

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **24th March 2023** Signature:

CASE NO: 9442/2022

DATE: 24TH MARCH 2022

In the matter between:

ABSA BANK LIMITED

Applicant

and

GO ON SUPERMARKET (PTY) LIMITED

First Respondent

THE SPAR GROUP LIMITED

Intervening Party

Coram: Adams J

Heard: 15 March 2022 – The ‘virtual hearing’ of this Urgent Application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 24 March 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* system and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 24 March 2022.

Summary: Urgent application – General notarial bond over movable property – Perfecting of – Effect of debtor placed under business rescue – Business Rescue Practitioner consenting to the perfection of general notarial bond over

movables – creditor obtains possession by leaving debtor in control and possession – pledge perfected – symbolic transfer of possession sufficient to constitute a pledge – real right established – application granted to limited extent.

ORDER

- (1) The intervening party is granted leave to intervene in this urgent application.
- (2) The applicant's non-compliance with the rules of this Court in respect of time periods and service of processes, is condoned and compliance with such rules are dispensed with and this application is enrolled as an urgent application in terms of Uniform Court Rule 6(12).
- (3) Subject to the Spar Group Limited's pledge and real right of possession over all the assets and equipment as contained in annexure A to the Special Notarial Bond BN9369/2018 held by and in favour of the Spar Group Limited, the applicant is authorised to perfect its security of pledge under General Covering Notarial Bond BN16/43750, limited to the amount of R6 000 000, in respect of those assets of the respondent that are not the subject of the Spar Group's Special Notarial Bond BN9369/2018, situated at the respondent's premises at shop 12 and 13, Lyndhurst Superspar, Lyndhurst Square Shopping Centre, corner Drome and Pretoria Road, Lyndhurst, Gauteng, 2192 or wherever else situated.
- (4) The Sheriff of the High Court is authorised to attach and take a written inventory of and value so much of such moveables and stock-in-trade situated at the premises, limited to the value of R6 000 000 ('the attached assets') and thereafter hand such written inventory to the applicant's attorneys and the Business Rescue Practitioner.
- (5) This order of perfection in respect of the movables and stock-in-trade shall vest with the applicant a continuing real right of attachment over such attached assets, subject to the conditions that:

- 5.1 The applicant itself shall not take physical possession or remove such attached assets;
- 5.2 The Business Rescue Practitioner is allowed to use the attached assets in its day-to-day trading activities of the respondent, while in business rescue.
- (6) Notwithstanding that provided for in paragraph 4 above, the Business Rescue Practitioner is nominated as and will at all times act as the applicant's agent for the purposes of the applicant exercising control and physical possession of and over the attached assets.
- (7) The applicant may not, without the leave of the Court or with the written consent of the Business Rescue Practitioner, sell, alienate and/or dispose of the attached assets.
- (8) Each party shall bear his own costs.

JUDGMENT

Adams J:

[1]. In this urgent application, the applicant (Absa) applies for an order perfecting its security in terms of a general notarial bond. The general notarial bond is held by Absa to the value of R6 000 000 in respect of certain of the respondent's moveable property. The respondent is at present under business rescue and the duly appointed Business Rescue Practitioner (the BRP) is Mr Knoop, who was appointed as such on 14 February 2022.

[2]. On 4 March 2022, the BRP consented, in writing, to Absa bringing this application. He also expressly consented to Absa perfecting the security held by it in terms of the general notarial bond, subject to certain conditions, notably that Absa would not take possession of the attached property, but leave it in his possession, which would allow him to continue the business of the respondent. Additionally, the BRP does not oppose the urgent application and he has in fact filed a notice to abide.

[3]. Absa alleges that this application is urgent because on 4 March 2022, they were informed by the BRP of the Spar Group Limited's intention to perfect their notarial bonds over certain general and specific moveable property of the respondent. By applying for the relief in this urgent application, so Absa avers, it seeks to be vigilant in the protection of its interests and rights. A vigilant creditor who seeks to apply to perfect his right of pledge first before another, so it was submitted on behalf of Absa, does not make the act unjust or inequitable, even where he is the holder of a later bond of security.

[4]. Secondly, Absa contends that the application is urgent because certain of the assets of the respondent, which are subject to the applicant's general notarial bond, are perishable stock in trade goods. So, if they were to wait in the ordinary course, those goods would go off and hold no value for the respondent. Furthermore, it is alleged by Absa that the respondent presently trades on a cash basis, the Spar Group having cancelled its line of credit. This is, amongst other grounds, the foundation for the respondent resolving to enter business rescue, but are also grounds for Absa to secure its position if business rescue is unsuccessful, and liquidation ensues.

[5]. Importantly, so Absa submits, the respondent is financially distressed and reasonably unlikely that it will be able to pay its debts as and when they fall due in the next six months. Therefore, so the argument goes, the respondent may very well not be able to fulfil its obligations to Absa under the overdraft even whilst under business rescue.

[6]. Therefore, so the argument is concluded, Absa, which is entitled to protect its rights of pledge embodied in the general notarial bond and perfect it, should be granted the relief prayed for in this urgent application, which it will not get in the ordinary course because the time periods for the formulation and development of a business rescue plan are truncated in the Companies Act, 71 of 2008 ('the Companies Act').

[7]. I find myself in agreement with these submissions on behalf of Absa. In any event, applications to perfect securities in terms of notarial bonds are, by definition, urgent. I therefore find that Absa's application is urgent.

[8]. As indicated above, the BRP consented to Absa perfecting its security in terms of the general notarial bond subject to the following conditions: Absa is not to take physical possession of the assets or removing the assets; and that the BRP is entitled to use the assets in the day-to-day trading of the respondent; and that the BRP shall act as Absa's nominated agent for the purpose of having physical control and possession of the assets.

[9]. The intervening party (the Spar Group), on the other hand, applies for leave to intervene and, once admitted, it seeks an order striking the application from the roll, alternatively, an order dismissing the main application with costs. It contends that the Court's endorsement by way of a perfection order is not necessary in the present situation which amounts to a proposed voluntary surrender subject to certain conditions. If the Court is amenable to granting a perfection order, then, so the Spar Group contends, the formulation of the relief claimed is deficient in a number of respects in that it *inter alia* infringes on their vested rights arising from their own special and general notarial bonds and from contracts reserving ownership in stock-in-trade. In sum, Spar Group contends that Absa's application for an interdict should fail as being bad in law.

[10]. As regards the application to intervene in terms of Uniform Rule of Court 12, read with Rule 6(14), the Spar Group avers that it is the major creditor of the respondent (in business rescue), it being indebted to the Spar Group in the sum of an amount in excess R17 000 000, being in respect of its trade debt. Therefore, so the Spar Group contends, on ordinary principles, it should be granted leave to intervene because it has a direct and substantial interest in the subject matter of the main application.

[11]. I find myself in agreement with the Spar Group's submissions in that regard. The point is that the Spar Group has rights in and to the respondent's movable property, which stand to be adversely affected by the Order sought in this application. These rights are derived by virtue of the Special Notarial Bond registered in favour of the Spar Group over certain identified movable assets of the respondent and the contractual reservation of ownership in its favour in

respect of all goods sold and delivered to the respondent for as long as the respondent continues to hold the goods in stock.

[12]. Moreover, in terms of section 145(1)(b) of the Companies Act, each creditor is entitled to participate in any court proceedings arising during business rescue proceedings. For all of these reasons, I am of the view that the Spar Group has made out a case for leave to intervene in this urgent application. I therefore intend granting an order to that effect.

[13]. As for their opposition to the application itself, the Spar Group alleges that, as a wholesaler, it supplies groceries and other household goods to the respondent which carries on a retail supermarket business under the Spar brand name. In the course of this trading relationship, the respondent was granted credit facilities subject to the operation of their standard terms of sale and the obtaining of securities for the credit facilities, in particular the registration of notarial bonds over the movable property of the respondent. As already indicated, the respondent's indebtedness to the Spar Group at present amounts to a sum in excess of R17 000 000.

[14]. On the other hand, so the Spar Group contends, the respondent's indebtedness to Absa is insignificant if compared to the indebtedness to the Spar Group.

[15]. The Spar Group also contends that, because they and ABSA are competing creditors laying claim, in terms of their general notarial bonds, to the same movable property of the respondent, the BRP should not have afforded Absa the opportunity to launch its perfection application before the Spar Group was brought into the picture. Absa's application was launched on 8 March 2022 and the Spar Group was only informed thereof by the BRP on 10 March 2022.

[16]. The Spar Group also opposes Absa's application for a perfection order on the basis that it is not founded upon a breach by the respondent of the terms of the general notarial bond and the ABSA's entitlement to foreclose. Rather, so the Spar Group contends, Absa seeks a perfection order based solely on the ostensible consent given in writing by the BRP.

[17]. There is, in my view, no merit in these contentions by the Spar Group. The respondent's indebtedness to Absa is secured by a notarial bond registered in favour of Absa over the movable property of the respondent. In terms of the notarial bond, Absa is entitled to 'foreclose' in the event *inter alia* of the respondent being placed under judicial management. Business rescue proceedings is, in my view, a form of judicial management. Absa is therefore entitled to foreclose in terms of the bond and the fact that the Spar Group has a claim of a personal nature against the respondent makes no difference to Absa's entitlement to proceed in terms of the bond.

[18]. As was held in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others*¹, a perfection clause entitles the holder of the bond to take possession of the movables over which the bond has been registered. Such a clause amounts to an agreement to constitute a pledge and will be enforced at the instance of the bondholder, whereupon the creditor obtains a real right of security.

[19]. At para 6, Harms JA held as follows:

'Real rights are stronger than personal rights and in the case of conflicting real rights the principle *prior tempore potior iure* applies. The right in question, a pledge, is a real right, which is established by means of taking possession and not by means of an agreement to pledge. The bondholder who obtains possession first thereby establishes a real right. If I may be permitted some more Latin: *vigilantibus non dormientibus iura subveniunt*, meaning that the laws aid those who are vigilant and not those who sleep. (Both principles provide a safer guide to the correct answer than the Court below's "just and equitable" principle. The fact that it is "fortuitous" that the vigilant person perfects his rights first does not make the act either unjust or inequitable.) The fact that Chesterfin's bond contained a provision prohibiting Eurotile from pledging or hypothecating its movables without Chesterfin's consent also has no effect on Contract Forwarding's position unless the latter knows of it. In the absence of Contract Forwarding's knowledge, Eurotile's breach of its contract with Chesterfin does not affect the former's position.'

[20]. As per the ratio in *Contract Forwarding*, I am of the view that Absa is entitled and permitted to take possession of the pledged goods with a view to perfecting its bond.

¹ *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 (SCA).

[21]. Also at para 14, the court had the following to say:

'There is no rule that provides that symbolical transfer of possession (like the handing over of keys) is not sufficient to constitute a pledge. It is different with *constitutum possessorium*, a method of delivery that presupposes that the goods remained under the physical control of the debtor. That simply did not happen in this case.'

[22]. On the basis of this authority, I reiterate that, in my view, the Spar Group's grounds of opposition to Absa's application are devoid of merit.

[23]. In the event that the above Honourable Court is amenable to grant a perfection order in favour of Absa, so the Spar Group contends, the Court should not grant Absa the relief claimed as formulated by them because such formulation is defective in that Absa cannot obtain a perfection order in respect of assets belonging to the respondent which are already the subject matter of the Spar Group's special notarial bond. There is merit in this contention by the Spar Group. However, during the hearing of arguments before me, Mr Marais, who appeared on behalf of Absa, conceded as much, but proposed that any order granted by me should take into account this fact. The suggestion by Mr Marais was that the assets which are the subject of the special notarial bond in favour of the Spar Group be expressly excluded from the perfection order. That, in my view, takes care of that ground of objection.

[24]. The Spar Group also contends that the Absa cannot obtain a perfection order in respect of the movable assets in the respondent's possession, in respect of which the Spar Group has contractually retained ownership. This consists of stock supplied by the Spar Group. Also, so the Spar Group submits, Absa cannot obtain a perfection order in respect of the balance of the respondent's trading stock as trading stock is a circulating asset and the pledge will be destroyed the moment the respondent disposes of the trading stock. The proposed court order, so the argument goes, cannot vest Absa with a continuing real right of attachment over such attached assets as this depends on continuous possession and control being exercised by or on behalf of ABSA. For the reasons mentioned above, these contentions stand to be rejected. The point is that Absa has the right to perfect its security in terms of the notarial bond.

Costs

[25]. The general rule in matters of costs is that the successful party should be given her or his costs, and this rule should not be departed from except where there are good grounds for doing so.

[26]. *In casu*, it is so that Absa has been substantially successful in its application. The BRP did however not oppose the application and he in fact gave notice of his intention to abide. Therefore, there cannot possibly be a costs order awarded against the respondent.

[27]. As for the costs as between Absa and the intervening party, as correctly pointed out by Mr Strydom, who appeared on behalf the Spar Group, they have a measure of success in that property in respect of which they enjoy security in terms of a special notarial bond is to be excluded from a perfection of the notarial bond in favour of Absa. I therefore believe that the correct costs order to be awarded is one in terms of which each party is to bear his own costs.

[28]. I therefore intend granting a costs order to that effect.

Order

[29]. Accordingly, I make the following order: -

- (1) The intervening party is granted leave to intervene in this urgent application.
- (2) The applicant's non-compliance with the rules of this Court in respect of time periods and service of processes, is condoned and compliance with such rules are dispensed with and this application is enrolled as an urgent application in terms of Uniform Court Rule 6(12).
- (3) Subject to the Spar Group Limited's pledge and real right of possession over all the assets and equipment as contained in annexure A to the Special Notarial Bond BN9369/2018 held by and in favour of the Spar Group Limited, the applicant is authorised to perfect its security of pledge under General Covering Notarial Bond BN16/43750, limited to the amount of R6 000 000, in respect of those assets of the respondent that are not

the subject of the Spar Group's Special Notarial Bond BN9369/2018, situated at the respondent's premises at shop 12 and 13, Lyndhurst Superspar, Lyndhurst Square Shopping Centre, corner Drome and Pretoria Road, Lyndhurst, Gauteng, 2192 or wherever else situated.

- (4) The Sheriff of the High Court is authorised to attach and take a written inventory of and value so much of such moveables and stock-in-trade situated at the premises, limited to the value of R6 000 000 ('the attached assets') and thereafter hand such written inventory to the applicant's attorneys and the Business Rescue Practitioner.
- (5) This order of perfection in respect of the movables and stock-in-trade shall vest with the applicant a continuing real right of attachment over such attached assets, subject to the conditions that:
 - 5.3 The applicant itself shall not take physical possession or remove such attached assets;
 - 5.4 The Business Rescue Practitioner is allowed to use the attached assets in its day-to-day trading activities of the respondent, while in business rescue.
- (6) Notwithstanding that provided for in paragraph 4 above, the Business Rescue Practitioner is nominated as and will at all times act as the applicant's agent for the purposes of the applicant exercising control and physical possession of and over the attached assets.
- (7) The applicant may not, without the leave of the Court or with the written consent of the Business Rescue Practitioner, sell, alienate and/or dispose of the attached assets.
- (8) Each party shall bear his own costs.

L R ADAMS

*Judge of the High Court
Gauteng Division, Johannesburg*

HEARD ON: 15th March 2022 – as a videoconference on *Microsoft Teams*.

JUDGMENT DATE: 24th March 2022 – judgment handed down electronically

FOR THE APPLICANT: Adv B S W Marais

INSTRUCTED BY: De Vries Incorporated, Sandton

FOR THE RESPONDENT: Adv Desai _

INSTRUCTED BY: Petker & Associates Incorporated, Hyde Park, Johannesburg

FOR THE INTERVENING PARTY: Advocate Francois Strydom

INSTRUCTED BY: Moss Marsh & Georgiev , Johannesburg