A Review of Security Rights Over Movable Property in Namibia
Hilleni T.N Shikongo

Abstract

This paper argues that although Namibian law recognises the creation of security interests over movable property, such as general and special notarial bonds, legal liens, cessions, pledges, suretyships, guarantees and liens, it does not recognise non-possessory security over these assets. The lack of an effective regulatory framework dealing with security over movable assets in Namibia is the reason why lenders and particularly commercial banks in Namibia, are unwilling to provide credit where the only available asset is movable. This may have many detrimental effects on the Namibian economy as SMEs have the potential to contribute not only to employment but to the Gross Domestic Product (GDP) of the country. The UNCITRAL Legislative Guide on Secured Transactions recommends a functional, integrated and comprehensive approach to the concept of security in both developed and developing economies in order to ensure that the legal rights of creditors, debtors and third parties are subject to a common legal framework regardless of the form of transaction, the type of encumbered asset, the nature of the secured obligation or the status of the parties. The paper concludes by recommending the adoption of the UNCITRAL Legislative Guide on Secured Transactions and the development of a legislative framework which recognises non-possessory security over movable assets. This legal framework should address the existing barriers to access to finance in Namibia.

Introduction

Security is important because it allows persons to access credit from financial institutions. Real security is the security a creditor may acquire by exercising a limited real right over a thing owned by the debtor to enforce payment by the debtor. Real security is, for instance, created by mortgage over immovable property and
pledge over a movable thing.¹

Security rights over non-possessor movable assets, is unrecognized and unregulated in Namibia. It is this gap that creates a barrier to Small and Medium Enterprises (SMEs) that are in need of access to credit and where the only property they have is movable, and where such property cannot be possessed by the credit grantor.

This article argues for legal reform and development to allow improved access to credit for the benefit of the Namibian economy. It considers the UNCITRAL Legislative Guide on Secured Transactions a vital key to assist Namibia in the development of an effective legal framework for security interests over movable property.

**The Current Position in Namibia**

Mortgage bonds, notarial bonds, pledges and cession are the most common types of security over movable property in Namibia.² These forms of security, although recognised in our law do not all allow for non-possessor security rights.

Section 50(5) of the Deeds Registries Act, 1937 (Act No. 47 of 1937) provides that debts and obligations owing to various creditors and arising from different causes of action may not be secured by one mortgage bond. This poses an additional barrier to debtors who are unable to register multiple bonds owing to the various creditors that they may owe.

Notarial bonds also provide a favoured sense of security because a creditor may register the notarial bond over the movable property with the Registrar of Deeds in terms of sections 61-62 of the Deeds Registries Act, 1937. The registration of this bond does not automatically dispossess the property from the debtor. There is no perfect security prior to insolvency or default, and at the point of insolvency there is no payment of security unless the creditor is in possession of the movable asset.

² LEXAfrica. *Insolvency and Restructuring Guide for Africa* 2015. P.70
The creditor may however, in the event of default on the part of the debtor, apply to the High Court for possession of the movable assets.

Creditors would prefer to enter into pledge agreements with debtors, allowing them to take possession of the movable property to perfect security. However, taking possession of the property may not always be possible due to the nature of the property and the reality of the debtor to part with the property.

The Namibian High Court correctly reflects the Namibian position as it is today in Commercial Bank of Namibia Limited v Rossing Stone Crushers as follows:³

“Applicant as bondholder is not a secured creditor in the event of the insolvency of the respondent, and is entitled only to a preference over the concurrent creditors of the respondent with respect to the proceeds of assets subject to the bond in so far as they fall into the free residue of the estate. Should applicant however be able to take possession of the bonded property prior to the insolvency of the respondent it will have a secured claim as it then holds the property subject to a pledge.”

This is the reason why lenders and particularly commercial banks in Namibia, are unwilling to provide credit where the only available asset is movable. Consequently, the availability of credit particularly to SMEs is limited. In the absence of possession of the movable asset in order to perfect security other types of security over movable assets are neglected and lenders are better of being pledgees than in a position of bondholders.

The resulting lesson for Namibia is that there is a clear need to register security interests over movable property. The benefit of registration is two-fold firstly, it will create a secured claim for the holder of the security; and secondly, it will provide certainty about the assets encumbered. The registration of the security interests over movable property will therefore result in the validation and recognition of non-possessory security over movable assets, allowing for lenders to provide credit to

³ Case No. A 40/93 heard by Frank J in the High Court of Namibia on 10 March 1993.
persons and, especially SMEs who can only provide security in the form of movable assets.

This article proposes a fair consideration of the international best practices, and particularly the UNCITRAL Legislative Guide on Secured Transactions, in developing the relevant legislative framework for Namibia. This article maintains further that the UNCITRAL Guide on the Implementation of a Security Rights Registry will provide the urgently needed guidance to Namibia with respect to the establishment and operation of security rights registries\(^4\) and that the provisions of these two UNCITRAL Guides should form part of the domestic legislation.

**Conclusion and Recommendations**

The Namibian courts have already pointed out that the fact that the bondholder over specific movables may be in an even a worse position points to a need for law reform in this area.

This means that Namibia needs to undertake the task of recognising and developing a legal framework for security rights over non-possessory movable property. The legal reform must consider the specific types of movable assets recognized as registrable, the appropriate legislation for the registration of rights over movable property, and how this reform impacts the Deeds Registries Act, 1937 and the manner in which commercial institutions currently grant credit.

There will be a need to determine a broad scope of the type of entities or institutions that can take a secure interest over the identified movable asset. The registration of security interests over movable assets will need to define the kinds of transactions that can benefit from the registration of such interests. By effecting this legislative reform, Namibia will be furthering its Constitutional objective to secure economic growth, prosperity and life of human dignity for all Namibians as provided under Article 98 of the Namibian Constitution. It is the duty of the State to establish a

---

financial and legal framework that understands and addresses the barriers to access to finance.\(^5\)

**Author’s Contact Information**

Ms. Hilleni Tangi N. Shikongo  
Baccalaureus Juris degree (B. Juris) (UNAM), Bachelor of Laws degree (LLB Hon) (UNAM)  
Legal Officer  
Office of the Attorney-General: Namibia  
11\(^{th}\) Floor, Sanlam Centre, Independence Avenue, Windhoek, Namibia  
Tel: +264 61 281 2243  
Fax: +264 61 247 886  
Mobile: +264 81 295 0062  
Email: tangishikongo@gmail.com / Tangi.Shikongo@ag.gov.na

\(^5\) Ibid.