RoSSING STONE CRUSHERS (PTY) LTD vs COMMERCIAL BANK OF NAMIBIA LIMITED & MR F FLACHBERGER t/a OKAPUKA SAND

MULLER, AJ

APPLICATION MS ~ Q1

PRACTICE & PROCEDURE

- Robust Approach
- setting aside of valuation of cer_£Airr~'items of a valuation report by a appraiser
- Court Order final CANNOT be interpreted by referring to history or BACKGROUND if unambigious
- Rule NISI partly confirmed

CASE NO. A 175/93

IN THE HIGH COURT OF NAMIBIA

In the matter between

ROSSING STONE CRUSHERS (PTY) LTD **APPLICANT**

and

COMMERCIAL BANK OF NAMIBIA LIMITED **FIRST RESPONDENT**

MR F. FLACHBERGER t/a OKAPUKA SAND **SECOND RESPONDENT**

CORAM: MULLER, A.J.

Heard on: 1993/08/13 Delivered on: 1993/09/01

JUDGMENT

MULLER, A.J. : This is the return date of a Rule nisi, which called upon the respondent to give reasons as to why:

"2.1 In respect of First Respondent

the valuation of applicant's property attached in terms of the Court Order dated 29 March 1993, by Mr Esterhuizen, appointed as appraiser at the instance of the First Respondent, should not be set aside for being unreasonable, improper and unjust.

2.2 In respect of First and Second Respondent, the sale of the crusher plant at Gobabis to Second Respondent for R100 000.00, should not

be declared null and void or set aside.

2.3.1 In respect of First Respondent,

it should not be interdicted from proceeding to sell any of the equipment of applicant attached by it, pending the final determination of this application.

2.3.2 It should pay the costs of this application.

2.4 In respect of Second Respondent:

2.4.1 he should not be interdicted from removing, dealing or disposing in any way with the crushing plant situated at Gobabis bought from the First Respondent, pending the outcome of these proceedings.

2.4.2 he should not pay the costs of this application jointly and severally with the First Respondent in the event of him opposing the relief sought against him.

3. That the orders in prayers 2.3.1 and 2.4.1 above shall serve as interim interdicts."

Paragraph 4 only dealt with the manner of service authorized in the particular circumstances. First respondent filed an answering affidavit with annexures including an affidavit by the second respondent and the appraiser Mr Esterhuizen and the applicant replied thereto. Full argument was presented today by Mr Coleman on behalf of the applicant and Mr Smuts on behalf of first respondent. As the second respondent had decided to return the stone crusher situated at Gobabis that he bought from the first respondent in the light of these proceedings and was refunded, the second respondent is not

a party anymore to these procedings and no order for costs was asked by Mr Coleman on behalf of the applicant against the second respondent. The first respondent also undertook not to continue with the selling of any of the attached equipment until this matter has been finalized. In the light thereof Mr Coleman today only asked for confirmation of the Rule in respect of paragraphs 2.1 and 2.3.2.

To understand the purpose and extent of these present proceedings it is necessary to refer briefly to the background and the previous litigation between the parties and in particular between the applicant and the first respondent. The applicant is involved in a stone crushing business and owns inter alia two stone crushing plants, one situated at Arandis near Swakopmund and the other at Gobabis, which plants are apparently also the largest assets of the applicant. The applicant is indebted to the first respondent in an amount of R507 034,28 plus interest which amount is due and payable to the first respondent. First respondent is the holder of a registered general notarial covering bond executed by the applicant in favour of first respondent which covers the applicant's "movable property of every description whatsoever...", up to an amount of R900 000,00. The reason for the previous litigation between the parties was the first respondent's fear that the applicant's business might collapse as a result of serious financial problems. The first respondent consequently approached this Court on an urgent basis for an order to secure first respondent's claim in the event of respondent being liquidated. As the first respondent was not a secured

creditor in the event of insolvency of the applicant the first respondent was only entitled to preference over concurrent creditors of the applicant with respect to the proceeds of assets subject to the bond insofar as they would fall into the free residue of the estate. The purpose of that application was consequently to obtain an order to enable the first respondent to take possession of the bonded property prior to any insolvency of the applicant so that it could have a secure claim and then hold the property subject to the pledge (Barclays Western Bank v Comfy Hotels (Pty) Ltd 1980 (4) SA 174 (E); Barclays National Bank v Natal Fire Extinguishers Manufacturing Company (Pty) Ltd and others 1982 (4) SA 650 (D); International Shipping Co. (Pty) Ltd v Affinity (Ptvl Ltd 1983 (1) SA 79 (C). A Rule nisi was issued on the 15 February 1993 calling on the applicant, respondent in that matter, to show cause why:

> "1.1 the High Court Sheriff or his appropriate deputy should not be authorised to take possession of and to deliver into the possession of the applicant of the movable property and effects of Respondent situate at the registered office of and the principal place of business of respondent and wherever else such assets may be found.

2.4.3 the applicant should not retain such possession for as long as it is necessary to give effect to prayer 1.3 and 1.4 below.

2.4.4 an appraiser should not be appointed to determine the value of the aforesaid

property at the expense of respondent.

2.4.5 the applicant should not be authorised to sell the property or to have the right to purchase the property itself at the highest price tendered by a purchaser, if any, provided the purchase price is not less than the valuation determined in terms of prayer 1.3 above up to an amount of R900 000,00 in such manner and in such terms as the applicant might decide and to convey valid title to the purchaser (s) and credit the respondents account held with applicant with the proceeds of such sale.

2.4.6 the costs of this application should not be borne by the Respondent.

2.4.7 an order should not be granted directing and restraining the respondent from dealing with, disposing in any way or removing all or any of the assets referred to without the written consent of the applicant first being had and obtained.

2. That prayer 1.6 above shall operate as an interim interdict pending the Return Date."

There was also a third paragraph which only dealt with the manner in which the matter would be heard and time limits for filing of affidavits. The applicant, respondent in that application, opposed the application and answering affidavits were filed and were replied to. Full argument was heard on the 29 March 1993 by Mr Justice Frank and, except for allowing the applicant, respondent in that

matter, time until the 9 July 1993 to obtain or to finalise certain loans that were in the pipeline, the Rule nisi was basically confirmed.

The following order was made at the end of a well-considered judgment.

> "1.1 The High Court Sheriff or his appropriate deputy is authorised to take possession on the 9 July 1993 and to deliver into the possession of the Applicant all the movable property and effects of the Respondent situate at the registered office of and the principal place(s) of business of Respondent and wherever else such assets may be found.
>
> 2.4.8 That the Applicant shall retain such possession for as long as it is necessary to give effect to prayers 1.3 and 1.4 below.
>
> 2.4.9 That an appraiser shall be appointed to determine the value of the aforesaid property at the expense of Respondent.
>
> 2.4.10 That the Applicant is authorised to sell the property or to have the right to purchase the property itself at the highest price tendered by a purchaser, if any, provided the purchase price is not less than the valuation determined in terms of prayer 1.3 above up to an amount of R900 000,00 in such manner and in such terms as the applicant might decide and to convey valid title to the purchaser(s) and credit the Respondent's account held with the Applicant with the proceeds of such sale.
>
> The Respondent is interdicted and restrained from dealing with, disposing in any way or removing all or any assets referred to, other

than in the ordinary course of business, without the prior written consent of the Applicant until 9 July 1993.

3. That the Applicant is authorised to approach this Court for an order altering the date in paragraph 1.1 supra to an earlier date on these papers duly amplified, with 24 (twenty-four) hours notice to the Respondent, in the event of:

2.4.11 Applicant ascertaining that Surdec International cc cannot or will not advance the amount of R2,5 million to Respondent;

2.4.12 Respondent acting in breach of paragraph 2 of this order supra.

2.4.13 Liquidation proceedings being launched against Respondent by a third party.

4. That Respondent is to pay the costs of this application."

After the possible loans could apparently not be finalised the first respondent in fact attached the property of the applicant on the 9th July 1993, as it was authorised to do in terms of the said Court order. This attachment included the two crushing plants situated at Arandis and Gobabis, respectively. The first respondent then obtained a valuation report by an appraiser Mr J.J. Esterhuizen, the deputy sheriff of Windhoek. Mr Esterhuizen inspected the property and valued it in a total amount of R266 560,00 and the two crusher plants at Gobabis and Arandis respectively at R35 000,00 and R40 000,00. When the applicant obtained the valuation report of Mr Esterhuizen on the 21 July 1993

the applicant considered that its assets were totally and substantially underestimated and particularly so the two crushing plants. The applicant then addressed a letter on the same date to the first respondent's attorneys contesting the validity of the valuation and requesting a stay of the sale of any of the equipment. The letter reads as follows:

> **"ROSSING STONE CRUSHERS (PTY) LTD/COMMERCIAL BANK OF NAMIBIA**
>
> We refer to the abovementioned matter and confirm that we are in possession of the valuation report of Mr J J Esterhuizen which report valuated both the Crushing Plant and Equipment on the Grauwater and Rossing Sites as well as a few items at Rundu at the amount of R266 560,00 which in our opinion is well below it's real value.
>
> We are of the opinion that the appointment of Mr Esterhuizen as Appraiser in this matter does not comply with the Court Order given by the High Court of Namibia during March 1993 since Mr Esterhuizen although a Sworn Appraiser is not a qualified Appraiser for purposes of valuation of the items concerned.
>
> We herewith request you to stay the sale of all equipment secured under the Notarial Bond on the strength of this valuation report until this matter is properly sorted out.
>
> We also attach for easy reference a summary of a valuation report dated the 20th of January 1993 by Transplant Namibia who is the only qualified persons to do valuation on equipment of this nature which valuation reflects the true value of the Crushing Plant concerned.

Kindly confirm in writing before 15h00 today that the equipment will not be sold for the amount reflected in Mr Esterhuizen's Valuation unless this dispute has been properly resolved, failing which we will have no option but to approach the Court on an urgent basis to clarify the matter."

To this letter the first respondent's attorneys replied as follows:

"THE COMMERCIAL BANK OF NAMIBIA LIMITED // ROSSING STONE CRUSHERS (PTY) LTD

With reference to your FAX of this morning, we wish to comment as follows: We are of the opinion that we have acted in accordance with the relevant Court Order. Needless to say, our client will endeavour to obtain the highest possible offers, since this is in its own interest.

I must thus take any further steps as you deem necessary."

During a telephone conversation on the next day, the 26 July 1993, the applicant was further informed by first respondent's attorneys that the crushing plant at Gobabis, valued by Mr Esterhuizen at R35 000,00, had in fact been sold to the second respondent for an amount of R100 000,00 which amount the applicant regarded as still being substantially below the value of the said crushing plant. This then led to an urgent application by the applicant and the issue of the Rule nisi on the 23 July 1993. It must be mentioned that the applicant in his founding affidavit referred to a valuation by Mr Jan Vermeulen of Crush Plant Namibia who is an expert on this type of equipment and who

valued the crushing plant at Gobabis at R295 000,00 and the Arandis plant at R456 895,00 and who in an affidavit annexed to applicant's founding affidavit, disputed the correctness of Mr Esterhuizen's valuation, particularly these two plants, as being totally underestimated.

It is trite law that the applicant bears the onus of establishing that he is entitled to the relief sought. Where a dispute of fact exists the so-called Stellenvale rule is applicable in motion proceedings:

> "... where there is a dispute as to the facts the final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in an applicant's affidavit justify such an order... Where it is clear that facts although not formally admitted, cannot be denied, they must be regarded as admitted."

Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235 E - G.

See also Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Greenpoint) (Pty) Ltd. 1976(2) SA 930 (A) at 938 A-B; Tamarillo (Ptv) Ltd v B N Aitken (Ptvl Ltd 1982(1) SA 398 (A) at 430 - 1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereinichte Backereien (Pty) Ltd e.a. 1982(3) SA 893 (A) at 923G - 924D.

This rule has been qualified in the Plascon-Evans case to the following extent:

"It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of facts have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by respondent, justify such an order. The power of the Court to give such final relief on the papers before is is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (See in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155 (T) at 1163 -5; Da Mata v Otto NO 1972 (3) SA 858 (A) at 882 D-H). If in such a case the respondent has not availed himself of his right to apply for the deponent's concerned to be called for cross-examination under rule 6(5) (g) of the Uniform rules of Court (cf Peterson v Cuthbert and Co. Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which he determines whether the applicant is entitled to the final relief which he seeks (see e.g. Rikhoto v East Rand Administration Board and another 1983(4) SA 278 (W) at 283 E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the paper (see the remarks of Botha A.J. in the Associated South

African Bakeries case, supra at 294A.)"

Plascon-Evans Paints v van Riebeeck Paints 1984 (3) SA 623 (A) 634 G- 635 C.

An applicant runs the risk, if he chooses to approach the Court by a way of notice of motion proceedings and a dispute arises, which he should have foreseen, to have his application dismissed or have the matter referred to viva voce evidence or to trial. Room Hire case supra p. 1168, Tamarillo case supra p. 430 G. Van Heerden AJA said the following in ASA Bakeries v Oryx and VB supra at 917 b:

> "Dit is in elk geval duidelik dat algemeen aanvaar word dat minstens in sodanige gevalle die party teen wie die oorwig van waarskynlikhede geld in ' n reel aansoek moet doen om die aanhoor van mondelinge getuienis indien hy 'n uitspraak teen hom wil vermy."

Freely translated it means that the party against which the balance of probabilities appear to be usually has to apply for the leading of oral evidence if he wants to avoid a verdict against him.

See also LAWSA vol 11 - Interdicts paragraph 315, p. 295.

Although there do exist on these papers certain disputes of fact, mainly with regard to certain types of eguipment or vehicles that were attached in respect of the ownership or the value thereof, this matter turns mainly around the valuation of **the** two **crusher plants** at Arandis and Gobabis, respectively. I am of the opinion that although there is a vast difference in the values of these two plants as valued

by Mr Esterhuizen on behalf of first respondent and the value put on it by Mr Vermeulen as appears from his affidavit, it is not in the interest of any of the parties to have this matter referred to evidence or trial. What is often called a "robust approach" should be applied in this instance and, in my opinion, the matter can be disposed of on papers before me. See Wiese v Joubert en Andere 1983(4) 182 (0) at 202 E - 203 C; Reed v Wittrup 1962(4) 437 (D) at 443; Carrara and Lecuona (Pty) Ltd v van den Heever Investments Ltd and Others 1973(3) SA 176 (T) at 719G; Von Steen v Von Steen en 'n Ander 1984 (2) 203 (T) at 205 D - E; Rawlins and another v Caravantruck (Pty) Ltd 1993 (1) 537 (A) at 541 I to 542 A. That a robust approach is what is called for in this instance is also supported by the fact that the arguments presented by both counsel mainly involved either the interpretation of the Court order or the law applicable in this respect as set out in certain decisions of the South African Supreme Court or the Zimbabwean Supreme Court.

This then brings me to the arguments advanced in this Court. Mr Coleman bases his argument for confirmation of the Rule nisi mainly on the decision by Grosskopf, J (as he then was) in Bekker v RSA Factors 1983(4) SA 568 (T) at 573 E - F and Gilliq v Sonnenbera 1953 (4) SA 675 (T) as well as certain extracts from LAWSA vol 13 paragraph 16 et seq.

In the Bekker-case supra, the defendant was in default with installments on a lease agreement in respect of a mechanical horse whereafter the agreement was cancelled and the vehicle

reposessed. Clause 14.1.1.2 of that lease agreement determined that the market value of the property should be ascertained by a sworn valuator appointed by the lessor which valuation would be final and binding on all the parties. The valuator in that case assessed the value of the mechanical horse as it stood, without establishing whether it was in working order or what had been damaged. Grosskopf J found that an uninformed buyer would not be able to buy such a vehicle and that it inevitably led to a wrong valuation. The Court also considered what was said in Gilliq v Sonnenberq supra, namely that a buyer or seller cannot be held to a valuation for reasons of fairness where that valuation differs materially from the real value of the property. After considering certain old authorities, Grosskopf J came to the following conclusion:

> "Na my **mening** kan die volgende beginsel deur die voorgaande gesag afgelei word. Indien 'n derde persoon henoem word om *n koopprys vas te stel of 'n waardasie te maak, moet hy die oordeel van 'n redelike man aan die dag le. Indien sy oordeel met betrekking to the prysvasstelling of waardasie egter so onredelik, onbehoorlik, onreelmatig of verkeerd is dat dit tot 'n ooglopende onbillikheid sal lei, is die persoon wat daardeur benadeel word, nie daaraan gebonde nie, maar kan die vasstelling of waardasie om billikheidsredes reggestel word." Bekker v RSA Factors supra p. 735 E - F.

A free translation of the relevant principle is that the valuation should be one of a reasonable man and can be rectified on grounds of fairness when it is so unreasonable.

improper, irregular or wrong that it may lead to obvious unfairness.

Mr Coleman submitted that the valuation by Mr Esterhuizen of the two crushing plants, in particular, differs so materially from the real value thereof that the valuation, in the words of Grosskopf **J,** is so unreasonable, improper, irregular or wrong that it leads to obvious unfairness and should, in consequence, not be held to be a proper valuation by an appraiser in terms of clause 1.3 of Frank J's order of the 29 March 1993. This Mr Coleman bases mainly on the difference between Esterhuizen's valuation of R35 000 and R40 000, respectively for the two plants against the valuation by Vermeulen by R295 000,00 and R456 895,00 for the same plants. Mr Coleman also attacked the grounds of Esterhuizen*s valuation, namely information received from a certain Mr Henning who bought a crush plant at an auction of the Ministry of Water Affairs at Okahandja at the beginning of 1993 for R27 000,00 as well as a gyro sphere for R24 500,00 at an auction at Swakopmund in March 1993. Mr Coleman's main objections to these two examples used in support of Esterhuizen*s valuation are that Esterhuizen used these examples for his contention that there does not exist a market for this type of equipment in Namibia and that the prices referred to by Henning were the appropriate values that should be attached to these plants as the market value thereof in Namibia. Vermeulen, on the other hand, deals with both examples used by Esterhuizen to support his valuation, as being irrelevant and that the market for these items does not consist of Namibia only. Vermeulen attached

to his affidavit a copy of advertisements that appear in a magazine "Site and Road" in which certain equipment such as crusher plants are advertised, including an advertisement for a particular crusher plant of Dolomiet Vergruisers at Keetmanshoop with similar components as the one attached by first respondent at Gobabis, for approximately R600 000,00. Vermeulen also refers to a similar plant that is presently up for sale by Roadrunners at Grootfontein for approximately R600 000,00 and another plant at Tsumeb that was sold recently in excess of Rl million, all of which Esterhuizen was apparently unaware or did not consider. Vermeulen also dealt with the two examples of plant bought by Henning. The crusher plant that he bought for R27 000,00 at the auction at Okahandja has become obsolete due to the fact that its spare parts are difficult to procure and have been replaced by modern equipment. The other example of the gyro sphere was, according to Vermeulen, a 36FC which is a different model than that of the applicant and which was offered at an auction where the crusher plant was not present. Vermeulen was present at that auction and mentions that the public was informed that the plant was in a dissembled state and was in fact sold for scrap. According to Vermeulen these two examples are not applicable or appropriate in the circumstances.

Mr Coleman also pointed out that the fact that the first respondent, after attaching the property, was able to sell the Gobabis plant, valued by Esterhuizen at R35 000,00, without any advertisement at nearly three times that value, namely R100 000, is a clear indication that it was totally

underestimated by Esterhuizen in the first place. Mr Coleman consequently submitted that the rule should be confirmed to the extent as set out before and that the valuation of Mr Esterhuizen, or at least in respect of the two crusher plants, should be set aside.

Mr Smuts made the following submissions on behalf of the first respondent in support of his request that the Rule nisi should be discharged. In the first instance Mr Smuts argued on the basis of Schlesinger v Schlesinger 1979(4) SA 342 (W) and other authorities that the applicant failed to disclose a material fact to the Court at the time of the ex parte application, namely by failing to refer to the clear terms of the noterial bond concerning the obtaining of a valuation, namely the express agreement between the parties that such a valuation would be final and binding upon the parties. On this ground alone it is submitted the rule should be discharged and a special order of costs as between attorney and client would be appropriate and justified in the circumstances. The applicant in his founding affidavit referred the Court to the application proceedings in the other application and arranged for it to be available at the time of the hearing of this application on an urgent basis. The Court had the other application at its disposal and as I heard this matter myself I did read it and was aware of the notarial bond and its content, including the agreement in respect of the appointment of an appraiser. In fact that particular paragraph in the bond which formed part of the documents in the other application was referred to and I was fully aware of the content thereof. The applicant did

include the order by Mr Justice Frank issued on the 29 March 1993 on which his application was based in his papers. I shall refer to this aspect also in respect of Mr Smuts's second submission. This application was brought on an urgent basis and the Court was not kept in the dark in any way and to any extent that would prejudice the first respondent as to warrant the relief claimed by Mr Smuts in this respect. This submission is consequently rejected as having no substance at all.

Mr Smuts's second contention was that the first respondent originally approached the Court to perfect its security in terms of the notarial bond whereafter an order was granted on the 29 March 1993 by Mr Justice Frank after having heard full argument. He submits that that particular order in respect of the appointment of the valuator should be interpreted with regard to the express agreement between the parties as set out in paragraph J of the bond which reads as follows.

> "The bank shall be entitled to take possession of the morgature's property bonded under this agreement and to appoint an appraiser to determine the value of the aforesaid property, which shall be at the expense of the Mortgagor and <u>which valuation shall be final and binding on the Mortgagor</u>. The bank shall furthermore be entitled and is hereby specifically authorised to either purchase itself or sell the said property (for an amount not less than the valuation) and credit Mortgagor's account with the proceeds of the sale."

(Mr Smuts underlined the part indicated above).

Not only do I have difficulty with Mr Smuts's reasoning in

this regard because of the history of this matter and the previous application, but also the basis of his submission in this regard is legally untenable. In the first instance the applicant in the first application (first respondent herein) asked for the following relief in his notice of motion, and I refer only to the relevant part thereof in respect of this submission:

"2. Calling upon the respondent to show course upon a date to be determined by this Honourable Court by an order should not issue:

2.1 Directing the applicant that the applicant is authorised and empowered to:

2.4.14 Take and retain possession of the movable property and effect of the respondent situate at the registered office and/or principle place of business of the respondent and where ever else such assets may be found;

2.4.15 To retain such possession for as long as is necessary to give effect to 213 and 214 below;

2.4.16 To appoint and appraiser to determine the value of the aforesaid property at the expense of the respondent;

2.4.17 To purchase itself or to sell the property for an amount not less than the valuation determined in terms of 213 above up to an amount of R900 000,00 in such a manner and on such terms as the applicant might decide and to convey valid title to the purchaser(s) and credit the respondent's account

held with the applicant with the proceeds of such fail(s)."

(My underlining)

Although the bond, and in particular the paragraph quoted supra, refers to a valuation that is final and binding upon the mortgagor, this part was not included in the relief sought by the applicant in that application as appears clearly from the underlined part of the notice of motion in that application. This also corresponds with the coinciding paragraph in the resolution of the first respondent (applicant in that application) to institute those proceedings. The order of the 3rd February, granting a Rule nisi, only authorised the appointment of an appraiser and this is what was confirmed by Mr Justice Frank on the 29th March 1993. Despite this the first respondent now attempts to drag in by the back door the part of the bond that the appraisers report would be final and binding and to base its argument that this valuation is untouchable on that particular agreement as contained in the notarial bond. That this is an afterthought is apparent from the first respondent's own conduct in seeking the relief that it obtained in the previous application as set out above. Even if this was not so, it is trite law that if an order of Court is made, which is unambiguous, that order stands and cannot be interpreted by referring to extrananeous evidence or to the background of the previous litigation, unless it is, of course, appealed against. This order is unambiguous and was not appealed against. It was accepted by all parties, including first respondent. See in this regard:

"A judgment or order of a court must be construed in accordance with the principles of construction that apply to the interpretation of documents. The order is the executive part and if it is clear its meaning cannot be extended or restricted by what is said in the judgment. The judgment must be read as a whole and if it is clear and unambiguous no extraneous fact or evidence is admissible to contradict, vary, qualify or supplement it. Not even the court that delivered the judgment may be asked to construe it subjectively."

Harms: Civil Procedure in the Supreme Court: 205, p. 419

See also: Firestone S.A. (Pty) Ltd v Gentiruco A.G. 1977(4) SA 298 (A) at 304 D-H;

Postmasburg Motors (Edms) Bpk v Peens en Andere 1970(2) SA 35 (N.C.) at 39 D-H; Standard General Ins Co. v Gutman 1981(2) 426 (C) at 433 (A)

Hoffman: The S.A. Law of Evidence 4th Ed -24. p. 321.

Consequently, the argument by Mr Smuts that the valuation is now final and binding and cannot be interfered with because that was what the parties agreed in a notarial bond, is untenable and legally unsound and should be rejected.

This brings me to the final submission by Mr Smuts which is based on a decision by Dumbutchena CJ (as he then was) in Macevs Consolidated (Pvt) Ltd v T.A. Holdings Ltd 1987(1) SA 173 (ZSC) at 179 - 180 in an attempt to distinguish that case from the present situation. Based on Macevs case Mr Smuts also submitted that although the result in the Bekkers

case was correct, the reasoning by Mr Justice Grosskopf and in particular the principle quoted supra, was either to wide or clearly wrong. Mr Smuts accordingly attempts to draw support from Macey' s case for his contention that the valuation by an appraiser appointed in circumstances like these can only be upset where fraud, collusion or capriciousness is involved and not on the grounds of unreasonableness, impropriety, irregularity or mistake which may lead to obvious unfairness, as was held in Bekker' s case. Mr Smuts does concede that a valuation based on the misconception of the condition of the property as in Bekker's case may be regarded as capricious. Based on his previous argument that the terms of the contract between the parties cannot be ameliorated to suit the applicant and on the case of Bank of Lisbon and S.A. Ltd v De Ornelas and another 1988(3) 580 (A) where it was decided that there is no exceptio doli generalis in our law, Mr Smuts submits that in the absence of fraud, collusion or capriciousness the applicant is bound by the clear terms of the contract, however harsh the consequences may be. He also referred to Tamarillo v Aitken supra p. 436 C-G in this regard. As I have indicated before, this application is based on the judgment by Mr Justice Frank and whatever the parties may have contracted earlier it does not form part of that judgment in the sense that Mr Smuts wants to draw support from that agreement.

Mr Smuts also submitted that this matter is distinguishable from the other instances where a valuation is made by a third party as the valuation in this matter is not the final

determination of the selling price and furthermore because setting aside the valuation report would not lead to a restitutio in integrum. While the setting aside of this valuation, or part of it, will not lead to restitutio in integrum of the property attached in terms of the court order, or any part of it, it would only mean that the property or part of it will have to be revalued.

Common sense dictates that there must be a basis of setting aside a valuator's report even if there is no fraud, collusion or capriciousness involved. The purpose of having a property valued by an appraiser is obviously to ascertain what the market value of the property is and to establish a reserve price beyond which the property should not be sold or even bought by the first respondent himself as is clearly envisaged in paragraphs 1.3 and 1.4 of the order of 29 March 1993. It is of the utmost importance to both parties that a price as near as possible to the market value of the property is received. The bank, first respondent, wants to receive as much as possible in order to extinguish the applicant's debt with it and the applicant, on the other hand, does not want his property to be sold for less than the market value. It is common cause, and it was so also in the previous application, that the debt is approximately R500 000,00 for which a notarial bond of R900 000,00 was registered and later perfected, while the assets of the applicant were in excess of R4 million. If an appraiser appointed by one party consequently makes a wrong assessment of the value of the respective property because he bases his valuation on entirely wrong assumptions of the market or the

determination of the property or the condition of the property and the result thereof is that the property is valued at a substantial lower price than its real value, then certainly, however bona fide the appraiser might have been, the valuation is not what it was intended to be and there must be some basis to set it aside. I am in agreement with Mr Coleman that Grosskopf J correctly set out the approach in our law in such a situation as a basis for setting aside such a valuation.

I shall now turn to the facts of this matter. The applicant from the beginning has, as is apparent from the letter of the 21 July 1993, conveyed his attitude to the first respondent that he did not regard Mr Esterhuizen as a qualified appraiser for valuating items like the crusher plants and even provided it with Mr Vermeulen * s valuation of the crusher plants. This was brushed off by the first respondent's attorneys and together with the sale of the Gobabis plant to second respondent led to the application now before Court. Mr Esterhuizen, although a sworn appraiser and experienced in appraising certain items and in the auctioneering business, expressly concedes that he has not previously valued or sold crushing plant equipment of the nature referred to in the application. He however attempted to put forward a basis for valuation of these plants on the information received from Mr Henning, as referred to earlier herein. Mr Esterhuizen also states that he does not dispute Mr Vermeulen's knowledge and expertise in relation to crushing plant and related equipment and says that in his opinion and based on his experience the book

dealer's value of such items do not necessarily correspond with market conditions in Namibia, particularly the small market for such equipment and the sporadic and isolated demand for those items. I have already dealt with the two plants or parts thereof that Mr Henning bought and upon which Mr Esterhuizen based his valuation of the Gobabis and Arandis plants. The only grounds upon which Mr Esterhuizen insists that his valuation of the crusher plants is appropriate, whilst accepting Mr Vermeulen's expertise, are twofold, namely the limited market in Namibia for these items as well as the dealer's values to which Mr Vermeulen refers. Accepting Mr Vermeulen's expertise, which is not disputed as mentioned, it also includes his experience of the market which he claims is not limited to Namibia alone. On this basis Mr Esterhuizen clearly valuated at least the crushing plants on a wrong assumption as the market extends beyond Namibia. In respect of the so-called "dealers value" Mr Vermeulen clearly explains it in his first affidavit, namely the more conservative value for which a dealer would buy it in order to re-sell it for a profit and he allowed the margin of 15% between these two values. According to him that also indicates the minimum market value of the property. However, the two plants are clearly valued by Mr Esterhuizen for a price much lower than the market value thereof. The fact that second respondent was prepared to buy the Gobabis plant, valued at R35 000,00 by Mr Esterhuizen, at R100 000,00 without any advertisement or effort on behalf of first respondent to market it, to my mind clearly indicates that Mr Esterhuizen's valuation of these plants, although bona fide, is absolutely inadequate

and inappropriate. It is so manifestly wrong, unreasonable and improper, that it obviously leads to unfairness. If this valuation is to be used at a public auction as a reserve price for any of these crusher plants it would definitely lead to prejudice of the applicant in that property worth much more could then be sold far below its market value.

Mr Coleman based his application to set the valuation report aside mainly on the valuation of the two crusher plants. There exist disputes of fact in respect of the other items. Mr Vermeulen's expertise apparently does not stretch further than the crusher plants. Mr Esterhuizen's expertise and experience to appraise the values of the other equipment, have not been attacked in any way. As the crusher plants can clearly be distinguished from the other equipment I am of the opinion that this is a situation where a definite distinction of the items valued is possible and that the valuation of the crusher plants alone can and should be set aside while the valuation by Mr Esterhuizen of the rest of the attached items remains intact.

With regard to costs, the Applicant was substantially successful and is entitled to its costs.

In the result the following order is made:

> Paragraph 2.1, in respect of the two crusher plants at Rundu and Gobabis, as well as par. 2.3.2 of the Rule nisi of the 23rd July 1993 are confirmed.

MULLER, ACTING JUDGE