



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case no: 7614/2013

In the matter between:

MERCHANT COMMERCIAL FINANCE (PTY) LIMITED

APPLICANT

and

X-MOOR TRANSPORT CC t/a CROSSMOOR

FIRST RESPONDENT

WELLPICK PROPERTIES (PTY) LIMITED

SECOND RESPONDENT

JUDGMENT

Delivered: 18 June 2014

MBATHA J

[1] The Applicant brought an application as a matter of urgency and a rule nisi was granted in due course effectively restraining the First Respondent from disposing or in any way encumbering two (2) trailers that forms the basis of the application pending the final adjudication of the application itself.

[2] In the Notice of Motion the relief being sought against the First Respondent is in the nature of a declarator to the effect that the Applicant is entitled to possess two (2) trailers described in some detail and in possession of the First Respondent and for an order that the two (2) trailers in question should be restored to the possession of the Applicant.

[3] The facts giving rise to the present litigation are not complicated and can be summarised as follows:

(a) On 4 October 2011 the Applicant concluded a written factoring agreement with an entity known as Taxi Trucks Logistics (Pty) Limited ("taxi trucks") and an entity known as Taxi Trucks Parcel Logistics (Pty) Limited ("taxi logistics") as the suppliers. The Second Respondent concluded a suretyship agreement pursuant to which it stood surety of all the obligations of taxi trucks to the Applicant in terms of the factoring agreement.

(b) Taxi trucks went into liquidation and was finally wound up in the Western Cape High Court on 22 January 2013.

- (c) The Second Respondent's obligations as surety remained of full force and effect and it is not disputed that an amount exceeding R7million is due by it to the Applicant in respect of the failure of taxi trucks to honour its obligations.
- (d) On 5 March 2012 the Applicant registered a special notarial collateral covering bond over movable property belonging to the Second Respondent, taxi trucks and taxi logistics. The bond identified a vast number of immovable and more specifically the two (2) trailers as described in paragraph 2 of the Notice of Motion and the object of the present dispute.
- (e) Copies of the certificates of registration of the two (2) trailers in question reveal the Second Respondent as owners and the Applicant as title holders, respectively.
- (f) The First Respondent is a transport and plant equipment contractor and operates a large trucking and earthmoving fleet and prior to the liquidation of taxi trucks it contracted with it to haul the trailers belonging to taxi trucks upon which goods belonging to customers of taxi trucks had been loaded for transport.
- (g) Taxi trucks defaulted in its obligations to pay the First Respondent the amounts due to it and during November 2012 the First

Respondent having been engaged by taxi trucks to tow the two (2) trailers in question to Durban held the trailers and the consignments upon them and demanded settlement of the amounts due by taxi trucks to it.

(h) Taxi trucks could not make the required payments to the First Respondent and the latter decided to hold on to the two (2) trailers and the consignments placed upon them and incurred expenditure necessary for the preservation of the trailers and the loads in question.

(i) The First Respondent contends that it was entitled to hold the trailers and was exercising a debtor/creditor lien. In the answering affidavit it is alleged that it is clear to the First Respondent that the Applicant wishes to secure for itself the goods which are on the trailers. The latter claim is in my view without any foundation.

(j) The First Respondent alleges that *ex facie* the bond on which the Applicant relies, the trailers belongs to taxi trucks and given the fact that taxi trucks is in liquidation there is no basis on which the Applicant can seek possession of the trucks-at least not in the absence of the liquidators of taxi trucks as a party to the present application.

[4] First Respondent raised a number of points *in limine*. It is not necessary to deal with each and every point taken *in limine*, suffice it to say that I am not persuaded that any particular substance to the relief being sought is revealed. It is so that the liquidators of taxi trucks have not been cited as a party to the present application but in the relying affidavit it is made clear that they have no objection to the orders being sought by the Applicant. Nor for that matter do any other interested party show any opposition to the relief being sought by the Applicant.

[5] The First Respondent rely on the decision in **Contract Forwarding (Pty) Limited & Others**¹ for support and contends that the Applicant ought to have perfected the bond it relies upon prior to the liquidation of taxi trucks. In this case the Supreme Court of Appeal was dealing with a general covering bond and not a special notarial bond as in the present matter where the property in question is specifically identified.

¹2003 (2) SA 253 (SCA)

[6] Section 1(1) of the Security by Means of Movable Property Act² provides as follows:

“1. Legal consequences of special notarial bond over movable property:

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

(a) subject to any encumbrance resting upon it on the date of registration of the bond; and

(b) notwithstanding the fact that it has not been delivered to the mortgagee, be deemed to have been pledged to the mortgagee as effectually as if it had expressly been pledged and delivered to the mortgagee.”

[7] The two (2) trailers are both readily identifiable from the bond itself and passes the test laid down by the Supreme Court of Appeal in Ikea Trading *cite case ref copy on file*. For purposes of this application it is immaterial if the owner of the trailers is the Second Respondent or taxi trucks as both are mentioned in the bond itself.

²Act 57 of 1983.

[8] In my view it was therefore not required of the Applicant to perfect the bond in order to rely on the protection afforded by the bond.

[9] The First Respondent therefore only has a debtor/creditor lien over the two (2) trailers and these are not real securities capable of ranking ahead of the protection afforded to the Applicant in terms of the bond. See **Glaser & Sons v The Master and Another NO.**³

[10] It follows that I am of the view that the *rule nisi* ought to be confirmed save to the extent that I do not consider that a punitive costs order ought to be made.

[11] I therefor make the following order:

(a) The Rule nisi granted by consent on 25 July 2013 is confirmed but the order in paragraph 1.4 shall be amended to simply read “that the First Respondent pays the costs of this application” with the rest of this subparagraph to be deleted.

³1979 (4) SA 780 (C) at 787 D-H.

MBATHA J

Date of hearing:	3 December 2013
Date of judgment:	18 June 2014
Counsel for the Applicant:	Adv. A.M. Smallberger
Instructed by:	Werkmans Attorneys c/oShepstone & Wylie Ridgeside Office Park
Counsel for the 1 st Respondent:	Adv. A.D. Collingwood
Instructed by:	NaidooMaharaj Inc. Morningside