IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 634/02

In the matter between

N JUGLAL NO
JUMBO TRUST t/a OK FOODS
PORT SHEPSTONE **APPELLANT**

and

SHOPRITE CHECKERS (PTY) LTD
t/a OK FRANCHISE DIVISION **RESPONDENT**

Coram: **MPATI DP, MARAIS, CAMERON, CONRADIE and HEHER JJA**

Heard: **2 MARCH 2004**

Delivered: **31 MARCH 2004**

Summary: **Notarial bond – validity of *parate executie* clause and other terms enabling bondholder to use and dispose of secured movables.**

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JUDGMENT

HEHER JA:

[1] This appeal concerns the validity of certain clauses in a notarial general bond over movables. The respondent is the franchisor of a chain of general retail shops throughout South Africa. It conducts business as the central purchase organization for commodities which it sells to the members of the franchise. The Jumbo Trust became such a member in July 2000 in terms of a written agreement with the respondent. On 21 August 2000 it caused a continuing notarial covering bond to be registered over its (unspecified) movable assets in order to secure payment of amounts owing by it to the respondent from time to time.

[2] At 26 September 2001 the Trust was in arrears and indebted to the respondent in the sum of R2 371 804,34 together with interest from 1 September 2001 at the rate of 2,3% per month. It possessed trading stock to the value of about R400 000,00 but refused to allow the appellant to perfect its bond. It appeared to be trading in insolvent circumstances, creating an obvious and imminent threat to the respondent's security. The appellant, the trustee, refused either to hand over the keys of the business to the respondent or to deliver any of its movables or stock in trade for the purposes of allowing the respondent to perfect its bond. The Trust was without cash to purchase goods and was simply diminishing its existing stock without reducing its indebtedness to the respondent.

[3] Clause 14 of the bond conditions provided as follows:

‘14.1 IF:

14.1.1 there should be a default in the timeous fulfilment of any obligation imposed upon the MORTGAGOR in terms hereof,

OR

14.1.2 . . .

14.1.3 The MORTGAGEE has at any time reason to believe that his interests are in any way imperilled by any act or omission on the part of the MORTGAGOR or any of his officers, servants or agents or any creditor of the MORTGAGOR or in any other circumstance reasonable in the context thereof, the MORTGAGEE shall, notwithstanding any prior waiver, enjoy the rights and remedies set out in the succeeding sub-paragraphs, and the MORTGAGOR indemnifies the MORTGAGEE and any agent of the MORTGAGEE against any claim of whatsoever nature that may be instituted in consequence of any exercise thereof by the MORTGAGEE; it is, moreover, confirmed and agreed that neither the MORTGAGEE nor any agent of the MORTGAGEE shall in the exercise of the hereinaftermentioned rights and remedies be liable for any loss or damage suffered, including loss or damage occasioned as a result of negligence.

14.2 The MORTGAGEE shall forthwith be entitled without prior notice to the MORTGAGOR and the MORTGAGOR hereby irrevocably and unconditionally authorizes and empowers the MORTGAGEE (with power of substitution):

14.2.1 To take and retain at the expense of the MORTGAGOR possession of the business of the MORTGAGOR and/or the assets of the MORTGAGOR (as the case may be) hereby hypothecated as security for any amounts owing to the MORTGAGEE in terms hereof and whether due or not;

14.2.2 To conduct the business of the MORTGAGOR in name and for the account and risk of the

MORTGAGOR, and to which end the MORTGAGEE shall, moreover, be entitled:

14.2.2.1 To purchase stock from time to time;

14.2.2.2 To recover all moneys owing to the MORTGAGOR and for which purpose to take such action, including the institution of legal action, as is deemed necessary, to issue valid receipts and in his discretion to grant extension, compromise any claim and to apply moneys recovered either for the conduct of the business and/or settlement or reduction of any amount owing by the MORTGAGOR in terms hereof, and pay any surplus to the MORTGAGOR;

14.2.2.3 To operate and draw on the banking account of the MORTGAGOR and to instruct that all funds in such account, or which may be paid into such account, be paid to the MORTGAGEE or not be withdrawn therefrom except by or to the order of the MORTGAGEE.

14.2.2.4 To complete, sign and lodge all requisite documents for the retention of all licences, permits, quotas, concessions and registration certificates of the business and to this end the MORTGAGEE shall, furthermore, be entitled in his discretion to appoint a nominee in the place of the MORTGAGOR;

14.2.2.5 To perform all such further acts in the conduct of the business as the MORTGAGEE deems necessary;

AND/OR

14.3 The MORTGAGEE shall, whether or not he shall have exercised his rights in terms of sub-paragraph 14.2 above, be entitled and the MORTGAGOR hereby irrevocably and unconditionally authorizes and empowers the MORTGAGEE or his agent to sell and dispose of the business and/or the assets hypothecated in terms hereof (as the case may be) or any portion thereof by public auction, public tender or private treaty on such terms as the MORTGAGEE may decide and to this end:

14.3.1 To sign all requisite documents and perform all necessary acts to convey valid title to the purchaser or transferee, and

14.3.2 To collect and take receipt of the purchase price which shall be applied in the first instance to defray all costs and charges relating to such sale and thereafter in settlement or reduction of amounts owing by the MORTGAGOR to the MORTGAGEE in terms hereof, and the surplus (if any) shall be paid to the MORTGAGOR, save that if only a portion of the assets hypothecated in terms hereof are thus sold, and the MORTGAGEE has exercised his rights in terms of sub-paragraph 14.2 above and is still so exercising these rights, the surplus may be retained by the MORTGAGEE in his sole discretion in the continued conduct of the MORTGAGOR's business;

AND/OR

14.4 The MORTGAGEE shall be entitled to claim and recover all amounts owing in terms hereof (whether due or not) from the MORTGAGOR together with finance charges as herein prescribed and all legal costs on an attorney and client scale (including collection charges at the ruling rate) and for this purpose:

14.4.1 To obtain Provisional, Summary or final Judgment from a competent Court and

14.4.2 To have any or all of the assets hypothecated in terms hereof excussed by legal process

AND/OR

14.5 The MORTGAGEE shall be entitled to any other remedy as is in Law allowed,

OR

14.6 The MORTGAGEE shall be entitled to expend any amount on behalf of the MORTGAGOR as is necessary for the latter's fulfilment of his obligations in terms hereof and to recover the amount so expended from the MORTGAGOR with finance charges as provided in paragraph 5.0 above and costs on an attorney and client scale (including collection costs at the ruling rate).'

[4] The respondent applied *ex parte* for an interim order to protect and enforce its rights under clause 14 of the bond. A rule *nisi* was thereupon issued by Squires J which called on the appellant to show cause why an order in the following terms (inter alia) should not be made:

'2.1 The applicant be and is hereby authorized and empowered for the purposes of protecting its security in terms of a General Notarial Covering Bond duly registered under No BN23853/2000 to enter upon the premises of the respondent and to take possession of all respondent's movable property as defined in clause 1.2.1 of the said Notarial Bond on the said premises or where such movable assets may be found, and to retain such assets for so long as the applicant may deem fit as security for the payment of all amounts owing or which may become owing by the respondent to the applicant and to exercise any of its rights under and in terms of the said Notarial Bond as set out in paragraph 14.2 and 14.3.

2.2 The respondent be and [is] hereby interdicted and restrained from dealing with, alienating, disposing of, or in any way dissipating or removing any of such movable assets hypothecated in favour of the applicant without the written consent of the applicant first being obtained.

2.3 That the applicant must institute action against the respondent within (30) thirty days of confirmation of this order for payment of the outstanding amount of R2 371 804,34 together with interest thereon.

2.4 The applicant is to compile a full and complete inventory of all goods seized in terms of this order and on completion thereof which shall not be later than three days of this order, to deliver a copy to the respondent.

2.5 The applicant is to keep a full and detailed record of the sales of any goods in pursuance of clauses 14.2 and 14.3 and to make such available to respondent on five (5) days notice.

2.6 The respondent is ordered to pay the costs of this application on the scale between attorney and client.'

In addition the order provided:

'3. The order in paragraph 2.1, 2.2, 2.4 and 2.5 above shall immediately operate as an order pending the final determination of this application provided that the rights in terms of paragraph 14.3 will not be exercised until a period of 48 hours after service of the order herein.

4. The orders in paragraphs 2.1 and 2.2 are subject to the condition that the applicant agrees and undertakes to be liable to the respondents for any damages proved to have been suffered by them as a result of the granting of the interdict, should the applicant's action in paragraph 2.3 fail.'

[5] The appellant opposed the confirmation of the rule. Save as appears hereafter its grounds of opposition are no longer relevant. Hurt J, however, confirmed the rule and extended the operation of paragraph 3 of the order in so far as the present respondent had not yet exercised its rights to sell any of the bonded properties. He granted leave to appeal to this Court against his order.

The judgment of the Court *a quo*

[6] Counsel for the appellant submitted that it was not proved before Hurt J that the Trust was a debtor of the respondent and that this question was, therefore, moot before us. That, he said, was why the learned Judge had confirmed para 2.2 of the rule requiring the respondent to institute action for payment. In those circumstances perfection of the bond should either not have been granted or, if it was, public policy demanded that the terms of the order should be materially cut down. The response of

counsel for the respondent was that the question of the Trust's indebtedness had been decided and thus rendered *res judicata* by the judgment of the Court *a quo*. Para 2.2 meant, he submitted, that, in the action the respondent had only to prove the quantum of the debt.

[7] One of the respondent's grounds for invoking clause 14 of the bond was a breach by the Trust of its obligation to make payments in reduction of its indebtedness. In his answering affidavit the appellant denied that the Trust was in debt to the respondent. He relied on a wide range of alleged breaches of contract which were said to give rise to 'a substantial counterclaim for past, present and future damages' which were as yet unquantified. He averred that there was 'complete uncertainty until a proper debatement of the account has been done, of the [Trust's] indebtedness to the [Respondent]'. Of this issue Hurt J said in his reasons for judgment

'The debt claimed and certified by the [respondent] is a very substantial one. Before the [respondent] could be disentitled from invoking its powers under the bond, material malperformance by it, or a very substantial counterclaim, would have to be established. It is inconceivable that the [Trust] would have supinely submitted to this type of treatment at the hands of the [respondent] without protesting and endeavouring to enforce its rights. It is equally inconceivable the [Trust] would have made the settlement proposals which resulted in the agreement of 18 July 2001 if, in fact, it genuinely disputed the [respondent's] claims against it. In the circumstances, I do not consider that the apparent dispute of fact on the papers is, indeed, a "genuine dispute" as contemplated in the authorities . . .'

These findings were not challenged in the appeal. The only issue was their meaning.

In the context, the agreement of 18 July 2001 to which Hurt J referred is not without relevance: the Trust undertook to pay its outstanding debt, then R3 056 953,01, by means of a loan (which it was to raise) at a rate of R100 000 per month above the existing payment terms. In turn, the credit facility provided by the respondent would be reduced to not more than R150 000 per month payable at the end of each month.

[8] I think that the quoted passage disposes of the initial question. The learned Judge found that the present respondent had, *for the purpose of justifying its application to perfect*, proved that the Trust was its debtor in a substantial sum. It was unnecessary for him to quantify the entitlement and he chose not to do so. Instead, he left it to the respondent to prove its claim in the ordinary course at a trial in which the Trust could again raise such counterclaims as were available to it. On that interpretation the issue of indebtedness is *res judicata* only in so far as the perfection proceedings are concerned, and the appropriateness of the order therein. As that is the subject of this appeal I conclude that we must proceed on an acceptance that the Trust has been proved to be in debt to the respondent in a substantial sum of money.

[9] Hurt J declined to follow the reasoning of Froneman J in *Findevco (Pty) Ltd v Faceformat SA (Pty) Ltd* 2001 (1) SA 251 (E). His refusal was proved justified by the decision of this Court in *Bock and Others v Duburoro Investments (Pty) Ltd* [2003] 4 All SA 103 (SCA). He further held that the common law of contract does not allow *parate* execution in a manner which infringes the right of recourse to the courts entrenched in s 34 of the Constitution.

After referring to certain decided cases Hurt J said:

'In the case of **Sasfin (Pty) Ltd v Beukes** 1989(1) SA 1 **Smalberger JA,** said, in relation to a clause of a contract which was being examined for the purpose of deciding whether it was contrary to public policy:-

> "In addition, clause 3.4.2, which provides for *parate executie*, goes to such lengths that it offends against the public interest and is contrary to public policy. A clause for *parate executie*, which authorizes execution without an order of court, is valid (**Osry v Hirsch, Loubser & Co Ltd** 1922 CPD 531), provided it does not prejudice, or is not likely to prejudice, the rights of the debtor unduly. This I conceive to be the principle underlying the passage in the judgment of **Kotze JP** in **Osry**'s case at page 547, where he stated
>
> > 'It is, however, open to the debtor to seek the protection of the court if, upon any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him in his rights.'
>
> Clause 3.4.2 is couched in very wide terms. It gives **Sasfin** carte blanche in regard to the sale of **Beukes**' book debts. It is open to abuse, and the likelihood of undue prejudice to **Beukes** exists if its terms are enforced. As stated in **Eastwood v Shepstone** (supra), it is the tendency of the proposed transaction, not its actually proved result, which determines whether it is contrary to public policy."

As I understand the above passage, it is open to the debtor to impugn the validity of the clause for *parate* execution on the ground that it is against public policy (which he obviously does as soon as he receives notice that the creditor intends invoking the clause) or to challenge the manner in which the creditor goes about enforcing the clause. There are no contentions, before me, to the effect that clause 14 of the bond in question is *contra bonos mores*.

In summary, the common law, insofar as stipulations for *parate* execution are concerned, is that stipulations, which are not so far-reaching as to be contrary to public policy, are valid and enforceable; that, as a matter of practice, creditors seeking to enforce such stipulations take the

precaution of applying for judicial sanction before doing so; and that the debtor can avail himself of the court's assistance in order to protect himself against prejudice at the hands of the creditor.'

To this I would add that the 'matter of practice' referred to is in fact a constitutional requirement: creditors not in possession are obliged to apply for judicial sanction. With that qualification, Hurt J's exposition seems to me to be a correct summary of the present state of the common law.

[10] The learned Judge proceeded to consider whether the common law, as summarized, requires development or modification to bring it into conformity with the Constitution having regard to the requirements of s 39(2) thereof and the terms of sections 8 and 173, and, in particular the right conferred by s 34:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

His conclusion was that while *parate executie* in theory detracted from the entrenched right, in practice the clause was hedged about with conditions which fully preserve the debtor's right to approach a court for relief. He said, with reference to s 39(3) of the Constitution

'A court should be chary of developing the common law in a way which impinges upon the fundamental principles of contract such as the freedom to contract on properly consensual terms and the principle of *pacta sunt servanda* which I think it can safely be said, are fundamentally consistent with the Bill of Rights.'

Accordingly he decided that

'there is no aspect of the common law relating to the type of contractual stipulation for *parate*

execution in the bond in this case which needs modification in order to bring it into line with the Constitution.'

[11] **The issues on appeal**

The submissions of the appellant appear to be broader than those addressed to Hurt J. They are, in summary-

As to the common law:

The tendency of the conditions in clauses 14.2 and 14.3 of the bond, in particular, was such as to expose the debtor to exploitation by the creditor to an extent which was unconscionable and incompatible with the public interest. The elements which in their individual and cumulative effect are said to manifest this tendency are-

(a) the power to trade, which vests total control of the business in the hands of the creditor;

(b) the power to operate and draw on the banking account of the business;

(c) the power to retain any surplus for the conduct of the business, even, so counsel submitted, when nothing is owing by the debtor to the creditor;

(d) the powers under clause 14.2 are irrevocable and unconditional; appellant's counsel submitted that the debtor had no power to terminate the agreement or to bring the forced administration to an end although the indebtedness was fully discharged;

(e) the continuation of the bond, notwithstanding interim settlement, was

an invalid *pactum commissorium*;

(f) the creditor was not liable for loss or damage including loss or damage suffered as a result of negligence;

(g) the *parate executie* power in clause 14.3 is too wide, especially in regard to the exemption from liability for negligence; there is no appropriate remedy against prejudicial action by the respondent. (On appeal, the respondent did not rely on the effect of the exemptions, wisely in view of the judgment in *Sasfin supra* at 15F.)

As to the Constitution:

(On the constitutional imperative to develop the common law see *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) at paras [33]-[40], *S v Thebus and Another* 2003 (6) SA 505 (CC) at paras [24]-[32].) Although initially counsel submitted boldly that the common law required development, in the course of argument it appeared that his sole suggestion for development was that the remedy should be available only to a creditor whose debt is undisputed. He expressly disavowed any attack on binding precedent. As I have already concluded, the proper interpretation of the judgment in the court below is that the existence of the debt was for purposes of these proceedings placed beyond dispute. As the summary in para [9] above makes clear, the common law does not limit the right of access to the courts. Nor does it fall short of the spirit, purport or objects of the Bill of Rights. The need to consider this aspect further accordingly falls away.

[12] Because the courts will conclude that contractual provisions are contrary to

public policy only when that is their clear effect (see the authorities cited in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 8C-9G) it follows that the tendency of a proposed transaction towards such a conflict (*Eastwood v Shepstone* 1902 TS 294 at 302) can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency.) If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract itself will stand. Much of the appellant's reliance before us on considerations of public policy suffered from a failure to make the distinction between the contract and its implementation and the unjustified assumption that, because its terms were open to oppressive abuse by the creditor, they must, as a necessary consequence, be against public policy.

[13] An attempt to identify the tendency of contractual provisions may require consideration of the purpose of the contract, discernible from its terms and from the objective circumstances of its conclusion. The present is such a case.

[14] To regard the case as simply one of a creditor exacting security in return for lending money to his debtor, as counsel for the appellant would have us do, is a gross over-simplification. The relationship between the parties was complex and the bond

was an important element in its regulation.

[15] A retailer who wishes to take advantage of the respondent's access to bulk purchases must become a member of the franchise operated by the respondent. By purchasing stock through the respondent a franchisee obtains favourable credit terms, as well as the benefit of participation in a well-known national chain. The supplier invoices the respondent directly and the respondent pays the supplier directly and is in turn paid by the member.

[16] The appellant intended to establish a supermarket in Port Shepstone. The appellant applied for membership of the franchise in July 2001 and on 28 August 2001 a written agreement was concluded between the parties. There is nothing in the papers to gainsay the impression that they contracted on an entirely equal footing for their mutual profit. The scale of their ambitions may be gauged from the fact that the appellant apparently spent some R1,4 million on equipping the premises and the price of the initial stock of products supplied on credit by the respondent was about R2 million.

[17] Clause 18.1 of the agreement required the appellant to register a continuing covering bond over its movable assets in order to secure its indebtedness to the respondent from time to time. The security which was duly provided was a general notarial bond in which there was no identification of the specific assets covered by it.

[18] The agreement neither specified the duration of the franchise nor provided specifically for its termination by the appellant. On general principles the franchise was, therefore, terminable on reasonable notice to the respondent. The bond would

continue to remain operative while the franchise agreement subsisted or, after its termination, for as long as the appellant remained indebted to the respondent but thereafter the *causa* for its existence would cease to exist.

[19] The franchise agreement was premised on an ongoing relationship of debtor and creditor. The agreement makes it clear that the appellant was buying into an established name, reputation and goodwill (attaching to an 'OK store'). The location of the store (clause 3.3), its productivity and viability (clause 4.4), method of operation (clauses 6.3 and 6.4), the standards which the appellant was required to maintain (clause 3.1, 4.1, 5.1, 12.1 and 12.4) and the public identification of the franchise (clause 8.1) are material aspects of the agreement which reflect the importance attached by both parties to the successful operation of the business.

[20] The parties contemplated that at any given time a substantial proportion of the goods in the store would be subject to a reservation of ownership in favour of the respondent (clauses 10.3 and 19.1).

[21] The nature of the business rendered it likely that much of the stock would be of a perishable nature. The stock was of such a nature as to be constantly disposed of and replaced. The respondent's security lay almost entirely in the stock and equipment and in the value of the goodwill which attached to the business. (The relevance of the allegations made by the respondent in its affidavits that the appellant was disposing of its stock, was not possessed of resources to replace stock and had ceased to reduce its indebtedness to the respondent, is obvious.)

[22] The parties agreed that the respondent should possess rights of inspection,

accounting, auditing and access to all books of account and tax records of the appellant (clauses 14.2 and 14.3).

[23] The agreement manifested a clear intention that should the appellant default or the business fail the respondent would have the right to keep the lease of the premises alive (clause 12.10.1), take over operation of the store and continue the business at the same location (clauses 12.10.2 and 12.10.3), with the obvious, albeit unstated, purpose of affording the respondent an opportunity of finding a new franchisee who would be able to take over an existing business. On termination of the franchise agreement the appellant would be excluded from any further involvement at the location, in the business or in a competing business (clauses 17.4 and 17.6).

[24] A comparison of the terms of the agreement with the conditions of the bond, particularly clause 14, demonstrates the complementary effect of the latter. The thread which connects the two is the importance of maintaining the business as a going concern in a single location irrespective of the success or failure of the appellant's enterprise.

[25] The appellant's counsel censured the use and effects of the phrase 'without prior notice to the MORTGAGOR' in clause 14.2. He contended that it authorized self-help in relation to all the powers conferred by the succeeding sub-clauses. The necessary implication, he said, was that the respondent could at its whim move into the premises, expel the appellant's representatives, take over the business and run it at the appellant's risk but principally for its own profit without consulting the appellant on any matter. I do not think the phrase bears those nuances or that, properly

interpreted, it gives the respondent carte blanche in matters affecting the appellant. In the first place the right to invoke clause 14.2 arises only if the preconditions of default, insolvency or imperilment are satisfied. There is no indication whatsoever of an intention to make the respondent a judge in its own cause in those matters or to exclude adjudication by a court of law. Second, the phrase itself merely regulates the rights of the parties *vis-à-vis* each other but says nothing about ousting the authority of the courts or restricting the appellant's access to them or making unnecessary a prior application to court for the perfection of the respondent's security. Given the rule of interpretation which promotes validity rather than invalidity ('*ut res magis valeat quam pereat')* and the presumption that parties to a contract intend it to be implemented in a lawful manner if that can be done, clause 14.1 can and should be construed in a sense consistent with the existing common law. Despite the passing of the bond the secured movables remained in possession of the debtor. To obtain a real right over its security the creditor needed to obtain possession, either by procuring the mortgagor's consent and co-operation or by obtaining judicial sanction: *Bock & Others v Duburoro Investments (Pty) Ltd*, *supra* at para [14].

[26] That is what the respondent did. Although neither the contract nor the common law required a court order for the exercise of the additional powers in clauses 14.2.2 to 14.6, the respondent expressly sought approval for the exercise of the power to conduct the business in the manner provided in clause 14.2.2, to sell and dispose of the business or assets in terms of clause 14.3 and to proceed as contemplated in clauses 14.5 and 14.6. I have already made it clear that it did require court sanction to

take possession in terms of clause 14.2.1, which it also obtained. That the respondent subjected the terms of the contract and its implementation to the intervention and oversight of the court takes much of the sting out of the appellant's complaint about the arbitrary, unreasonable and oppressive nature of the contractual powers conferred on it. While the taking over of a business as a going concern to secure a debt is a fairly drastic step which can, if abused, inflict hardship on a debtor, the context of the contractual powers in the bond under consideration renders the provision and exercise of the power commercially intelligible and combines adequate protection of the (largely perishable) security with realization of it in a manner calculated to achieve a realistic price (which would certainly be a lesser prospect were the creditor tied to a forced sale). Moreover, as counsel for the respondent pointed out, in exercising the discretionary powers inherent in operating and selling the business and the assets the respondent is obliged to act reasonably and to exercise reasonable judgment (*arbitrio boni viri*): *NBS Boland Bank Ltd v One Berg River Drive CC and Others*; *Deeb and Another v Absa Bank Ltd*; *Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at 937A-F. Moreover, the effect of clause 14.2.2 is that the mortgagee acts to all intents and purposes as the agent of the mortgagor in exercising its powers and subject to the duties in law that flow from that relationship.

[27] Counsel for the appellant suggested that clauses 14.2.2 and 14.3 both permit the mortgagee to carry on the business indefinitely while maintaining an ongoing indebtedness by the mortgagor to itself by the simple expedient of continuing to

purchase on credit on the mortgagor's behalf. This, he submitted, demonstrated the oppressive force of the provisions. I do not agree that the clauses have that tendency whatever the speculative limits of their misapplication. Clauses 14.2 and 14.3 must be read subject to clause 14.1. As soon as the default or imperilment which gave rise to the enforcement of the rights they provide has been overcome the causa for the retention of the business would fall away and the respondent would be obliged to restore the business to the appellant (if it has not already been lawfully sold or the franchise agreement cancelled). If the respondent were to seek improperly to manipulate the powers to draw out its hold on the business the appellant would have its remedies. Of course the likely concomitant of a sale of the business is a cancellation of the franchise agreement which is the trigger for the assignment or transfer of the lease, the closure of the store and the cessation of trading at the location. These are all consequences which the respondent is entitled to bring into operation under the franchise agreement. They are not under attack. That they exist independently of the bond, illustrates once again that the supposedly unhappy results of the exercise of the powers under the bond are in reality no more radical than the appellant has willingly and, commercially speaking, fairly exposed itself to without complaint under the contract.

[28] For these reasons I am satisfied that none of the clauses of the bond to which we have been referred possesses the pernicious tendencies which would warrant and require the Court to strike them down as contrary to public policy.

[29] In the result the appeal is dismissed with costs.

J A HEHER
JUDGE OF APPEAL

MPATI DP)Concur
MARAIS JA)
CAMERON JA)
CONRADIE JA)