CASE NO.: SA10/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between :

ZACHARIAS JOHANNES GROBLER APPELLANT

AND

THE COMMERCIAL BANK OF NAMIBIA LTD RESPONDENT

CORAM: Strydom, C.J., O'Linn, A.J.A. et Chomba, A.J.A.

HEARD ON: 11/10/2002

DELIVERED ON : 24/01/2003

APPEAL JUDGMENT

CHOMBA, A.J.A.

By a combined summons issuing out of the High Court and dated November 19, 1998, accompanied by particulars of claim bearing the same date, the Commercial Bank of Namibia ("the plaintiff") instituted a claim for payment by Zacharias Johannes Grobler ("the defendant") of a sum of N$ 643,929.78 together with interest at the rate of 18.75% calculated on a daily basis and running from October 27, 1998 until full payment. Costs of the suit were also claimed. The plaintiff further

prayed to the court a quo to make an order declaring property known as ERF No. 147, Hochlandpark ("the mortgaged property") situate in the Municipality of Windhoek, Registration Division "K" and which was held by the defendant by virtue of Deed of Transfer No. T2371/1993 executable pursuant to mortgage bond No. B1136/1993 ("the mortgage.")

In elaboration of the principal claim of N$643,929.78, the plaintiff states in the particulars of claim that on October 22, 1992 the defendant was granted a house loan of N$269,000 by the Namibian Banking Corporation Ltd. ("NBC"). That loan was repayable by way of monthly instalments over a period of 20 years and was secured by the mortgage. By a merger agreement ("the merger") effectuated on October 1, 1993, and entered into by the plaintiff, DEG – Deutshe Investitions and - Entwicklungsgesellschaft mbH, NBC, Nedcore Bank Limited and Société Financiére Pour Les Pays D'outre – Mer, NBC sold its banking business as a going concern to the plaintiff. The merger was effected pursuant to Section 30 of the Banks Act, No. 23 of 1965 (the Banks Act) which, among other things, required that the merger be approved in writing by the Minister of Finance (the Minister). It is stated in the amended particulars of claim that the Minister's written approval of the merger was given on December 9, 1993.

It was as a result of the merger that the plaintiff felt that the right to foreclose the mortgage had accrued to it. Therefore upon the failure by the defendant to keep up instalmental payments of the loaned money, it instituted this action since it was a condition of the loan agreement between the defendant and NBC that in the event of a breach being committed by the defendant regarding the repayment arrangements, then payment of the balance would immediately fall due, together with interest.

By mutual consent of the parties hereto, the crisp issue which was submitted for resolution by Manyarara, A.J., was whether the plaintiff's claim was secured by the mortgage bond, as the plaintiff contended, or, as was contended by the defendant, whether the mortgage bond did not accrue to the plaintiff upon the merger with the result that the house loan which the plaintiff inherited from NBC was not secured. For clarity's sake, I should record that it was accepted by the defendant that the merger did take place premised on the Minister's written approval. It is also necessary to state that the application for the resolution of this issue by Manyarara , A.J., was made pursuant to rule 33 (4) of the High Court Rules. That rule provides as follows :-

> "(4) If it appears to the court mero motu or on the application of any party that there is, in any pending action, a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the trial of such question in such manner as it may deem fit, and may order that all further proceedings be stayed until such question has been disposed of: Provided that in an action of any damages arising from any motor vehicle accident, under any law, the court may on application of any party, order that any questions of liability for and the amount of any damages be decided separately unless it appears that the questions cannot conveniently be so decided".

The arguments of the parties in the High Court were centred, as indeed they were on appeal to this Court also, on the interpretation of Section 30 of the Banks Act, as read with Section 16 of the Deeds Registries Act No. 47 of 1937, as amended by Section 4 of Act No. 80 of 1964(the Deeds Registries Act). For a better appreciation of the two

statutory provisions, it is necessary to reproduce the twain as I do hereunder:

> “30 (1) Two or more banking institutions shall not amalgamate nor shall all the assets and liabilities of any banking institution be transferred to or taken over by any other institution except with the consent of the Minister conveyed in writing through the Registrar, and no such consent shall be given by the Minister unless he is satisfied that the transaction in question will not be detrimental to the public interest.
>
> (2) Upon coming into effect of a transaction such as referred to in sub-section (1) -
>
> a) all the assets and liabilities of the amalgamating institutions or (in the case of a transfer of assets and liabilities) of the institution by which the transfer is effected, shall vest in and become binding upon the amalgamated institution or, as the case may be, the institution taking over such assets and liabilities;
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> b) the amalgamated institution or (in the case of a transfer of assets and liabilities) the institution taking over such assets and liabilities, shall have the same rights and be subject to the same obligations as will be immediately before the amalgamation or transfer possessed by or binding upon the amalgamating institutions or as the case

may be, the institutions by which transfer is being effected;

c) all agreements, appointments, transactions and documents made and entered into between or executed by with or in favour of any of the amalgamating institutions or, as the case may be, the institution by which the transfer has been effected and in force immediately prior to the amalgamation or transfer, shall remain in full force and effect and shall be construed for all purposes as if they had been made, entered into, drawn or executed by, with or in favour of the amalgamating institutions or, as the case may be, the institution taking over the assets and liabilities in question;

d) any bond, pledge, guarantee or other instrument to secure future advances, facilities or services by any of the amalgamating institutions or, as the case may be, the institution transferring such assets and liabilities, which was in force immediately prior to the amalgamation or transfer, shall remain in full force and effect and shall be construed as a bond, ledge, guarantee or instrument given to or in favour of the amalgamated institution or, as the case may be, the institution taking over such assets and liabilities as security for future advances, facilities or services by that institution.

3) the Registrar of Companies, every Registrar of Deeds or Master of Supreme Court and every officer in

charge of an office in which is registered any title to property belonging to or any bond or other right in favour of, or any appointment of or by, or in which have been issued any licence, other than a licence in terms of Section 228 of the Companies Act to or in favour of, any banking institution which has amalgamated with any other such institution or any banking institution which has transferred all its assets and liabilities to any other such institution shall, upon being satisfied that the Minister has under subsection (1) consented to the amalgamation or transfer, and that such amalgamation or transfer has been duly effected, and upon production to him of any relevant deed, bond, certificate, letter of appointment, licence or other document, make such endorsement thereon and effect such alteration in his registers as may be necessary to record the transfer thereof and of any rights thereunder to the amalgamated institution or, as the case may be, the institution which has so taken over the said assets and liabilities, and no transfer duty, stamp duty, registration fees, licence duty or any other charges shall be payable in respect of the transfer or any endorsements or alterations so made to give effect thereto."

Sectiion 16 "Save as otherwise provided in this Act and in any other law, the ownership of land may be conveyed from one person to another only by means of a Deed of Transfer executed or attested by the Registrar, and other real rights in land may be conveyed from one

> person to another only by means of a deed of cession attested by a notary public and registered by the Registrar. Provided that notarial attestation shall not be necessary in respect of conveyance of a cession of real rights acquired under a mortgage bond."

The defendant's contention is that the principal Deeds Registries Act contained two procedural requirements necessary to convey real rights from one person to another. These were by deed of cession which should be –

a) attested by a Notary Public, and
b) registered by the Registrar of Deeds.

The amendment brought in by Act No. 80 of 1964 dispensed with requirement (a) above in as far as rights acquired under a mortgage bond are concerned, but requirement (b) still endures. Adverting to Section 30 of the Banks Act, he focused on that provision of it which states :

> "…….every Registrar of Deeds ……..shall upon being satisfied that the Minister has under subsection (1) consented to the amalgamation or transfer and that such amalgamation has been duly effected, and upon production to him of any relevant deed, bond, certificate, ….. or other document, make such endorsement thereon and effect such alteration in his registers as may be necessary to record the transfer thereof and of any rights thereunder to the amalgamated institution, or as the case may be, the institution which has taken over such assets and liabilities …."

The defendant then argued that the recordal referred to in that provision should be read as the necessary registration required under Section 16 of the Deeds Registries Act. He went on to state that since the plaintiff had conceded that it had not produced the mortgage bond to the Registrar so that the latter could endorse thereon and effect such alteration in his registers as might have been necessary to record the transfer thereof and the rights under that bond, the said rights had not passed or been conveyed to the plaintiff. Both in the court a quo and in this court the plaintiff's counsel cited the case of ABSA BANK LTD VS VAN BILJON AND ANOTHER 2000(1) SA 1163 (W) in support of the plaintiff's case. The ratio decidendi in that case is that where institutions merge or one institution transfers its assets to another and the deed of amalgamation or transfer, as the case may be, has been approved by the Minister as required by Section 54 of the Banks Act No. 94 of 1990 of South Africa, then the rights and liabilities of the amalgamating institutions or transferor institution are to be deemed as being those of the product of the amalgamation or the transfer transaction. Further that case held that the amalgamated institution or transferee institution shall, upon the effectuation of the merger or transfer as required by the said Banks Act, have the same rights and be subject of the same obligations as will be immediately before the amalgamation or transfer possessed by or binding upon the amalgamating institutions or the institution by which the transfer is effected. In short the effect of the ABSA case is that by operation of law the one institution is substituted for the other in terms of all real rights (and indeed all obligations.) Manyarara, A.J., accepted the plaintiff's counsel's submissions and determined this case in consonance with the ABSA case, supra, as the corresponding provisions of section 30 of the Banks Act of Namibia are in pari materia with those of section 54 of the Banks Act of South Africa.

No, argued the defendant. He criticized the ABSA trial judge, Robinson, A.J., for, as he claimed, having misconstrued the provisions of Section 54 of the Banks Act of South Africa. He cited many South African cases which he felt supported his own interpretation on the basis already indicated herein. I find it unnecessary to refer to any of them as in my view ABSA was correctly decided as I shall presently show. Moreover none of them has contradicted the ratio decidendi in ABSA.

I shall start with considering section 16 of the Deeds Registries Act. Its opening words are "Save as otherwise provided by this Act and any other law....." These words are instructive.

In the first place, I am of the view that the word "and" between "this Act" and "any other law" should be read as "or", because I opine that it was not intended to convey the idea that the Deeds Registries Act <u>together with any other law</u> may provide other methods of transferring real rights from one person to another vis-a-vis the method provided by Section 16. According to section 16 itself the method whereby such transfer is effected is by a deed of cession registered by the Registrar. However the opening words to section 16 have the effect of putting one on enquiry to scrutinize the Deeds Registries Act and other statutes with a view of ascertaining whether that Act or such other statutes provide for other methods of conveying rights in land, or indeed of conveying land itself. In the present case, the issue is whether there are other methods of conveying real rights created by a mortgage bond and therefore I shall not concern myself with searching for alternative methods of conveying land. This immediately leads me to section 30 of the Banks Act as it was the one chosen by the plaintiff and those other institutions which merged with it to produce the plaintiff. The question in the event is whether that section provides for a method of transferring real rights from one person to another other than by means stated in section 16 of the Deeds Registries Act.

Subsection (1) of section 30 provides in effect that there can be no properly constituted amalgamation or transfer of assets and liabilities between institutions unless such amalgamation or transfer is sanctioned in writing by the Minister if he is satisfied that the amalgamation or transfer is not detrimental to the public interest. The approval must be conveyed through the Registrar of Banks. In casu it is common cause that all the requirements of subsection (1) were complied with.

The next crucial provisions are to be found in subsection (2) of section 30. The opening words of this subsection are equally critical as glossing over them can lead to a misunderstanding of the consequences in the four paragraphs into which the subsection is broken. The words are - "Upon coming into effect of a transaction such as (is) referred to in subsection (1) ...." It is especially emphasized that these words state expressly that the transaction referred to in subsection (1) has come into effect. The four paragraphs into which the subsection is broken indicate the consequences of a properly consummated amalgamation or transfer. Paragraph (a) states that all assets and liabilities of the amalgamating institutions or those of the transferor institution shall vest in and become binding upon the amalgamated institution or transferee institution respectively. Paragraph (b) says that the amalgamated institution or transferee institution shall have the same rights and be subject to the same obligations as those which the amalgamating institutions or transferor institution had immediately prior to the amalgamation or transfer. As for paragraph (c) it provides that all agreements, appointments, transactions and documents made or entered into between or executed by, with or in favour of any amalgamating institutions or transferor institution and in force immediately prior to the

amalgamation or transfer, shall remain in force and effect and shall be construed as if they were made, entered into, with or in favour of the amalgamated institution or transferee institution. Paragraph (d) has the effect that any bond or any other instrument therein mentioned and referable to the amalgamating institutions or transferor institution and which were in force immediately prior to the amalgamation or transfer shall remain in force and shall be construed as an instrument given to or in favour of the amalgamated institution or transferee institution as the case may be. (all emphases supplied)

Pausing there for a moment, there can be no doubt that the provisions in subsection (2) have the cumulative effect that when an amalgamation (in casu referred to as a merger) is consummated, the institution emerging in consequence thereof shall, by operation of section 30 of the Banks Act, be substituted for the amalgamating institutions or transferor institution, as the case may be. In the result all assets and liabilities owned by the latter vest in and become binding upon the former and consequently the former takes over the same rights and becomes subject to the same obligations which the latter had immediately prior to the amalgamation. Equally all agreements and other matters mentioned in paragraphs (c) and (d) are transferred from one to the other.

The defendant urged it upon the court that the mutations enacted by the various paragraphs of subsection (2) do not take effect until the action contemplated by subsection (3) is taken. Let us look more closely at that subsection to ascertain whether that is so.

In its skeletal form the bare essentials of that subsection are the following :

(i) satisfaction by the Registrar that the Minister has consented to the amalgamation/transfer

(ii) the amalgamation or transfer having been duly effected.

(iii) the deed, bond, etc relevant to the amalgamation/transfer having been produced to the Registrar.

When the foregoing essentials exist, then the Registrar shall -

(iv) make an endorsement on the deed, bond, etc, as the case may be to -

(v) effect an alteration in his register in order to -

(vi) record the transfer of the deed, bond, etc, and the rights under the deed, bond, etc

It is to be observed that the subsection talks about the amalgamation or transfer having been duly effected. In this part of the section the word "effected" has the meaning of "the purpose of the amalgamation or transfer having been achieved". In the latter part of the subsection the word "effect" is again used in the phrase "……. the Registrar shall ……. make such endorsement and effect such alterations ……." In this latter part the word effect has a different connotation, namely "to cause to be made."

The provisions in paragraphs (a) to (d) of subsection (2) of section 30 are crucial. I have declared that there is no doubt that subsection (2), when looked at in isolation, has the meaning that upon an effective amalgamation or transfer coming into existence, the amalgamated or transferee institution respectively steps into the shoes of the amalgamating institutions or transferor institution. As can be seen from what I have stated in the immediately preceding paragraph, subsection (3), in fact recognizes, or perhaps you may even say, confirms, that the amalgamation or transfer has been duly effected. It is consequently my considered view that subsection (3) does not have the effect of postponing the consequences of the action taken under

subsection (1), which consequences are set out in subsection (2). If a postponement of consequences was contemplated by the legislature it must have used clear words of importing such postponement.

Statutes are replete with words of postponement. The legislature would, for instance have used the words, " subject to the provisions of " or words to that effect, as the opening words to subsection (2). But as we have seen subsection (2) opens with the words – " upon coming into effect of a transaction such as is referred to in subsection (1)..... ....." That phrase does not connote deferment of the consequences of the action taken under subsection (1). What it means is that after the action taken under subsection (1) has been accomplished then the consequences stated in paragraphs (a) to (d) would follow. By parity of reasoning if the legislature had intended subsection (3) to have an overriding effect on the events described in the four paragraphs of subsection (2), clear and appropriate words expressing such intent would have been employed. As can be seen from the list of the essential elements of subsection (3), the essence of that subsection is no more than one of affording the Registrar of Deeds a chance to update his records once a deed, bond, or as the case may be, which is the subject of a consummated amalgamation or transfer, is produced to him. Moreover in his submissions the defendant has argued that the act of producing the bond or any other instrument mentioned therein is obligatory. On a proper reading of subsection (3) I do not see any obligatoriness in this regard.

In the additional heads of argument which the defendant presented on the day of hearing this appeal he purported to argue that when a banking institution has extended a loan secured by a mortgage to a person and then later that bank transfers its business to another bank, the latter bank only inherits a personal right to the loan money. He

submitted that at common law the real right in the loan is transferable only upon registration of a deed of cession in the Deeds register. He recognised that under section 30 of the Banks Act, the deed of cession has been dispensed with so that a transfer is accomplished only upon the Minister giving his written consent. However he asserted that even in the last mentioned situation the proof of such transfer has to be submitted to the Registrar of Deeds for registration. In other words, so the defendant's argument goes, it is only by that act of registration that the real rights in the mortgage are transferred.

In commenting on this argument I must acknowledge that it is a well established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the common law unless it uses words that point unmistakably to that conclusion: per Devlin J, as he then was in **National Assistance Board Vs Wilkinson (1952) 2 QBD 648** at page 661. The question therefore is whether Section 30 of the Banks Act has used words which were clearly intended to alter the common law position by dispensing with registration.

My reading of subsection (2) of section 30 is that a clear language has been used to show that the Banks Act has altered the course of the common law. In paragraph (a) that section provides for "all assets and liabilities;" in paragraph (b) it refers to "the same rights and obligations;" paragraph (c) concerns "all agreements, appointments, transactions and documents;" while paragraph (d) embraces "any bond, pledge guarantee, any other instrument." All these things change hands from the transferor institution to the transferee institution without exception. Paragraph (b) is particularly instructive. It says that the transferee institution shall have the same rights and be subject to the same obligations as the transferor had immediately before the change over. My immediate comment on this provision is to

underscore the words “same rights” and “same obligations.” These words in themselves signify a departure from the common law. If that was not so then the transferee or amalgamated institution would not have the same rights or same obligations if paragraph (b) followed the common law. In other words if the defendant’s contention was correct that section 30 of the Banks Act only served to transfer the personal right in the loan money while the real right therein remained to be transferred through the common law mechanism, then the question of the transferee or amalgamated institution inheriting the same rights and same obligations would be heretical.

Looked in another way, in casu the rights which NBC had vis-a-vis the house loan were both personal, by virtue of the fact of loaning and borrowing on the part of NBC and the defendant respectively, and real, by virtue of the securement of the loan by the mortgage bond. According to paragraph (b) all those rights were transferred. The same can be said about the assets which the NBC had before the merger. These were real as well as personal. The agreements and other instruments mentioned in that subsection were possibly equally dichotomous.

In the event I feel satisfied on a balance of probabilities that the Banks Act has used amply clear words to show that it has effected a departure from the common law principle which postulates that real rights can be transferred only upon registration. In fact I dare say that the common law principle is now codified and encapsulated in section 16 of the Deeds Registries Act, Act No. 47 of 1937 as amended by Act No. 80 of 1964.

In the final analysis, after a critical scrutiny of section 30 of the Banks Act, I feel satisfied that it has provided an alterative method of

conveying a real interest in a secured loan, such as the interest created by the mortgage bond executed by the defendant in favour of NBC. That interest was duly transferred to the plaintiff upon the effectuation of the merger when the Minister approved the merger on December 9, 1993. I accordingly find as a matter of law that the house loan which was granted to the defendant and was secured by the mortgage bond continued to be a secured loan when it changed hands from NBC to the plaintiff.

I would consequently dismiss the appeal with costs.

The following orders consequently follow :

1. The appeal is dismissed
2. The Appellant shall pay the Respondent's costs including those of two counsel who appeared for the Respondent.
3. This matter is remitted to the court a quo to dispose of whatever issues may be outstanding.

CHOMBA, A.J.A.

I agree

STRYDOM, C.J.

I agree

O'LINN, A.J.A.

APPELLANT APPEARED IN PERSON

COUNSEL FOR RESPONDENT :MR. T.J. FRANK, S.C.
ASSISTED BY: MS. S. VIVIER
(P.F. KOEP and Co.)