**Reportable**
Case No 228/2002

In the matters between:

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| **ANTHONY SIMON BOCK AND OTHERS** | **Appellants** |
| **and** | |
| **DUBURORO INVESTMENTS (PTY) LTD** | **Respondent** |

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| Coram: | HARMS, ZULMAN, FARLAM, NAVSA JJA and VAN HEERDEN AJA |
| Heard: | 8 SEPTEMBER 2003 |
| Delivered: | 26 SEPTEMBER 2003 |
| Subject: | Suretyship – release of – parate executie – pactum commissorium – pledge of shares |

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**JUDGMENT**

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HARMS JA/

HARMS JA:

[1] These appeals are about the release of sureties (the appellants) from their obligations under a number of deeds of suretyship. They stood surety for the obligations of L S Molope Holdings (Pty) Ltd, a company that had borrowed substantial amounts from three banks: Nedcor Bank Ltd, Mercantile Bank Ltd and The Business Bank Ltd. One of the appellants, Dunbush Investments (Pty) Ltd, was also a debtor of Mercantile Bank and the other appellants stood surety for its liabilities. Much more need not be said about this because the outcome of the case on the indebtedness of Molope Holdings applies to that of Dunbush.

[2] The banks have ceded their rights against the sureties to the present respondent, Duburoro Investments (Pty) Ltd, a company in which they hold shares and which they control. Duburoro instituted separate applications, each dealing with the claims of one of the banks but since the issues were similar they were heard together in the Court below and so have the appeals, which are before us by leave of that Court.

[3] The facts have been set out in the judgment of Schwartzman J,[1] who found in favour of Duburoro, and since it has been reported, I shall limit myself to recite those facts that are material to this judgment. It may

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[1] *Duburoro Investments (Pty) Ltd v Bock and Others* 2003 (2) SA 76 (W).

be noted that his factual findings have not been attacked and that the issues on appeal are largely legal. Because of the factual overlap, I intend to take the claim of one of the banks as the basis for discussion of the issues and where necessary indicate any relevant differences.

[4] Dunbush, Molope Holdings and the appellants were all part of an intricate control structure of a listed company, Molope Group Ltd, and as security for the loans of Dunbush and Molope Holdings a large number of shares in Molope Group were pledged to the banks. (Some other shares had also been pledged but those have no effect on this judgment.) Each bank used its own deed of pledge and these differ one from the other but, as will become apparent, not much turns on these differences. When the principal debtors defaulted, the banks called up the loans and, purportedly acting in terms of the pledges, took over the pledged shares and credited the principal debtors with the value attributed to them. Herein lies the rub of the problem between the sureties and the banks. The sureties, in summary, say that the banks, in acting as they did, acted to their prejudice and this led to their release. In the alternative, they allege that the amounts credited to the principal debtors as a result of the taking over of the shares were insufficient and that since the true amount of the principal indebtedness had not been established on the papers, the applications should have been dismissed or referred to trial or evidence.

[5] The Nedcor pledge permitted Nedcor, on default of the debtor,

'immediately or at any time thereafter irrevocably and *in rem suam* or at its discretion . . . to realise the securities . . . or to take over the securities at the bank's election at a fair value . . ..'

In other words, the bank had an option: it could have realised the pledged shares by disposing of them to a third party or it could have taken them over.[2] It was, in any event, not obliged to do either.

[6] Three distinct legal concepts are at play:[3] (a) The right to dispose of a pledged article without the intervention of a court order, commonly known as *parate executie*; (b) the contractual right of taking over a pledged article by the creditor – a *pactum commissorium*; and (c) the quasi conditional sale whereby the creditor may, upon default, take over a pledge at a fair price.

[7] The principles concerning *parate executie* (immediate execution) are trite.[4] A clause in a mortgage bond permitting the bondholder to execute without recourse to the mortgagor or the court by taking possession of the property and selling it is void.[5] Nevertheless, after default the mortgagor may grant the bondholder the necessary authority to realise the bonded property.[6] It does not matter whether the goods are immovable or movable: in the latter instance, to perfect the security, the

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[2] So did the other pledges. Their terms appear from the judgment below para 14.1 and 15.1.
[3] Cf *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 14C-E.
[4] Scott & Scott *Wille's Mortgage and Pledge* 3 ed 121-123; 17 *LAWSA* para 478 and 539; Van der Merwe *Sakereg* 2 ed 611, 659; *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) para 26.
[5] *Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another* 1971 (1) SA 613 (T).
[6] *Iscor Housing Utility Co and Another v Chief Registrar of Deeds and Another* 1971 (1) SA 613 (T) 616D-G.

court's imprimatur is required.[7] It is different with movables held in pledge: a term in an agreement of pledge, which provides for the private sale of the pledged article and in the possession of the creditor, is valid but a debtor may

> '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.'[8]

Smalberger JA put the proviso in slightly different terms when he said that for validity the private execution clause should not prejudice, or be likely to prejudice, rights of the debtor unduly,[9] meaning that the clause should not contain execution provisions that would be *contra bonos mores*.

[8] The principles about a *pactum commissorium* have recently been reaffirmed by this Court:[10]

> 'A *pactum commissorium* in the context of a pledge is an agreement that, if the pledgor defaults, the pledgee may keep the security as his own property.'

Such an agreement is void.

[9] An agreement whereby a creditor may keep a pledge upon the debtor's default – at a fair price then determined is similar to a conditional sale. Such an agreement is valid[11] and, in relation to the

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[7] Cf *Contract Forwarding (Pty) td v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 (SCA).
[8] *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 547.
[9] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 14D-E.
[10] *Graf v Buechel* 2003 (4) SA 378 (SCA) para 9-11.
[11] *Graf v Buechel* 2003 (4) SA 378 (SCA) para 27 et seq.

pledging of shares, known since at least 1892.[12] It does not differ much in kind from a *lex commissoria* or forfeiture clause which, typically, permits a creditor to keep what was received from a debtor in the event of the cancellation of an agreement.[13] The effect of a forfeiture clause may be alleviated under the Conventional Penalties Act.[14]

[10] The quoted clause in the Nedcor pledge does provide for *parate executie* of the pledged shares which, for purposes of these rules, are considered to be movables held by the creditor *in securitatem debiti*.[15] But Nedcor did not 'execute' in terms of this right. It had, additionally, the right to exercise the 'option' to purchase the pledged shares at a fair price and it is this right the Bank sought to exercise.

[11] I have taken the trouble to explain this in some detail because the Court below (at para 13.1) and the appellants in argument assumed that Nedcor had exercised a right of *parate executie*. The importance of this assumption for purposes of the appellants' argument lies therein that they submit that Nedcor's exercise of its right to *parate executie* was unconstitutional since clauses permitting summary execution are in conflict with s 34 of the Constitution which, i. a., guarantees the right to have a dispute resolved by the application of law before a court of law. For this submission they rely on two judgments of the Constitutional

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[12] *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 546-547.
[13] Cf *Port Elizabeth Town Council v Rigg* (1903) 20 SC 252 256.
[14] 15 of 1962.
[15] *Graf v Buechel* 2003 (4) SA 378 (SCA) fn 1.

Court[16] where it had to consider the constitutionality of legislative provisions entitling an organ of state acting as a bank in the agricultural sector, without recourse to a court of law, to instruct a messenger of the court to seize property, which is subject to a right of security and in the possession of the debtor, and to sell it on such conditions as the bank in its discretion may determine.

[12] Procedurally, the way this point has been dealt with by the appellants is unacceptable. They, in one sentence in the answering affidavit, submitted that what Nedcor did by means of *parate executie* was unconstitutional. Before Schwartzman J the point was not argued although the heads of argument had made some reference to it. He consequently assumed the constitutionality of *parate executie* (at para 13.1). Before us it became the main point. It has more than once been said[17] that this is unsatisfactory especially where, as in the present case, the attack becomes diffuse and the ramifications of the decision are difficult to envisage. Where unconstitutionality may involve questions of fact, especially when questions of reasonableness and justifiability have to be considered, this method of dealing with such important commercial matters ought not to be countenanced.

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[16] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC); *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and Others, Sheard v Land and Agricultural Bank of South Africa and Another* 2000 (3) SA 626 (CC).

[17] E.g. *Singh v Commissioner South African Revenue Service* 2003 (4) SA 520 (SCA) para 24.

[13] Nevertheless, I find it difficult to extend the proscription of these statutory provisions by the Constitutional Court to *parate executie* of movables which are lawfully in the possession of the creditor. This procedure does not authorise a creditor to bypass the courts and 'seize and sell the debtor's property of which the debtor was in lawful and undisturbed possession.'[18] It does not entitle the creditor 'to take the law into his or her hands'.[19] It does not permit 'the seizure of property against the will of a debtor in possession of such property'.[20] And since the debtor may seek the protection of the court if, on any just ground, he can show that, in carrying out the agreement and effecting a sale, the creditor acted in a manner which prejudiced him in his rights,[21] the creditor cannot be said to be the judge in his own cause.[22]

[14] Our common law has always recognised that self-help is unlawful.[23] That is why the *mandament van spolie* developed and

[18] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 10.
[19] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 11.
[20] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 19.
[21] *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 547 quoted above.
[22] *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) para 50.
[23] *First National Bank of South Africa Ltd v Land and Agricultural Bank and Others* 2000 (6) BCLR 586 (O) 590 quoting *Curatoren van 'Pioneer Lodge No 1' v Champion en Andere* 1879 OFS 51 at 54 where the following was said:
'Deze is eene der belangrijkste zaken die voor dit Hof ooit kan gebracht worden of gebracht is; niet wegens de waarde der goederen die er in betrokken zijn, maar wegens de voorname principen die er in opgesloten zijn. Wanneer in dit hoofdstad van den Oranjevrijstaat het toegelaten zou kunnen worden dat eene bende van achttien personen zou gaan om op eigen gezag goederen weg te voeren terwijl die zijn in het bezit van anderen waartoe zij geen recht van ingang hadden, dan zou men bijna kunnen zeggen dat de gerechtshoven maar moeten gesloten worden, want "de sterkste man is baas". Dit zou slaan aan den wortel van de veiligheid der maatschappij.'

judgments such as *Nino Bonino v De Lange*[24] have stood the test of time. The rules relating to *parate executie* in relation to pledged articles developed within that milieu and drew a sensible distinction between the case where the security is in the hands of the debtor and that where it is in the hands of the creditor. The Constitutional Court was concerned with a legislative deviation from the norm.

[15] It follows from this that the judgment in *Findevco (Pty) ltd v Faceformat SA (Pty) Ltd*,[25] finding that the law relating to *parate executie* of movables as set out above is unconstitutional, is wrong. It is not necessary to deal with all the reasons[26] for this conclusion since the criticism of Prof Susan Scott[27] is generally to the point, especially where she points out that the judgment failed to distinguish between (a) perfection clauses, (b) statutory measures empowering the state to seize, without the intervention of the courts, property from debtors and (c) summary execution clauses in pledge agreements.

[16] However, as I have indicated, Nedcor (and, for that matter, the other two banks) did not exercise its right of *parate executie*; instead it took over the shares at an allegedly fair price in terms of its option. When

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[24] 1906 TS 120.
[25] 2001 (1) SA 251 (E) per Froneman J.
[26] Froneman J thought it important that the statutory provisions dealt with by the CC related to both immovables and movables (at 254G-H), failing to realise that the movables, too, were in the possession of the debtor in terms of a statutory hypothec which does not require the creditor to have possession. He also thought that that the common law permits the attachment of movables without a court order (at 256E-F) which it does not.
[27] 'Summary Execution Clauses in Pledge and Perfecting Clauses in Notarial Bonds' 2002 (65) *THRHR* 656.

this became apparent during argument, the appellants were driven to submit that conditional contracts (especially sales), forfeiture clauses, agency agreements permitting the sale of one's property, powers of attorney *in rem suam*, voluntary repossessions and even rights of retention are all unconstitutional. I do not believe that this was suggested with any degree of confidence and it illustrates my objection to the procedure adopted.

[17] The Nedcor pledge, permitting it to take over the shares 'at a fair price', contained an important qualification: the parties to the pledge had to agree on the price; and in the absence of agreement the price had to be determined by an expert. Nedcor relied on an agreement which came about as follows. On 6 December 1999, it wrote a letter to the directors of Molope Holdings, informing them of its intention to take over the shares at a fair price which it set out. Agreement was sought. In response, Nedcor the following day received a letter on a Molope Holdings letterhead, signed by a director, Mr Hirschowitz, agreeing to the value proposed. Nedcor referred to these facts in answer to an allegation by one of the sureties, Mr Bock, that no directors' meeting had been held to consider the letter of 6 December and that, to the best of his knowledge, the company had never approved the suggested values. The Court *a quo* (at para 13.3) saw this as a dispute of Hirschowitz' authority which, on the papers, could not be resolved and proceeded to determine the issues

on the assumption that in taking over the shares Nedcor was in breach of the pledge agreement (at para 21.1). Counsel for the respondent was content to argue the case on this assumption. The effect of this assumption was that the validity of the relevant clauses and the propriety of the exercise of their rights by the banks became irrelevant.

[18] I then turn to the next issue, namely that of prejudice. In the 1992 edition of *Caney's The Law of Suretyship*,[28] there appeared a statement in these general terms:

'The creditor must do nothing in his dealings with the principal debtor and the other sureties which has the effect of prejudicing the surety; if he does the surety is released.'

This and a similar statement from *Wessels Law of Contract in South Africa*,[29] were quoted in some judgments.[30] The latter reads as follows:

'In equity, upon a contract of suretyship, if the person guaranteed does any act injurious to the surety, or inconsistent with his right, or if he omits to do any act which his duty enjoins him to do and the omission proves injurious to the surety, the surety will be discharged.'

These statements, it appears, became in the eyes of some a rule of general application and it is on this rule that the sureties in a sense rely. The problem, however, is that Wessels was not quoted fully and that he was quoted out of context. Wessels was dealing with the effect of the

[28] 4 ed by Forsyth & Pretorius.
[29] 2 ed para 4346. The para and page references in Schwartzman J's judgment (at para 17.1) are wrong.
[30] E.g. *Minister of Community Development v SA Mutual Fire & General Insurance Co Ltd* 1978 (1) SA 1020 (W) 1023H; *Fry and Another v First National Bank of SA Ltd* 1996 (4) SA 924 (C) 928C-D.

creditor's negligence on the surety (para 4338). He mentioned that it is difficult to lay down a general rule to determine when the personal negligence of the creditor would enable the surety to claim discharge (para 4342). He then hypothesized that the surety might be released

'if *by contract* there is a duty cast upon the creditor to preserve the surety's rights.'

(Para 4343; my emphasis.) The next four paragraphs illustrate this proposition and the last of these deals with an 1861 case of *Watts v Shuttleworth*[31] where, as Wessels (at para 4346) said,

'a person became surety for the due performance of a work, on the understanding that the employer would insure against fire. The Court held that a failure to insure discharged the surety.'

Only then the quoted text came. In *Watts* the building did burn down. The Court there had to consider whether the failure to insure released the surety fully or only *pro tanto* and, applying the 'analogy' of the English rule of equity that if the creditor gives the debtor time to perform, the surety is released (which is not part of our law) the Court held that the surety had been released *in toto*.

[19] Probably fearing that he might be misunderstood by future generations Wessels, after the quotation, referred by way of comparison to a judgment of his. That case, *Nathanson and Another v Dennill* 1904 TH 289 292, makes his point in no uncertain terms. He held that if

[31] 158 ER 510 (Ex Ch).

‘a material alteration is made between the creditor and the principal debtor in an agreement to which there is a surety’

the surety may be released if the surety is thereby prejudiced. The alteration he referred to was one that amounted to a novation of the principal debt.

[20] This Court, in *Absa Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA), was confronted with the submission that:

‘there is a general so-called “prejudice principle” in our law to the effect that, if a creditor should do anything in his dealings with the principal debtor which has the effect of prejudicing the surety, the latter is fully released.’

It came, in the words of Olivier JA, without any mincing to the conclusion that no such principle exists and held (at para 19):

‘As a general proposition prejudice caused to the surety can only release the surety (whether totally or partially) if the prejudice is the result of a breach of some or other legal duty or obligation. The prime sources of a creditor's rights, duties and obligations are the principal agreement and the deed of suretyship. If, as is the case here, the alleged prejudice was caused by conduct falling within the terms of the principal agreement or the deed of suretyship, the prejudice suffered was one which the surety undertook to suffer. Counsel who drafted the plea was therefore on the right track when he sought to base his case upon prejudice which flowed from the breach of an obligation, contractual in the present circumstances.’

[21] This statement of the law was accepted as correct by Griesel J[32] and by the Court *a quo* (at para 19) and somewhat grudgingly by the sureties during argument before us. The problem is that Van Zyl J[33] added an obiter gloss to it in these terms:

> 'On the basis of these considerations I would then suggest that the prejudice required for a successful defence of prejudicial conduct justifying release from a suretyship agreement may be described in the following terms. With reference to all the relevant facts and circumstances, and with due regard to considerations of justice, fairness, reasonableness, good faith and public policy, the alleged prejudice must constitute real and substantial prejudice which has the effect of unduly increasing the contractual burden of the surety.'

I have to admit that I do not understand how this test will work in practice or why the gloss was necessary. The considerations given may be appropriate where a judicial discretion is involved or a value judgment called for, such as in the case of sentencing or the determination of wrongfulness, but the release of a surety is not a matter of either. In a constitutional democracy the principle of legality applies and making all rules of law discretionary or subject to value judgments may be destructive of the principle. In any event, this gloss is irreconcilable with *Brisley v Drosky* 2002 (4) SA 1 (SCA) para 11-24 dealing with the concept of bona fides in the law of contract. Lest there be any

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[32] *Investec Bank Ltd v Lewis* 2002 (2) SA 111 (C) 116H-117C.
[33] Hlope JP concurring in *Di Giulio v First National Bank of SA Ltd* 2002 (6) SA 281 (C) para 41.

misunderstanding, this judgment subscribes to the law as set out in the judgment of Olivier JA[34] in spite of the criticism in the current edition of *Caney*.[35]

[22] The argument of the sureties amounts to this: the banks were in possession of securities; these had to be realised in a lawful manner at the appropriate time and at a fair value; since this did not happen, they were released. The Court *a quo* (at para 19.1) saw the law in another way:

'I can see no reason in equity, morality, public policy, principle or law why minimal prejudice should automatically release a surety from all liability for the principal debt. In an appropriate case there is much to be said for limiting the surety's release to the extent that he or she has been prejudiced by the conduct of the creditor that is in breach of some of some or other legal duty or obligation.'

[23] One can approach the matter from a slightly different angle. The agreement between Nedcor and the principal debtor provided for the take-over of the pledges in a particular manner. Nedcor took them over in a manner contrary to that agreed upon. This breach did not release the principal debtor from its liability but the principal debtor was entitled to have been placed in the position as if the agreement had not been breached, which means in this case that the principal debtor was entitled to be credited with the 'true' value of the shares as at the date of take-over. Why should the position of the sureties, who are also co-principal

[34] *Absa Bank Ltd v Davidson* 2000 (1) SA 1117 (SCA) para 19.
[35] Forsyth & Pretorius *Caney's The Law of Suretyship* 5 ed 205-206.

debtors, be any different? There is no fiduciary relationship between them and the creditor.[36] Their indebtedness will not have been increased or changed as a result of Nedcor's breach.

[24] Wessels (para 4345) in the paragraph preceding his discussion of *Watts*, gave an example that fits this exposition of the law and is particularly apposite to the facts of this case:

'A obtained an advance of money from a loan society and B became his surety. There were certain goods pledged to the society by A. The society sold these goods and claimed on B for the balance. B pleaded as an equitable defence that but for the mismanagement of the agents of the society in selling A's goods they would have realised sufficient *to satisfy the whole debt*. The Court held this to be a good plea.'

(Emphasis added.)

[25] It would thus appear as if the question of the release of a surety due to the prejudicial conduct of the creditor and the question of the quantum of the principal debt tend to be conflated. These are two distinct inquiries. Properly analyzed, the sureties' defence is about quantum, i.e., the extent of the principal debtor's liability for which they are *in solidum* liable.[37]

[26] Nestadt JA[38] once referred to a general principle according to which a surety will be discharged if the creditor by his own act makes it impossible for himself to cede his security to the surety. This statement of

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[36] Cf the relationship between a bank and its client: *Absa Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) para 16.
[37] Cf Wessels para 4363; *Gould v Ekermans* 1929 TPD 96.
[38] *Barlows Tractor Co Ltd v Townsend* 1996 (2) SA 869 (A) 878D-E.

his may appear to be in conflict with conclusions thus far. The learned Judge, it should be noted, did not deal with the question whether the release is *in toto* or *pro tanto* and, additionally, Wessels makes it clear that the release is dependent on the creditor's negligence (at para 4338-4339 and 4352) and is *pro tanto* (at para 4354). This principle can, in any event, not be applicable where the creditor utilised the securities in order to reduce the indebtedness of the principal debtor.[39]

[27] The banks were entitled to prove prima facie the extent of the principal debtor's liability by means of certificates, which they have done.[40] The extent of the indebtedness before the credit due to the take-over of the pledges is common cause. It is also common cause that the debtor was credited by the banks with an amount somewhat above the ruling price of the shares as quoted on the Johannesburg Secureties Exchange on the dates the shares were taken over.[41] There is no acceptable evidence to contradict that of the banks that, at the time, these prices represented the fair value of the shares.[42] The fact that thereafter the share price kept dropping to still lower levels provides compelling evidence that the banks were correct.

[39] Cf *South African Scottish Finance Corporation Ltd v Wassenaar* 1966 (2) SA 723 (A) 731H-732A.
[40] Contrary to the position in the Court *a quo* (at para 25 et seq), there is no attack on the certificates before us.
[41] Nedcor took over the shares pledged to it on 6 December 1999 at a price of 105 cents. On that day the closing price of the shares on JSE was 100 cents. Mercantile Bank took over the shares pledged to it on 14 December 1999 at 92 cents an ordinary share and 90 cents an 'N' share. The closing prices of the shares on the JSE that day were 84 cents and 85 cents respectively. On 3 December 1999 Business Bank took over the shares pledged to it at a price of 107 cents a share for the ordinary shares and 105 for the 'N' shares. These were the closing prices of the shares on the JSE that day. (Para 12.7.)
[42] The reasons for the fall of the share prices are set out by Schwarzman J at para 12.

[28] The sureties, contrary to their main submission that the banks were not entitled to take over the shares at all, submit that the shares should have been taken over as soon as the respective debts fell due, relying on the principle that the exception to the prohibition of a *pactum commissorium* depends on

'the proviso that a fair price is to be given when the debt falls due, not the time when the agreement is concluded.'[43]

The sureties point out that if the shares had been taken over at an earlier date their indebtedness would have been smaller. Once again, different concepts are being confused. At this stage of the inquiry we are no longer concerned with the validity of *parate executie* and the like – since the argument is proceeding on the assumption that the take-over was in any event flawed – but with the question whether the banks, through their negligence, have prejudiced the sureties. In any event, there is much to be said for the following view of Schwartzman J (at para 22.4):

'I find that *Mapenduka's*[44] case does not lay down as a principle of our common law that a pledgee must realise the pledged property on the date when the debt falls due for payment. The *Sun Life*[45] decision clearly suggests that this is not the case. If there is no common-law duty on the pledgee to realise the pledge on the day the debt falls due it follows that a surety for such debt cannot complain if the debt is not so realised.'

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[43] *Graf v Buechel* 2003 (4) SA 378 (SCA) para 29.
[44] *Mapenduka v Ashington* 1919 AD 343.
[45] *Sun Life Assurance Co of Canada v Kuranda* 1924 AD 20.

[29] There is, however, a simpler answer. As the venerable Voet[46] once said

‘agreements make the law for contracts, and therefore for suretyships also . . .’

thereby making the obvious point that one should begin with the terms of a deed of suretyship in order to determine the rights and obligations of the respective parties. In the Nedcor case, the deed granted the Bank a discretion to determine the nature and duration of the facilities; without prejudicing its rights, the Bank could give time in respect of any security; additionally, the sureties renounced the benefit of excussion. Similar, if not more stringent, provisions are contained in the other banks’ deeds. Further, if one has regard to the terms of the pledges, they make it clear that the banks were entitled, at their discretion, to decide when to realise the pledges.[47] In other words, the reliance on the (supposed) rule cannot succeed in the light of the agreements to which the debtor and the sureties had bound themselves.

[30] In order to protect their own interests in recovering the debt, the banks entered into an agreement with a third party. The circumstances surrounding and the effect of this arrangement gave rise to further ‘defences’ for the sureties.

[31] Schwartzman J explained the reasons for and effect of the agreement fully (at para 12) and what follows is more or less a quotation.

[46] *Comm ad Pandectas* 46.1.36 (Gane’s translation vol 7 p 67).
[47] The detail appears from the judgment below at para 22.5.

The banks found the value of their security rapidly diminishing and were on the horns of a dilemma. If any of them attempted to realise their security by disposing of the pledged shares the sheer size of the number of shares offered for sale would probably have caused a panic amongst investors and further suppressed the price, thereby materially reducing the amount that might be recovered. Legal proceedings against Molope Holdings to recover the debt or exercise the pledge could also have caused a panic. In the circumstances the financial interests of the banks lay in preserving the going concern value of the Molope Group until a cash-rich buyer of either its shares or assets could be found. There was no purchaser for this number of shares.

[32] During the week ending 15 October 1999 there were three possible purchasers of the business. Two of them fell by the wayside. The third, Rebhold Ltd, a quoted company, pursued negotiations that resulted in a written agreement signed on 25 November 1999 in terms of which Rebhold Ltd and an associated company, Rebserve Ltd, purchased certain of the businesses of the Molope Group and its subsidiaries. The purchase price was R483 million, being a cash amount of R300 million plus R183 million of liabilities assumed by Rebserve Ltd. The price that Rebhold offered was the best available price.

[33] Consummating the Rebserve sale required the passing of some resolutions and it was essential that the voting rights attached to the

shares should be exercised in favour of all resolutions that were required to implement the agreement.

[34] In the agreement (the letter agreement) the banks undertook to take possession of and execute under the terms of their respective deeds of pledge all the shares held by them in Molope Group; to attend all shareholders' meetings of the Molope Group; and to vote for the resolutions.[48] All this they subsequently did.

[35] The agreement envisaged the voluntary winding-up of Molope Group and the payment to shareholders of a liquidation dividend. This, on the evidence, would not have exceeded 90 cents a share which is less than the value attributed to the shares by the banks for purposes of their taking over.

[36] Mr van Huysteen, who appeared on behalf of some sureties, submitted that the banks should have disclosed the arrangement with Rebhold and Rebserve to Molope Holdings and to the sureties, and that a failure to have done so amounted to some breach of confidence. Assuming that to have been the case, the question that springs to mind is how did this breach of confidence affect the value of the shares at the time? He could not provide us with any answer. He also made some recalculations of the value of the shares in which he assumed that the net

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[48] Nedcor and Mercantile Bank did not in terms of their respective pledges have to execute on their pledges as their respective agreements gave them voting rights over the pledged shares.

asset value of a company divided by the number of shares gives the value of those shares. This I find a startling proposition but it is in any event not supported by evidence. His recalculation was also flawed in that the facts used for the exercise were not the correct facts. He further argued that the shares gave the banks a controlling interest in Molope Holdings and that some premium should have been added to the quoted prices. One can assume that, in principle, the controlling shares in a company do have a premium but the fact is that the banks acted as creditors and none had a controlling interest and they did not act in concert to take control of Molope Holdings. This matter was fully thrashed out before the Securities Regulation Panel, and we agree with its conclusion. However, the short answer is that there is no evidence that in this case the controlling shares had any added value over and above the quoted price. On the contrary, there were no buyers for the banks' bundle of shares.

[37] The letter agreement gave each bank an option to acquire a number of Rebserve shares. The options were not exercised and allowed to lapse. Mr van Huyssteen submitted that the options must have had a value when granted and that added value should have been deducted from the main debt. The first answer to this submission is, as Schwartzman J found (at para 24), that since they had not been exercised they did not provide the banks with any additional benefit. There is also a dispute as to the meaning of the options. In order to have exercised them, the banks had to

fork out substantial amounts as option price. They would have been obliged to have kept the shares for a substantial period of time. They were not permitted to dispose of the options. I know of no principle obliging a creditor to take steps such as these in order to reduce the liability of a surety. Last, there was no evidence that the options had any market value or of the amount by which the claims of the banks should have been reduced.

[38] In the Rebhold agreement the banks undertook to cede certain claims against the chairman of Molope Holdings (Mr Ramaphosa) and the mentioned Mr Hirshowitz to Rebhold. In consideration for these cessions Rebhold indemnified the banks indirectly

> 'in respect of such loss (limited to R20 000 000) which the [banks] may suffer, sustain or incur as a result of the [claims against the sureties] proving to be irrecoverable'.

Under a deeming provision the claims were to be deemed to have been irrecoverable if the sureties had not paid by 30 November 2001.

[39] The sureties argue that their indebtedness had to be reduced by R20m because of this. As I read the agreement, the intention of the parties was not that, eventually, the banks would be entitled to the R20m as additional consideration. It is not as if Rebhold had intended to pay part of the sureties' indebtedness or make payment on their behalf; on the contrary, Rebhold clearly did not intend to do anything of the kind.

[40] The appeals are dismissed with costs, including those of two counsel.

L T C HARMS
JUDGE OF APPEAL

Agree:

ZULMAN JA
FARLAM JA
NAVSA JA
VAN HEERDEN AJA