

IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 388/95

In the matter between:

Dorbyl Vehicle Trading & Finance

Company (Pty) Ltd

Plaintiff

vs

Sunnyboy Masende Zwane

Defendant

CORAM:

S.W. SAPIRE, ACJ

FOR THE PLAINTIFF

MR. P. FLYNN

FOR THE DEFENDANT

MR. MADAU

JUDGMENT

(15/11/96)

The Second Claimant has brought interpleader proceedings in terms of rule 58. Dorbyl Vehicle Trading and Finance Company is the 1st Claimant and it has caused two motor buses owned by the judgment debtor Sunnyboy Masende Zwane to be attached pursuant to a judgment granted by this Court in its favour. The Swaziland Development and Savings Bank which is the 2nd Claimant disputes the 1st Claimant's right to have the vehicle attached and sold in execution.

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The basis of this objection are deeds of hypothecation executed by the judgment debtor in favour of the second claimant purportedly in terms of Section 18 of the Swaziland Development and Savings Bank Order, of 1973.

The first deed of hypothec was executed on 8th June 1994 and provides that Zwane as the borrower "hereby charges to the Bank for the repayment of the Principal sum all that property described in the Fifth Schedule hereto as a continuing security". The property described in the Fifth Schedule is one of the buses which has been attached by the 1st Claimant.

Similarly the second deed of hypothec provides that the second bus is given as security.

The deeds of hypothec are said to be executed in terms of section 18 which reads as follows:

"18(1) - Subject to this section, the Board may upon such conditions as it deems fit and on completion of a deed of hypothecation in a form to be approved by the Board lend money upon a hypothec of crops or other agricultural or natural produce whether attached to the soil or not, field timber, animal fodder, industrial and fishing material, rolling stock, boats, fishing tackle or nets, raw materials equipment, machinery, stocking trade and generally all produce of labour and things necessary used in connection with production or other movable property of whatsoever kind or description of which the borrower is the owner and in respect with of he has right of use and disposal whether or not on the date of such land is made the property or thing offered as security is in existence or has been

acquired by the person receiving the loan".

Sub-section 2 of Section 18 provides that the deed of hypothec operates as a pledge in favour of the bank and obviously then secures that property against the execution by other creditors. This is specially provided for in this section.

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Sub-section 8 of Section 18 provides that the bank shall maintain a register of all deeds of hypothec entered into in terms of this section and its principal place of business and such register shall be open for inspection by members of the public during normal hours of business of the bank without charge.

This sub-section and its interpretation was the subject matter of the dispute between the parties. It was argued on behalf of the 1st claimant that the execution creditor that section 18 is peremptory.

And the point taken by the 1st claimant is that because it is provided in Section 18(8) that the bank shall maintain at its, principal place of business a register of all deeds of hypothecation entered into in terms of the section Such register shall be open for inspection by members of the public during normal business hours of the bank without charge but because the second claimant kept such a register only at its offices at Nhlangano which is not its principal place of business in Swaziland, it had not complied with the provisions of this act. Such non-compliance, so it was argued, rendered the deeds of hypothec invalid and ineffective as security in respect of the buses.

There is no mention in the papers filed by either side of registration of the deeds and when the matter initially came before me the hearing was adjourned for the parties to ascertain whether the deeds had been registered or not and if so where. I was informed at the commencement of the adjourned hearing that the deeds were registered at the second claimant place of business in Nhlangano and that the outcome of the application would therefore depend on the following considerations, namely,

- a) whether the provision requiring registration impinged on the validity of the deeds in the sense that failure to register automatically resulted in deeds being invalid and ineffective as security; and
- b) whether registration at Nhlangano where the 2nd claimant operated a branch was sufficient compliance with the requirement.

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The Statute itself describes no sanction or penalty for failure and does not stipulate any consequences of non-registration of the deed. No time limit as to the period within which registration must take place and if it were necessary to the validity of the deed of hypothecation that they be registered then no deed would be effective until so registered. On the other hand an invalid deed could be validated by registration at any time. Even the two deeds of hypothecation, if registration was necessary for their validity, could now be registered and would thereupon become valid, presumably from the time of their execution. This is an absurd conclusion to which to be led and I find therefore that Section 18(8) is not peremptory and failure to comply with its provisions does not render any deed of hypothecation executed in terms of Section 18(1) ineffective.

It is possible that a member of the public who has made a search at the banks principal place of business and relying on his finding no registration of a relevant deed of hypothecation there, acts to his prejudice by lending money on security of movables which are mentioned in an unregistered deed would be entitled to raise an estoppel against the bank if the latter sought to rely on the unregistered Deed, to afford it some preference in relation to those moveables. But the requirements of an estoppel are not present in the present case and in fact no estoppel was really relied on.

Having come to this conclusion it would seem that the 2nd claimant should be the successful party in these proceedings. There is however another consideration affecting the validity of the Deeds of hypothecation which cannot be overlooked. Section 18(1) which I have quoted permits the execution of deeds of hypothecation over a specific class of movable goods. The list is extensive but definitive. It includes crops and other agricultural or natural produce. Specifically included are felled timber, animals fodder, industrial and fishing materials, rolling stock, boats, fishing tackle or nets, raw materials, equipment, machinery, stock in trade and generally all produce of labour and things necessarily used in connection with production.

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It does not seem that buses fall within this category of goods so defined. Following on the list comprising the category of goods over which a hypothec may be created are the words "or any other movable property of whatsoever kind or description".

When 1 raised this question with counsel for the first claimant he was reluctant to accept this additional string to his bow. Less surprisingly counsel for the 2nd claimant gratefully accepted the declination of the first plaintiff's counsel and agreed that the *eiusdem generis* rule of construction was not to be applied. In other words counsel were in accord that the buses were other movable property of whatsoever kind or description which could be the subject matter of a deed of hypothec.

If the legislature in enacting Section 18 of the Order in Council 49/93 intended that the Bank could lend monies on the security on any movables whatsoever there was little point in defining any category of movables in the first place. All that needs to have been said is that the bank can register a deed of hypothec over movables. Moreover there is other statutory provision to be found for deeds hypothecating movables to banks generally. The only difference is that such deeds have to be registered in the deeds office. The conclusion in my view is inescapable that the legislature intended to limit the goods on the security of which the bank can lend money in terms of hypothec provisions for which is made in section 18. The category of goods envisaged as the subject matter of such deeds of hypothec are products of agriculture, fishery, forestry and industry together with the capital goods, machinery and tools used in the production thereof. In applying the *eiusdem generis* rule in the present instance I have in mind and have considered the judgment in *Commissioner for Inland Revenue vs the Ocean Manufacturing Limited* 1990 (3) of SA at 610.

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In *Oelofse vs Santam Insurance Company Limited* 1982(3) SA 882 the Appellate Division in South Africa stressed that the *eiusdem generis* rule must be applied with caution and reference was made to *Rex vs Nolte* 1928 AD at 382.

For the rule to operate, the word that is sought to be construed must be one of a series of similarly narrow words, all the other members of the series having a common element which may or may not be present in the doubtful word. Here the doubtful word is buses and it does not seem to have anything in common with the list of the movables which have been mentioned. In such a case the doubt as to the meaning may represent the greater width of the ordinary case to which the maxim is applied, but in any such use of the maxim there must be only one element that can possibly and reasonably be used to fix the category of the series. This was stated in *Standard General Insurance Company Limited vs Croucamp* 1959(3) SA at 166B. I also had reference to other cases in the High Court of Zimbabwe. The cases are *State vs Hove* and *State vs Shumba* 1979(4) SA 648. Here it was said because the primary rule in interpreting a statute requires the words - taking into consideration their context and without being blinded only by the language used to be construed according to their ordinary meaning, and because the *eiusdem generis* rule restricts the general tenor of such words, a

restrictive interpretation may only be placed upon the words if such intention clearly appears. In case of doubt the words should be given their ordinary meaning and should not be restricted to a species of a genus. In the present case as I have said the intention of the legislature as gathered from the words that are used clearly intended that there should be a limited category of goods which could be the subject matter of the hypothec.

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I have come to the conclusion that buses do not fall within such category and that the deed does not operate as a bar to the first claimant executing all the buses.

I therefore find for the first claimant and order the 2nd claimant to pay the costs of these proceedings.

S.W. SAPIRE

ACTING CHIEF JUSTICE