

SOUTH AFRICA / JUDGMENT

## Coetzer v Quad Ostrich Farming (Pty) Ltd (3052/2020) [2020] ZAFSHC 190 (14 October 2020) [2020] ZAFSHC 190

COURT

Free State High Court, Bloemfontein

BEFORE

C Nekosie

CASE / FILE NUMBER

3052/2020

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IN THE HIGH  
COURT OF SOUTH AFRICA  
FREE  
STATE DIVISION, BLOEMFONTEIN  
Case  
no: 3052/2020  
In

|                     |                                                                                                    |
|---------------------|----------------------------------------------------------------------------------------------------|
| the matter between: | JACOBUS<br>NICOLAAS COETZER<br>Applicant<br>and<br>QUAD<br>OSTRICH FARMING (PTY) LTD<br>Respondent |
| CORAM:              | C NEKOSIE AJ                                                                                       |

**JUDGMENT**

BY: C NEKOSIE AJ

HEARD ON: 8 October 2020

DELIVERED ON: 14 October 2020

[1] The applicant approached this Court on 19 August 2020, on an urgent basis, and moved for orders in the following terms:

*“1 That the Applicant's non-compliance with form, process and prescribed time periods pertaining to service be condoned and that the application be heard on an urgent basis in accordance with the provisions of Uniform Rule of Court 6(12);*

2. That the Sheriff is authorised and directed to forthwith attach in order to perfect the Applicant's security, the items set out in annexure "X" to the Applicant's founding affidavit, wherever it may be found or in whose possession it may be;
3. The Sheriff is authorised and directed to hand over to the Applicant the property set out in annexure "X" hereto who is authorised to keep in his possession the property set out in annexure "X" hereto as payment of the Respondent's indebtedness towards the Applicant;
4. The Applicant is allowed to appoint security services to guard the items set out in annexure "X". The Defendant will bear the costs of the Security Services.
5. The Respondent is ordered, point out to the Sheriff set out in annexure "X" attached hereto;
6. This order shall not infringe upon the vested real rights of any other creditor of the Respondent;

7 The orders granted in terms of paragraphs 2 to 5 above, will have immediate effect, but the Respondent is granted leave to forward reasons, if any, on 3 September 2020, at 09h30 why the orders in the said paragraphs should be rescinded;

8 The Applicant is hereby ordered to serve this application and the order on Leon Lategan, the plaintiff in case no 1105/2019.

9 A rule nisi is hereby granted whereby the Respondent is called upon to supply reasons, if any, on Thursday, 3 September 2020, at 09h30 why the following orders will not be granted:

9.1 The Applicant is authorised to deal with the property referred to in paragraphs 2 and 3 above, read with the provisions of annexures "B" and "C" to the founding affidavit;

9.2 The Respondent is ordered to pay the costs of the application.

10 That the Respondent is entitled to anticipate the return dates referred to in paragraph 7 and above upon delivery of not less than 24 hours' notice.

11 This order, together with the notice of motion and annexures thereto will be delivered to the Respondent at its address referred to in paragraph 3 of the founding affidavit;”

[2] The relief sort was granted by Molitsoane J as is evident from the order dated 19 August 2020.  
[1]

[3] The dispute between the parties has its origin on 3 September 2018 when the Respondent hypothecated specified and other movable property to the bondholders, Applicant and other persons, in terms of a special general notarial bond, registered on 12 September 2018, which was to serve as security for money lent and advanced to the Respondent in the sum of R2,132,750.00.

[4] On 12 September 2019, an agreement to perfect was entered into between the parties. In terms of the agreement to perfect, the parties

agreed inter alia that the notarial bond is perfected and the movable assets subject to the notarial bond are delivered to the bondholders even though such assets would remain in the Respondent's possession.

[5] On 13 August 2020, the Sheriff attached movable property on the farm Bekerfontein to satisfy a judgment obtained against the Respondent by the third party creditor, Mr. Lategan. Some of the items attached by the Sheriff are also subject to the notarial bond in question. The items that were attached by the Sheriff are listed in annexure "E" to the founding affidavit.[2] The sheriff proposed the sale of the property to take place on 6 October 2020.

[6] On 17 August 2020 the Applicant sought an undertaking from the Respondent to sign an acknowledgment of debt and special power of attorney. The Respondent initially agreed to this, but later refused and it was made blatantly clear that he would not allow the Applicant to take possession of the property.

[7] The conduct of the Respondent caused the Applicant to proceed with the urgent application.

[8] Section 1(1) of the Security by Means of Movable Property Act 57 of 1993 provides that:

*“If a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it readily recognizable, is registered after the commencement of this Act in accordance with the Deeds Registries Act, 1937 (Act 47 of 1937), such property shall-*

(a) subject to any encumbrance resting upon it on the date of

registration of the bond; and

(b) notwithstanding the fact that it has not been delivered to the

mortgagee,

be deemed to have been pledged to the mortgagee as effectually as if it had expressly been pledged and delivered to the mortgagee.”

- [9] The essential argument for the Applicant is that it was necessary for him to bring the application in order to take possession of the assets pursuant to a court order to that effect, to acquire a real right in those assets. Taking possession of the assets in the absence of a court order, bearing in mind the attitude of the Respondent towards giving up possession, would expose the Applicant to a spoliation.
- [10] The Respondent on the other hand argues that the property had already been perfected by the notarial bond and the agreement to perfect. Consequently, the application was not necessary. To substantiate this argument I was referred to the matter of *Senwes Ltd v Muller*[3].
- [11] In *Senwes Ltd supra* the Court had to decide on the effect of the clauses in the notarial bonds that are legally unenforceable and invalid because they purport to permit the attachment and sale in execution of the mortgaged movable property without notice or legal process.
- [12] Moseneke AJ, as he then was, confirmed that there is no need to perfect a notarial bond as follows:
- “Mr Swart conceded, in my view correctly so, that in terms of s 1(1) of the Security by Means of Movable Property Act 57 of 1993 a bondholder in a special notarial bond does acquire possessionless pledge. In other words, it is not necessary for such a bondholder to be in actual possession of the mortgaged movables provided such movables have been clearly identified in the special notarial bond.”*
- [13] However the learned Judge proceeds to consider, with reference to a number of authorities, instances where the notarial bond contains clauses permitting the attachment and sale in execution of the mortgaged movable property without notice or legal process and its effect. Clauses of such nature were confirmed to be contrary to the dignity, equity, and spirit of our legal procedure. It would promote that creditors be allowed to take the law into their own hands which is against public policy and unconstitutional[4].
- [14] The notarial bond in the present case coincidentally contains clauses in paragraphs 2 and 3 thereof that may be susceptible to interpretation of being legally unenforceable and invalid. [5] It is not necessary in my view to make a determination in this regard.
- [15] The applicant, well knowing their rights as contained in the notarial bond and the agreement to perfect, was correct to approach the court for the Court for relief because failing to do so would leave him exposed to his conduct being challenged on the grounds of invalidity and unconstitutionality.
- [16] In *JUGLAL NO AND ANOTHER v SHOPRITE CHECKERS (PTY) LTD t/a OK FRANCHISE DIVISION*[6] the Supreme Court of Appeal in dealing with stipulations for parate execution quoted from the judgment of the Court *a quo* and expanded as follows:

*“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.”

[17] It is submitted on behalf of the respondent that the Applicant has not made out a case on the papers for needing physical control of the goods. Further that there is nothing in the founding affidavit to indicate a reasonable apprehension that the Respondent would dispose of or conceal the goods. Nor was it alleged that the Respondent would be imminently liquidated.

[18] In the present circumstances, I find that:

- (a) the attachment of certain goods by the Sheriff on behalf of a third party creditor, in conjunction with the indication that the attached property may be sold by 6 October 2020 ;
- (b) the Respondent's refusal to agree to an acknowledgment of debt and special power of attorney and
- (c) the Respondent's blatant refusal to comply with the request for removal of the movable property by the applicant as contained in the letter marked as annexure "F" to the founding affidavit;

constitute reasons justifying the Applicant to approach the court on an urgent basis.

[19] I am satisfied that the applicant properly made out a case for the relief sort and consequently,

It is ordered that

1. The rule nisi granted in paragraph 9 of the Court Order dated 19 August 2020 is herewith confirmed.
2. Reference in paragraph 9.1 of the aforesaid Court Order to annexure “C” is amended to read annexure “A”

CNEKOSIE, AJ

For the applicant: Adv A.J.R. VAN RHYN SC

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- [1] P. 81-82
- [2] see pp. 71 -75 of the indexed papers
- [3] 2002 (4) SA 134 (T) at 139
- [4] Senwes Ltd v Muller, supra at p140E to 142F
- [5] P 21 and p22 of the indexed papers
- [6] 2004
- (5) SA 248 (SCA)

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