted restrictively in that it retrospectively avoids transactions that may have been perfectly legitimate at the time they were entered into. I cannot agree that to interpret the phrase as referring to the specific time of the day would lead to insurmountable disputes.

[9] Before dealing with the second ground on which the court *a quo* discharged the rule *nisi,* another submission advanced by the respondents should be dealt with first. It is convenient to do so in that in terms of that submission the rule *nisi* and interim order should not have been granted.

[10] In terms of clauses 2.1 and 2.2 of the deed of pledge and cession the Agricultural Bank, as security for the proper and timeous performance by it of all its obligations under the principal agreement, pledged and ceded to the appellant **all** rights, benefit, monies and interest which it had relating to and arising out of the pledged securities. The pledged securities included the notarial bond. The respondents submitted that the cession only entitled the appellant as cessionary to enforce the rights ceded in the event of the Agricultural Bank's (i.e. the cedent's) failure to perform its obligations. As authority for this proposition they relied on *Volhand & Molenaar Ltd v Ruskin and Another*

NNO[3] (‘*Volhand & Molenaar’*) in which Hiemstra J said in respect of a cession *in securitatem debiti* of debts:[4]

> ‘The cessionary may not start collecting immediately. He may only do so if and when his own debtor (the cedent) defaults.’

However, that statement was made in the light of a specific agreement to that effect. Earlier on in that judgment Hiemstra J said:[5]

> ‘The normal - or in any case not unusual - position where debts are ceded as security for a debt owed by the cedent, is that the cessionary (who is the creditor in respect of the secured debt) can immediately proceed to recover the ceded debts if they are due and payable. When he has recovered an amount equal to the secured debt, he is normally obliged to re-cede the balance, if any, and to pay to his debtor any excess he may have collected.’

[11] In the instant case the appellant lent and advanced an amount of R7 200 000 to the Agricultural Bank and the Agricultural Bank in turn lent and advanced that amount to Serious Mills. As security for its indebtedness to the

[3] 1959 (2) SA 751 (W).
[4] At 753F.
[5] At 753D-E.

Agricultural Bank, Serious Mills passed the notarial bond in favour of the Agricultural Bank. The Agricultural Bank in turn as security for its indebtedness to the appellant ceded and pledged **all its rights** in terms of the notarial bond to the appellant. In effect the notarial bond afforded security in respect of both the aforesaid debts. Having ceded all its rights in terms of the notarial bond to the appellant the Agricultural Bank no longer had the right to enforce the rights of the mortgagee in terms of the notarial bond until such time as it had paid its debt to the appellant. It follows that the Agricultural Bank could not perfect the security afforded by the notarial bond by foreclosing the bond when Serious Mills defaulted. See in this regard *National Bank of South Africa Ltd v Cohen's Trustee*[6] in which Innes J said in respect of a cession *in securitatem debiti:*[7]

> 'The secured creditor, so far as the enforcement of the right is concerned, would seem to occupy a position practically equivalent to that of an owner. He alone can sue upon the ceded obligation: and he may do so for the full amount, however much in excess of the secured debt. (*Wetzlar vs*

[6] 1911 AD 235.
[7] At 251.

> *General Insurance Co., 3, J., p.86).* Nor need he excuss the pledgor before taking steps to realise the security (*Sande's* Decis. 3, 12, Def. 25). As was said in *Van der Byl vs Findlay and Kihn (9 J., p. 181):* "Until the debt for which the original security was given has been paid, he is entitled to all the rights of a cessionary."' (My underlining.)

See also *Bank of Lisbon and South Africa Ltd v The Master and Others*[8].

[12] The respondents submitted that the appellant did not have the right to foreclose the notarial bond either in that, on a proper interpretation of the deed of pledge and cession, Serious Mills' rights were ceded subject to a condition that they could not be exercised unless and until Serious Mills had failed to perform its obligations secured by the pledge and cession. They could not point to any express provision in the deed of pledge and cession to this effect but contended that such a condition was implicit in the wording of clauses 2.3 and 2.4 thereof.

[8] 1987 (1) SA 276 (A) at 294C.

[13] Clause 2.3 authorises the appellant to do certain things in the event of the Agricultural Bank failing to perform its obligations to the appellant. The appellant would have been entitled to perform some of these actions without any specific authority to do so and others not. The clause, furthermore, absolves the appellant from liablility should the Agricultural Bank suffer any loss or damages arising from or related to the exercise of its rights in terms of the clause. On the face of the agreement of pledge and cession clause 2.3 was inserted with the intention of confirming and conferring certain rights and not with the intention of curtailing rights ceded to the appellant in terms of clauses 2.1 and 2.2 of the agreement. The confirmation of certain rights, which the appellant had in terms of the cession is in my view an insufficient basis for inferring that the parties intended to restrict the appellant's rights to those specifically confirmed. No other basis for interpreting clause 2.3 so as to restrict

the appellant's rights to those specifically referred to in the clause was suggested by the respondent.

[14] Clause 2.4 authorises the appellant to realise the pledged securities in the event of the appellant becoming entitled to exercise its rights in terms of the agreement of pledge and cession. What those rights are has to be determined by reference to the other terms of the agreement. This clause therefore does not assist the respondents.

[15] It could not have been the intention of the parties that the appellant would, like the Agricultural Bank, not have the right of perfecting the security by foreclosing the notarial bond in the event of Serious Mills defaulting. Such an intention would have diminished the value of the notarial bond as security substantially without any reason for doing so. It must therefore have been the intention of the Agricultural Bank and the appellant that by ceding '**all the rights'** of the Agricultural Bank in terms of the notarial bond as security for its

indebtedness to the appellant, the appellant would, for so long as the debt by the Agricultural Bank to the appellant remained unpaid, have the right to foreclose the notarial bond in the event of Serious Mills defaulting. That that was the intention of the appellant and the Agricultural Bank is borne out by the fact that the Agricultural Bank requested the appellant to take action when Serious Mills defaulted.

[16] It remains to deal with the second ground on which the court *a quo* discharged the rule *nisi.* In my view the court *a quo's* reliance on *International Shipping* and *Trisilino* was misplaced. In *International Shipping* an application for provisional liquidation and an application for an order authorising the applicant to take possession of assets hypothecated in terms of a notarial general bond was heard at the same time. In respect of the latter application the court issued a rule *nisi* and granted an interim order authorising the applicant to take possession of the movable property and assets including the business of the

respondent. In respect of the former the court granted a provisional liquidation order. In order to safeguard the position of the applicant the court ordered that the rule *nisi* was to issue forthwith but that the provisional order of liquidation was to issue only at 9 am on the next morning. In terms of s 348 of the Companies Act the winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up. Such presentation occurred before the rule *nisi* and interim order were granted i.e. the winding-up commenced before the rule *nisi* and interim order were granted. Section 341(2) of the Companies Act provides that every disposition of its property by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court otherwise orders. Grosskopf J held[9]:

> 'The effect of the filing of the application for liquidation was therefore to change the nature and purpose of the order of Court which the applicant

[9] At 85F-G.

> sought (and still seeks). Prior to the filing, the applicant was *prima facie* entitled to insist that Affinity should perform its obligations under the bond. After the filing, Affinity was *prima facie* unable validly to perform its obligations if the application was pursued to finality. In the former event, a Court order would merely have enforced existing rights. In the latter event, a Court order would have created rights and obligations - it would have rendered valid what would or might otherwise have become void. Obviously the approach of the Court in granting or refusing an order would differ completely in the two different sets of circumstances.'

[17] Grosskopf J therefore held that the court which granted the rule *nisi* and interim order, after the filing of the application for liquidation, was not concerned with the enforcement of existing rights in terms of the notarial bond. As to whether that court intended to authorise a disposition of the respondent's property after the winding-up had commenced he found that the court had no such intention either but merely intended to preserve the applicant's rights pending the return day[10]. Grosskopf J was therefore not dealing with the question whether a rule *nisi* and interim order, which had been executed before

[10] At 86E-F.

the commencement of liquidation, should be confirmed. He had to decide whether or not to order a disposition of the property of a company after the winding-up of that company had commenced i.e. at a time when such a disposition would otherwise, in terms of s 341(2), have been void. Assuming that he had a discretion in this regard Grosskopf J stated that he could see no reason why he should exercise it in the applicant's favour[11]. Grosskopf J added that if, despite the fact that the company was under liquidation he had a discretion to order specific performance of the applicant's claim, he would not have exercised the discretion in favour of the applicant.

[18] It follows that *International Shipping* is no authority for the proposition that an interim order of attachment in terms of a notarial bond granted *ex parte* and executed before the commencement of the winding-up of a company may or should not be confirmed after the commencement of the winding-up.

[11] At 87C.

[19] In *Trisilino* the applicant applied for the enforcement of its rights in terms of a notarial general bond and obtained a rule *nisi* and an interim order to take immediate possession of the hypothecated movable property. He took possession in terms of the interim order but a provisional order of sequestration was granted before the confirmation of the rule. The rule was subsequently discharged on the basis that any right to delivery which the applicant may have had in order to transform his interest in movable property into a real right similar to that of a pledgee could only have been exercised against the respondent prior to sequestration. The court held that the fact that the applicant had taken possession of the movable goods in terms of the interim order before sequestration did not assist him in that the interim order was not intended to enforce rights but simply to preserve the applicant's rights. As authority for these findings the court relied on the decision in *International Shipping* to the effect that the rule *nisi* and interim order which were granted in that case was

not intended to enforce rights but simply to preserve the applicant's rights. However, the court erred in doing so. In *International Shipping* the court was, as was shown above, not dealing with the effect of a rule *nisi* and interim order made before the commencement of a winding-up but was dealing with an application for authority to dispose of property after the commencement of winding-up proceedings. Edeling J who gave the judgement in *Trisilino* said:

> 'The effect and intention of the interim order was clearly only to preserve the applicant's rights pending the return day.'[12]

If that is the intention of giving a mortgagee in terms of a general notarial bond immediate possession it would not make sense to discharge the rule when it is subsequently established that the mortgagee's right to possession was unassailable at the time when the provisional order was made.

[20] In terms of the present notarial bond the mortgagor bound all its movable property as security for the repayment of all amounts payable in terms of the

[12] At 519J.

notarial bond. However, that did not constitute the mortgagee a secured creditor. In order to qualify as a secured creditor the mortgagee had to obtain possession of the hypothecated property. Once such possession was obtained by the mortgagee he would have been in the position of a pledgee, with all the security attaching to a pledge[13]. The notarial bond recognizes the mortgagee's need to acquire such security in the event of a failure by the mortgagor to perform its obligations in terms thereof in that it provides 'that should the Mortgagor commit any breach of the terms and conditions of this Bond, then the Mortgagee shall have the right whenever he considers it advisable or necessary for perfecting his security under this Bond, to take and retain possession of any property hypothecated hereunder'.

[21] Serious Mills failed to make payment in terms of the notarial bond as a result of which the appellant as cessionary of the rights of the Agricultural Bank became entitled to take possession of its movable property before

[13] See *International Shipping at 84C-H.*

commencement of the winding-up of Serious Mills. As a result the appellant applied for the order referred to above. 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, authorized the appellant to take possession of the movable property and assets covered by the notarial bond 'in order to perfect its security'.

[22] The appellant was, in contrast to International Shipping, when the latter applied for a provisional order, purporting to enforce a contractual right. The order granted to the appellant was only a provisional order i.e. it could later be discharged if it should not have been granted in the first place because of the retrospective operation, in terms of s 348, of a subsequent winding-up order (as in the case of International Shipping) or otherwise. However, no valid basis was advanced for holding that the appellant was not entitled, immediately before the commencement of the winding-up of Serious Mills, to take possession of the

hypothecated property and that the provisional order should for that reason not have been granted. 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 he 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.

[23] After the commencement of the winding-up Serious Mills could no longer hand over any of its movable assets as such a handing over would have constituted a disposal of its movable assets prohibited in terms of s 341(2) unless a court otherwise ordered. By that time the appellant was, therefore, no longer entitled to take possession of the movable property of Serious Mills.

[24] It follows that, to the extent that the appellant obtained possession of Serious Mills' movable property before the commencement of the winding-up,

the appellant was a secured creditor at the commencement of the winding-up proceedings and as such entitled to remain in possession of such movable property subject to the provisions of the law in relation to the winding-up of Serious Mills. To that extent the court *a quo* erred in discharging the rule *nisi*. The proper order would have been to confirm the appellant's entitlement to possession of the movable property which had been hypothecated in terms of the notarial bond and was attached on 10 September 1999 and to discharge the rule *nisi* in other respects.

[26] The following order is made:

1 The appeal is upheld with costs including the costs of two counsel.

2 The order made by the court *a quo* is set aside and the following order is substituted therefore:

'1 To the extent that the applicant on 10 September 1999 attached movable property and assets covered by Notarial Bond BN770/99 the rule *nisi* granted to the applicant on 9 September 1999 is hereby confirmed.

2 Save as aforesaid the rule *nisi* is discharged.

3 The respondents are ordered to pay the costs of the application.’

_____
P E Streicher
Judge of Appeal

Navsa, JA) concur

NIENABER JA :

[1] I have read the judgment prepared by Streicher JA. I regret that I am unable to agree with either its reasoning or its result.

[2] The two principal points argued in the appeal were:

(1) whether the appellant, as a cessionary of a general notarial bond containing a perfection clause, by the expedient of an interim order of attachment, obtained *ex parte* and executed the next day, *ipso jure* acquired a real right over the attached movables prevailing over a provisional order of liquidation of the debtor obtained from the same court, prior to the return day of the interim order of attachment, by other creditors of the debtor. That was an issue that went to the nature of the appellant's entitlement;

(2) whether the appellant, as a cessionary *in securitatem debiti* of the notarial bond, was entitled to take action against the debtor even though the cedent was not in default, then or at any time thereafter, with its obligations to the appellant. That was an issue that went to the appellant's *locus standi*.

[3] Before elaborating on the legal principles occasioned by these questions it may be opportune to review some salient facts:

(1) The debtor, Serious Mills (Pty) Ltd ('Serious Mills'), was anxious to obtain a loan from the appellant ('the Development Bank'). For a reason not fully explained in the papers this was done through the medium of the North-West Agricultural Bank ('the Agri-Bank'). The Development Bank advanced R7,2 million to the Agri-Bank which it in turn advanced to Serious Mills. The loan was secured, inter alia, by a notarial general covering bond which the Agri-Bank in turn ceded to the Development Bank in *securitatem debiti*.

(2) The notarial bond in favour of the Agri-Bank was approved on 10 March 1999 and registered on 5 May 1999. Clause 14(b) thereof authorised the bondholder, in the event of the mortgagor failing to make payment of the amounts due, to foreclose and

> 'to seize and take possession of the property hypothecated and to sell the same or any portion thereof and to convey valid title to the purchaser and to have it excussed by legal process …'

(3) The cession *in securitatem debiti*, entitled 'Deed of Pledge and Cession', between the Agri-Bank and the Development Bank was concluded on the same day.

(4) On 31 March 1999 Serious Mills fell in arrears with its repayments in terms of the loan. No payments were thereafter effected by Serious Mills to either the Agri-Bank, as cedent, or the Development Bank, as cessionary.

(5) Neither the Agri-Bank nor the Development Bank took any steps at the time to 'perfect' their rights, such as they were, in terms of the notarial bond. It is trite that such a bond does not, by itself, vest the bondholder with a real right over the hypothecated movables. Such a real right is vested only if the bond contains a so-called perfection clause (cf Joubert (ed) *The Law of South Africa,* first reissue, vol 17, para 517) and the bondholder, prior to the insolvency of the mortgagor, takes possession of such movables, either with the consent of the mortgagor or pursuant to a court order. The order of court obtained at the instance of the bondholder normally authorises the Deputy Sheriff to attach the goods in question for delivery to the bondholder. Upon such delivery the bondholder acquires a real right over the movables that can be maintained against all comers in the event of the subsequent liquidation or sequestration of the mortgagor. Failing such 'perfection' (by assuming possession of the movables), the bondholder merely obtains a preference over concurrent creditors in the event of the mortgagor's subsequent insolvency.

(6) It was only on 10 August 1999 that the Agri-Bank wrote to the Development Bank informing it that Serious Mills had 'cash flow problems and had not paid interest for the past three months on capital advanced to it'. The letter continued:

> 'Agri-Bank has ceded all rights and title to the Development Bank of South Africa and therefore we would like you to intervene.'

What immediate steps, if any, were taken by the Development Bank at that stage does not appear from the papers.

(7) On 8 or 9 September 1999 four of Serious Mill's other creditors resolved to launch urgent liquidation proceedings against it. Through their attorneys, Messrs Van der Merwe & Ferreira ('M&F') they approached Minchin & Kelly Incorporated, attorneys at Mafikeng ('M&K'), to act for them. The immediate further history appears from a letter, written by Mr Minchin and annexed to the Development Bank's answering affidavit in the subsequent application for the rescission of the

confirmation of the rule. The letter itself was not confirmed under oath. Nevertheless I shall accept it as a true reflection of what happened during that period. The creditors' attorney, M&F, instructed M&K to launch the urgent application for liquidation of Serious Mills. M&K accepted the mandate and instructed a candidate attorney, a Mrs Steenkamp, to prepare the necessary security bond and to arrange for a Master's certificate in terms of s 346(3) of the Companies Act 61 of 1973. The letter then proceeds:

> 'Unfortunately the Master was not in office that whole afternoon and Mrs Steenkamp returned without the signed Master's Certificate.'

The application for liquidation could accordingly not be lodged with the Registrar. (Section 348 of the Companies Act 1973 provides that 'a winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up'. That has been

interpreted to refer to the moment of lodging of the application papers with the Registrar of the Court (cf Henochsberg on the Companies Act, issue 14, p 740).

(8) The Development Bank got wind of the proposed winding-up when a Mr Zondach (later appointed as one of Serious Mills' three co-provisional liquidators and as such the second respondent) telephoned a Mr Rees, the Development Bank's Sandton attorney. Paragraph 17 of the Development Bank's founding affidavit reads:

> 'At approximately 14h50 on 9 September 1999 Dean Rees ('Rees') of the applicant's attorneys of record was contacted by one Ferdinand Zondach ('Zondach') who introduced himself as a liquidator. Zondach advised Rees that a liquidation application was about to be launched against the respondent and he sought the applicant's support for his appointment as the liquidator therein. Zondach advised Rees that it was anticipated that the application for liquidation would be moved at 10h00 on Friday 10 September 1999.'

(9) It was on this information that the Development Bank relied for its averment of 'extreme' urgency and prejudice since, failing an order, so it stated,

it would 'lose the security for its claim and will be merely a preferent as opposed to a secured creditor in the winding-up of the respondent'.

(10) Rees thereupon telephoned M&K and spoke to Minchin. He instructed him to launch an urgent application for an order authorising an attachment of movables covered by the notarial bond. Minchin, in the letter referred to earlier, stated that he was at that stage unaware that his firm had already accepted instructions to act on behalf of the creditors in the impending liquidation proceedings. He nevertheless became aware of the true situation at about 16:50. He says:

> 'Only after returning to the office at approximately 16:50 was writer made aware of the existence of the instructions from Van der Merwe & Ferreira Attorneys. Writer then telephoned Mr Rees to inform him of our dilemma. Mr Rees assured us that the application would be brought that night, with or without us, but strongly indicated that he wanted us involved since we had played an instrumental role in the negotiations, drafting and finalising the contracts between Serious Mills (Pty) Ltd, Agri-Bank and the Development Bank of South Africa.'

An attempt, so it was stated, to make contact with M&F at the time was unsuccessful. The letter continues:

> 'After some mental gymnastics we summed up the situation that nothing was going to stop DBSA [the Development Bank] bringing the application that night. Since nothing could be done about the liquidation application until the Master returned to office to sign the Master's Certificate, we decided to remain involved in the DBSA application and appeared before Mr Justice Hendler at his house at approximately 22:00 that night when the interim order was granted.'

(11) Paragraph 2 of the interim order thus granted reads as follows:

> 'In order to perfect its security under notarial bond BN770/99 the Applicant is *provisionally* declared to be entitled and authorized to take possession of all the movable property and assets covered by the said notarial bond … ' (my emphasis).

Paragraph 4 provides :

> 'The Applicant is authorized to deal with the assets in terms of the powers conferred upon it by the said notarial bond and in accordance with law, save that prior to confirmation of the Rule Nisi the Applicant shall not sell, alienate or otherwise dispose of any of the assets.'

(12) The letter proceeds:

> 'The Deputy Sheriff, who had the previous evening been alerted of the urgent application by DBSA arranged for the Assistant Deputy Sheriff to fetch the Order at our office early Friday 10th September 1999 for service.'

(13) The attachment then commenced. The Deputy Sheriff drew an inventory which, *inter alia*, reads as follows:

> 'At 12H00 I had completed to compile an inventory of the respondent's assets and I took possession of the keys to all the vehicles … and thereafter took constructive possession of the plant and building by engaging the services of a security company by the name of Singobile Security Guards to look after the building and other movable property mentioned in the inventory.
> I handed over to the above-mentioned security firm to guard the property mentioned in the inventory after I had locked the gates to the premises at 13H00.'

(Nowhere in the papers is it stated that the property so secured was handed to the Development Bank by the security firm or that the Development Bank ever assumed or purported to exercise control over the attached goods, but no point was made, in the argument for the respondents, of this omission.)

(14) Meanwhile, and some time during the course of the morning of 10 September, the Master's certificate was obtained. Exactly when the application for liquidation was eventually lodged with the Registrar of the Court does not appear from the papers but according to Minchin it was served at about 12:30 and heard that afternoon when a provisional order for the liquidation of Serious Mills was duly granted.

[4] This history is related in full since it constitutes material that was relevant to the discretion the Court a quo exercised on the return day of the provisional order of attachment. I return to this issue later in this judgment.

[5] From the above resumé it is plain:

(1) that the creditors' decision to liquidate Serious Mills preceded the Development Bank's decision to apply for an attachment order;

(2) that it was the creditors' decision to liquidate that prompted the Development Bank to jump the gun by applying for a provisional attachment order without notice and as a matter of extreme urgency;

(3) that it was largely fortuitous that the provisional order for attachment was granted and the attachment commenced before the application for liquidation was lodged with the Registrar of the Court.

[6] On 30 September the rule was confirmed but such confirmation was afterwards, after an opposed application for its rescission in terms of Supreme Court Rule 42, set aside. On the extended return day Hendler J discharged the provisional order for attachment he had earlier granted. It is against that decision, discharging the rule, that this appeal is directed, leave to do so having been granted on petition.

The first issue:

[7] The first question, then, is whether an attachment pursuant to an *ex parte* provisional order of attachment is *ipso jure* immune to a provisional order of liquidation that is issued prior to the return day of the provisional order of attachment. This question, involving concurrence between provisional orders of liquidation and attachment, has arisen in three relatively recent judgments, on two of which the Court *a quo* sought to rely in discharging the rule. These decisions, not being judgments of this Court, are not binding on it. They should as such be examined for their reasoning rather than their authority.

[8] The first of these matters is *International Shipping Company (Pty) Ltd v Affinity (Pty) Ltd and Another* 1983 (1) SA 79 (C), a decision of Grosskopf J. I deal with it perhaps a little more fully than I would otherwise have done since Streicher JA in his judgment is at pains to show that it is not applicable. I respectfully disagree; I believe that it is both in point and helpful.

[9] There are differences as well as similarities between the facts in the *International Shipping* case and the present one. One difference was that it was the bondholder (International Shipping Co) and not an unsecured creditor (Factors) of the debtor (Affinity) which initiated the process culminating in the creditor's opposition to the confirmation of the provisional order of attachment. On 6 July 1982 the bondholder sought by consent to take possession of the hypothecated goods in terms of the perfection clause in its general notarial bond. When that attempt failed it applied urgently on 7 July 1982 for an order authorising such attachment. The creditor, unlike the creditors in the instant case, found out about the proposed application for attachment and intervened, thereby causing the matter to be postponed to 8 July, while immediately lodging the security for its own application for a provisional order of liquidation. In our case it was the proposed liquidation that prompted the application for attachment; in that case it was the proposed attachment that prompted the

application for liquidation. As it happens the urgent application for liquidation, (contrary to our case) was filed with the Registrar of the Court on the same day, thereby anticipating the actual hearing of the application for leave to attach. Both applications (for a provisional order for attachment and for a provisional order for liquidation respectively) were heard on the same day, which in our case might also have happened had the Master been on his post the day before or if MK had succeeded in alerting M&F of the impending application for attachment, thereby enabling the unsecured creditors to intervene.

[10] Although the application for the provisional order of liquidation took effect, in terms of s 348 of the Companies Act 1973, before the application for the provisional order for attachment was heard the Court hearing both applications staggered the issuing of its orders, the provisional order for attachment to issue forthwith and the provisional order for liquidation only with effect the day thereafter. The two orders accordingly brought about a situation that was comparable to the one under discussion: a provisional order of attachment

that was first issued, followed by a provisional order of liquidation that was issued prior to the return day of the first order.

[11] The two major differences in the facts of that case and the present one are:

(1) that the lodging of the application for liquidation preceded the application for attachment in that case and not in this one;

(2) that the commencement of the actual physical attachment of the hypothecated movables preceded the application for liquidation in this case and not in that one.

There are precursors to both these differences in the judgment of Grosskopf J in the *International Shipping* case who, like Hendler J, was concerned with the return day of the provisional order of attachment.

[12] As to the first of the differences mentioned in para [11] above, the reasoning, as I read the judgment, was as follows: a bondholder who applies for leave to attach the hypothecated goods in terms of a perfection clause is in

effect asking for specific performance (84E-H and cf *Barclays National Bank Ltd and Another v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd and Others* 1982 (4) SA 650 (D) at 654H-655A). As in other cases where specific performance is asked for so too in this case (so the Court was prepared to assume) the court had a discretion whether or not to grant the order. Leaving aside for the moment the intrusion of insolvency, a court

> 'would in my view be reluctant to deny the mortgagee all claims to security under the bond if it is sought to be enforced prior to the mortgagor's insolvency' (84H).

But when liquidation does intrude, s 341(2) of the Companies Act 1973 would not as a matter of course neutralise a subsequent application for leave to attach, even if the attachment should qualify as 'a disposition' in terms of the section. That is because of the concluding words in s 341(2): '… unless the court otherwise orders'. And that would be so even when, as in that case, the lodging

of the application for liquidation preceded the application for attachment (85A-H).

[13] As to the second difference mentioned in para [11] above (i e where an application for attachment and the consequent attachment precede the application for liquidation), there is of course a distinction: if the actual attachment took place pursuant to or was sanctioned by a confirmed rule *nisi* the bondholder would have acquired a real right that would be immune to any subsequent liquidation (84D-G). But where the attachment took place pursuant to but before the hearing of the return day of a rule *nisi* that was obtained without notice and as a matter of urgency (as happened in the *International Shipping* case as well as in this one), the position would be different. Thus it was said:

> 'The rule *nisi* was granted as a matter of urgency. All interested parties were not before the Court, and interested persons were accordingly called upon in para 1 to show cause why the order should not be made final. To enable such persons to be apprised of the matter, publication in two local

> newspapers was ordered. It would be strange if, in these circumstances, the Court were to have granted any order which had a greater effect than the preservation of the applicant's rights pending the return day'(85J-86A).

And again:

> 'The purpose of the order must have been the more limited one of protecting the applicant's position *pending the return day*; the Court apparently sought to anticipate a possible argument that the granting of a provisional order of liquidation would *ipso jure* avoid the grant of interim possession to the applicant' (86E-G).

The interim order, according to the above *dicta*, therefore had no more than a mere holding effect in respect of the attachment that took place in terms thereof. It did not have the additional effect of converting the possession resulting from the attachment into a real right that, per se, would enjoy preference over the claims of other creditors. That this is what the Court had in mind appears further from what was stated at 86H:

> 'I have pointed out that an order in favour of the applicant would not merely be the enforcement of an existing right, but would amount in effect to the grant of rights which the applicant would otherwise not have

had. More particularly, it would bestow upon the applicant a right of security which would disturb the distribution of Affinity's assets if Affinity were finally liquidated.'

[14] This conclusion, that the rule *nisi* did not have finite and definitive effect, is patently correct. An interim order is by its very nature both temporary and provisional; its purpose is to preserve the *status quo* pending the return day. Thus it was said by Corbett CJ in *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift and Another; Maphanga v Officer Commanding , South African Police and Murder and Robbery Unit, Pietermaritzburg and Others* 1995 (4) SA 1 (A) at 18J-19B:

'The term "rule *nisi"* is derived from the English law and practice, and the rule may be defined as an order by a Court issued at the instance of the applicant and calling upon another party to show cause before the Court on a particular day why the relief applied for should not be granted (see Van Zyls's *Judicial Practice* 3 ed 450 *et seq; Tollman v Tolmann* 1963 (4) SA 44 (C) at 46H). Walker's *Oxford Companion to Law* sv *"nisi"*, states that a decree, rule or order is made *nisi* when it is not to take effect unless the person affected fails within a stated time to appear and show cause why it should not take effect. As *Van Zyl* points out, our common law knew the temporary interdict and a "curious mixture of our

> practice with the practice of England" took place and the practice arose of asking the Court for a rule *nisi*, returnable on a certain day, but in the meantime to operate as a temporary interdict.'

(See too, *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674H-675C.) If the order authorising attachment is provisional and subject to confirmation it must follow that an attachment effected and any entitlement acquired on the strength thereof must likewise be provisional and subject to confirmation.

[15] I agree with Grosskopf J's conclusion that the interim order of attachment had a mere holding effect. For 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 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. Grosskopf J in effect decided that an attachment

pursuant to a rule *nisi* that was issued *ex parte* and which is in competition with a provisional winding-up order issued before its return day, is not to be equated in law with an attachment sanctioned by a confirmed rule *nisi*.

[16] Accordingly, so it was held, neither the provisional order of liquidation nor the provisional order of attachment precluded the Court from exercising the discretion it assumed it had:

> 'On this interpretation, it seems to me, I am not limited in any way by the terms of the rule *nisi* in deciding what would be the appropriate course to adopt. I should approach the matter as *res nova* to be decided on a consideration of the full facts and arguments now presented to me' (86F-G).

The position, then, was that each of the provisional orders (for attachment and for liquidation respectively) survived the other. The entire situation had to be reviewed on the return day of the provisional order of attachment when the respective claims of the bondholder in question, other bondholders, third parties with claims of ownership and the like over the attached goods, and the general

body of creditors, involved as a result of the provisional order of liquidation, came to be assessed.

[17] Having made certain assumptions in favour of the applicant for attachment (namely, that the Court had a discretion and that the Court was not precluded by s 359 of the Companies Act 1973 from exercising it), Grosskopf J said at 87A-E:

> 'If, despite the provisions of s 359 of the Companies Act relating to the suspension of civil proceedings against companies under liquidation, I still have the power to grant specific performance of the applicant's claim, I would exercise my discretion whether to do so in much the same way as I would under s 341(2) of the Act. And, since I propose exercising my discretion adverse to the applicant, I need not consider whether I may not possibly be completely precluded by law from granting the order which the applicant seeks.
>
> Assuming then that I have a discretion, I can see no reason why I should exercise it in the applicant's favour. On the papers before me the applicant's conduct prior to the commencement of Affinity's winding-up does not give it any equitable claim to be placed in a better position than other creditors, such as for instance Affinity's employees. The applicant took a business risk which failed and, like other creditors, must now be satisfied with its share of Affinity's assets as determined by law. And, as is also laid down by law, the provisional liquidators should in my view be

enabled to administer Affinity's estate. No sound reason has, in my view, been shown to allow the applicant in effect to take it over.

My view is accordingly that the rule *nisi* should be discharged and the applicant ordered to hand over possession of Affinity's assets to the provisional liquidators, as they have claimed in what amounts to a counter-application.'

[18] This is the very passage on which Hendler J sought to rely in discharging the rule in the instant case. It is clear that, following the lead of Grosskopf J in the *International Shipping* case, the Court *a quo* exercised what it believed to be a discretion in exactly the same manner and for the same fundamental reasons. In addition there was the history recounted earlier, which was before it when it dealt with the matter, and in particular that it was the contemplated application for the debtor's winding-up that precipitated the application for attachment.

[18] Like Grosskopf J I prefer to leave open the two issues on which he made assumptions in the bondholder's favour (i e that s 359 of the Companies Act 1973 was not conclusive of the entire matter and that he was invested with a discretion to authorise attachment 'if it is sought to be enforced prior to the

mortgagor's insolvency' (84H)). These aspects were not as fully argued before us as perhaps they should have been and I prefer to express no views on them.

[19] Hendler J, following Grosskopf J in the *International Shipping* matter, exercised his discretion in the provisional liquidators' favour. I am unable to say that he erred in doing so, the more so in the light of the history preceding the issue of the two potentially competing orders. In my view the *International Shipping* case accordingly provided direct and strong support for the conclusion reached by the Court *a quo*.

[20] The second judgment on which Hendler J placed reliance was *Trisilino v De Vries* 1994 (4) SA 514 (O), a decision of Edeling J. The facts in that case closely resemble those of the present one. On an application for attachment, a rule was issued on 14 April 1994, returnable on 19 May 1994, but with immediate interim effect, although subject to a duty imposed on the bondholder to keep records of and to account for his administration of the assets that were

placed in his possession in terms thereof. One day before the return date of the rule other unsecured creditors of the debtor brought an urgent application for a provisional order of sequestration. This was granted, returnable on 16 June 1994. On the return day of the return date of the order of attachment, the Court held, in my view correctly:

(a) that a bondholder's security over the hypothecated moveable property is forthwith converted into a real right, akin to that of a pledgee, only if possession of the movables is acquired by the bondholder prior to sequestration; and

(b) that possession acquired in terms of an interim order issued without notice functioned only 'to preserve the applicant's rights pending the return day' (at 519J).

All other things being equal a provisional order of sequestration issued prior to the return date of a rule *nisi* would therefore defeat the interim order of attachment, causing the rule to be discharged.

[21] Similar reasoning followed in a decision reported after the Court *a quo* gave its judgment*, viz Chesterfin (Pty) Ltd v Contract Forwarding (Pty) Ltd and Others* 2002 (1) SA 155 (T), a judgment of Moseneke AJ. On 11 April 2001 the Court issued a rule *nisi* in favour of a notarial bondholder, returnable on 24 April 2001, authorising it to take possession of the moveable assets covered by the notarial bond. On 20 April 2001 (i e after the provisional order was issued but before its return date) the debtor was placed under provisional liquidation. The Court held, at the instance of an earlier bondholder who sought leave to intervene, that the order of attachment was an interim one; that (as in the *International Shipping* matter) it had to approach the issues on the return day as being *res nova*; and that, inasmuch as the perfection of a notarial bond, being all about possession, is open to review on the return day, so too is the perfection of the bond (166H). Furthermore, since the prior winding-up order brought about a *concursus creditorum*, there was no cause for the Court to

exercise its discretion in favour of the earlier bondholder simply because it managed to obtain an interim order followed by an attachment (which was in itself in dispute) before the return date of the provisional order of attachment.

[22] In my view all three these cases were correctly decided. The current appeal to which the same reasoning applies, should in the event be dismissed.

The second issue:

[23] The argument advanced on behalf of the respondents, if I understood it correctly, was this: because a cessionary *in securitatem debiti* may not enforce the principal debt for as long as the cedent is not in default in respect of the secured debt, so too he may not, while that remains the position, perfect his ceded security. The analogy in my view is neither exact nor in point. The proper question in this case is whether the Development Bank as a cessionary *in securitatem debiti* of a notarial general bond had the requisite *locus standi* not so much to enforce the debt as to seek to perfect its security, regardless of

whether the cedent is in breach. The answer to that question is clearly in the affirmative. The Bank can do so *qua* mortgagee, even though he is only a mortgagee for the time being i e for as long as the secured debt remains unsatisfied. (Thereafter, should a rule *nisi* in a case such as the present be confirmed and the real right vest in the cessionary, such a cessionary may recoup himself from the proceeds of the sale of the goods in execution - but he would once again do so not so much *qua* cessionary as *qua* mortgagee.) The different issue of when and to what extent a cessionary who is not a mortgagee will have a right to *collect* the debt, even if the cedent is not in default, is a factual and not a legal issue; it is governed by the terms, express and tacit, of the obligationary agreement between the cedent and the cessionary. The dictum at 753D-E of *Volhand & Molenaar Ltd v Ruskin and Another NNO* 1959 (2) SA 751 (W), quoted by Streicher JA, says no more than that.

[24] Ever since *National Bank of South Africa v Cohen's Trustee* 1911 AD 235 it has been held, notwithstanding fundamental doctrinal difficulties with this construction (cf De Wet & Van Wyk, *Kontraktereg en Handelsreg*, 5 ed, 415-424; Van der Merwe, *Sakereg,* 2 ed, 673-688; Kleyn & Boraine, *Law of Property*, 3 ed 435, Scott, *Cession*, 2 ed para 12) that a cession *in securitatem debiti* resembles pledge. (See, for instance, *Leyds v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 (2) SA 769 (A) at 780E-G, *Marais v Ruskin* 1985 (4) SA 659 (A) at 669H, *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9H-J, *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd* 1990 (4) SA 798 (A) 804H-805A, (1) SA 77 (A), *Millman NO v Twiggs and Another* 1995 (3). S*tandard General Insurance Company Ltd v SA Brake CC* 1995 (3) SA 806 (A), *P G Bison Ltd and Others v The Master and Another* 2000 (1) SA 859 (SCA) 864.) In common with pledge the cedent as the security-giver is not *wholly* divested of an interest in the asset he surrenders

to the cessionary as the security-receiver; he retains, notwithstanding the cession, what has variously been described as ‘the bare dominium’ and ‘a reversionary interest’ (cf *Trust Bank of Africa Ltd v Standard Bank of SA Ltd* 1968 (3) SA 166 (A), *Land- en Landboubank van Suid-Afrika v Die Meester* 1991 (2) SA 761 (A) at 771D-G) . This reversionary interest, properly understood, refers to the cedent’s interest in the debtor’s performance (i e satisfaction of the principal debt by the debtor) rather than to his interest in the cessionary’s performance (i e re-cession of the principal debt on satisfaction of the secured debt – which is a right *ex contractu* against the cessionary). It is that reversionary interest that vests in the cedent’s trustee upon his insolvency, to be administered ‘in the interests of all the creditors and with due regard of the special position of the pledgee’ (*Millman NO v Twiggs and Another*, *supra*, at 676H-I); that can itself be attached or ceded; that invests him with the *locus standi* to sue or be sued or apply for the debtor’s sequestration; and may

conceivably entitle the cedent, in an appropriate case and notwithstanding the cession, to perfect in order to protect the ceded security.

[25] What the cedent may *not* as of right do, in the absence of a stipulation to that effect (cf *Ovland Management (Tvl) (Pty) Ltd and Another v Petrin (Pty) Ltd* 1995 (3) SA 276 (N), is to recover performance from the debtor. Only the cessionary has the standing to enforce the principal debt (cf *Millman NO v Twiggs and Another, supra,* at 678C-G; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 674 (A) at 87G-I); and he may as a rule do so (on pain of a claim for damages if by doing so he breaches the terms of the obligationary agreement) only if and when the cedent defaults on the secured debt. The primary purpose of the exercise, after all, is for the cession to serve as a form of collateral security: for the cessionary to retain, to restore and not to redeem the principal debt (cf *Vassen* v *Garrett* 1911 EDL 188 at 198). As it was

stated by F H Grosskopf JA in *P G Bison Ltd and Others v The Master and Another* 2000 (1) SA 859 (SCA) at 864I-J):

> 'It should be borne in mind that we are here dealing with a *cession in securitatem debiti.* As a rule the appellants as cessionaries would in any event not be entitled to recover directly from the corporation's debtors until such time as the corporation is in default. (See *Land- en Landboubank van Suid-Afrika* v *Die Meester en Andere* 1991 (2) SA 761 (A) at 771D.)'

[26] Even so, there is a potential problem when the cedent is not in breach but the principal debtor is. So too, when the principal debt falls due during the subsistence of the security and it becomes imperative for someone to take action, for instance to avert prescription (cf De Wet & Van Wyk, *Kontraktereg en Handelsreg*, 5 ed, 416). In those circumstances the terms of the obligationary agreement, express and tacit, will have to provide the answer whether it is permissible for the cessionary forthwith to institute proceedings against the debtor, and thereafter to account to the cedent for the proceeds so recovered. It is accordingly not accurate to assert that for as long as the cedent is not in

default of his obligations towards the cessionary, the latter is invariably precluded from taking action pursuant to the cession.

[27] The following order should in my opinion be made, essentially for the reasons discussed in paras 7-19 above:

The appeal is dismissed with costs, including the cost of two counsel.

……
P M NIENABER
JUDGE OF APPEAL