



**THE HIGH COURT OF SOUTH AFRICA  
GAUTENG HIGH COURT, JOHANNESBURG**

Case Number: 2022-027186

(1) MATTER HEARD: 14 April 2023  
(2) REPORTABLE: NO  
(3) OF INTEREST TO OTHER JUDGES: NO  
(4) REVISED

\_\_\_\_\_  
SIGNATURE  
DATE: 24 JULY 2023

In the matter between:

**THE INDUSTRIAL DEVELOPMENT CORPORATION  
OF SOUTH AFRICA LIMITED  
(REGISTRATION NUMBER: 1940/014201/06)**

Applicant

and

**BOKONE GROUP OF COMPANIES (PTY) LTD  
(REGISTRATION NUMBER: 2017/027265/07)**

Respondent

**JUDGMENT**

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**Delivered:** This judgment is handed down electronically by circulation to the parties' attorneys by email and uploading the electronic version on CaseLines.

## **KORF AJ:**

### **Introduction**

[1] This matter concerns relief relating to a general notarial bond passed by the respondent and registered in favour of the applicant. As is often the case with applications that are moved on an *ex parte* and urgent basis, the granting of such relief later draws into question the duties of an applicant to make full and correct disclosure of all material facts that may influence the judge hearing the *ex parte* application, and whether an applicant has obliged. This matter is no different.

[2] On 4 October 2022, the applicant approached this court urgently and *ex parte*. The relief granted on that day comprised two main components. First, the perfection of the Notarial Bond, authorising the applicant, through the Sheriff, to take possession of movables found at the respondent's addresses (orders 4 and 4.1), which possession can be obtained by removal (order 4.2), compiling an inventory (order 4.2.1), affixing an identifying mark/sticker (order 4.2.2), and the Sheriff is authorised to keep possession of the assets pending the finalisation of the application on the return date (order 4.2.3). Second, the court issued a rule *nisi*, returnable on 10 November 2022, for final relief authorising the applicant to dispose of the movable assets relevant to the notarial bond and that costs be awarded to the applicant (orders 2, 2.1 and 2.2). The order of 4 October 2022 shall be referred to as the "perfection order".

[3] On 5 October 2022, under the first component of the perfection order, the Sheriff attached (and thereby took possession of) movable assets at the respondent's premises, as listed or referred to in the Sheriff's return. During the hearing, counsel for both parties confirmed that the Sheriff marked and identified the listed assets. These items were not removed from the respondent's premises.

[4] On or about 6 October 2022, the respondent delivered its notice of intention to oppose. The respondent further delivered, *inter alia*, a notice of reconsideration [in terms of Rule 6(12)(c)] of the perfection order granted on 4 October 2022 and that the provisional order be set aside be struck from the roll for lack of urgency, the application be set aside struck from the roll for lack of urgency, costs, or further/alternative relief.

[5] The rule *nisi* was extended to 11 April 2023, re-extended until the hearing of the matter on 14 April 2023, and again until the date of this judgment.

### **Parties**

[6] The applicant is INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED, REGISTRATION NUMBER: 1940/014201/06, established in

terms of section 2 of the Industrial Development Corporation Act, 22 of 1940 (as amended) ("IDCA").

[7] As articulated in the object of IDCA, the applicant's purpose is to promote the establishment of new industries and industrial undertakings and the development of existing industries and industrial undertakings.

[8] The respondent is BOKONE GROUP OF COMPANIES (PROPRIETARY) LIMITED, REGISTRATION NUMBER: 2017/027265/07. The respondent operates in the mining sector, and its business includes constructing plants and related amenities and rendering services in the mining sector.

[9] During or about June 2018, the respondent secured a contract with Palabora Copper (Pty) Ltd, trading as "Palabora Mining Company" ("PMC"), to construct an oxygen supply plant and to supply oxygen to a furnace involving coal combustion and copper concentrates melting processes (the "PMC contract").

[10] As had been envisaged by IDCA, the applicant agreed to fund the respondent's business operations. This assistance was given effect in 2019 and in the form of a written Loan Agreement, which provided that loans were to be secured, *inter alia*, by registering a general notarial bond over the respondent's movable assets.

### **The perfection order of 4 October 2022**

[11] The applicant initially approached the court on Monday, 26 September 2022, on an "extremely urgent basis". However, the court struck the matter from the roll because it lacked adequate urgency for the matter to be heard on a day other than a Tuesday, the day urgent applications in this division are ordinarily enrolled.

[12] Having re-enrolled the matter for Tuesday, 4 October 2022, and armed with a supplementary founding affidavit, the applicant moved for the relief set out in the notice of motion on an urgent and *ex parte* basis, which succeeded.

[13] The relief granted included the following orders:

- "1. *That the Applicant's non-compliance with the Rules of Court is hereby condoned and directed that this matter be heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court;*
2. *That a rule nisi is hereby issued calling on the Respondent to show cause, if any, on **10 November 2022 at 10h00 or as soon thereafter** as the matter may be heard, why the provisional orders in 2.1 and 2.2 below cannot be confirmed and made final:*
  - 2.1. *The Applicant and its agents, employees or nominees, through the Sheriff, be and is hereby authorised and empowered to dispose of the assets (or any of them), in terms of the General Notarial Bond **BN000024611/2019** in such manner and upon*

- such terms as the Applicant or its duly authorised agent determines and to confer valid titles on the transferee thereof;
- 2.2. That the costs of this application shall be paid by the Respondent on a scale as between attorney and client.
  3. Directing that the Attorney for the Applicant is hereby authorised to dispatch this order and a copy of the application to the Respondent via the Sheriff per hand delivery, or facsimile and/or email;
  4. Directing that:-
    - 4.1. the Applicant and its agents, employees or nominees, through the Sheriff, be authorised and empowered for the purpose of perfecting its security, in terms of the General Notarial Bond **BN000024611/2019** to enter the premises of the Respondent situated at: ... and at any other premises wheresoever the movable assets of the Respondent may be found, and to take possession of and to hold in pledge all the Respondent's movable property and effects, of whatever nature and description and wheresoever situate, both corporeal and incorporeal and both such as the Respondent may now own or as it may in the future acquire, nothing accepted.
    - 4.2. such possession of the Respondent's assets described in 4.1 above, be obtained in one or more of the following ways, without necessarily removing same from the Respondent's premises (but without limiting the Applicant's right to remove same), by:
      - 4.2.1. Compiling of an inventory of the assets referred to;
      - 4.2.2. Affixing of such assets of a mark and/or sticker identifying same;
      - 4.2.3. The Sheriff to keep possession of such assets pending the finalisation of this application on the return date.
  5. That the orders in 4.1 and 4.2 above shall operate with immediate effect.
  6. That in the event of the Respondent choosing to oppose this application, then in that event, the Respondent is entitled to anticipate the return date on 24-Hour Notice to the Applicant's Attorneys."

[14] A meaningful interpretation and application of the perfection order is problematic, in any event, given the respondent's ensuing opposition and the proposed interpretation proffered by the applicant. I shall revert to this aspect.

### **The Loan Agreement**

[15] On 28 March 2019 at Sandton, the applicant, as the lender, concluded a written Loan Agreement with the respondent as the borrower, which provided for four loans by the applicant to the respondent.<sup>1</sup> In terms of clause 3, the aggregated loan amounted to R135,2 million plus capitalised interest in the amount of R10,7 million, of which the applicant would make advances on the respondent's drawdown

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<sup>1</sup> Loan 1 as a plant and equipment loan in the amount of R 81 million plus capitalised interest; Loan 2 as a bridging loan in the amount of R 38,6 million; Loan 3 as working capital in the amount of R 10 million and, Loan 4 as a VAT loan in the amount of R5,6 million.

requests from time to time.<sup>2</sup> Additionally, clauses 1.37 to 1.40 and 1.61 of the Loan Agreement envisaged the simultaneous conclusion of a Subordinated Loan Agreement for R 9 million.

[16] Clauses 8.2 and 8.2.1-8.2.4 of the Loan Agreement provided that the loans would each have been repaid within a specified period (i.e., Loan 1 in 84 and Loan 3 in 48 equal monthly instalments) or, in the case of Loan 2 and Loan 4, upon the occurrence of a specific event.<sup>3</sup>

[17] Further, Clauses 1.55 and 1.55.4 provided that the Loans were to be secured, *inter alia*, by a general notarial bond, to be registered for a minimum amount of R155 million plus an additional sum of 30% for ancillary costs and expenses.

### **The General Notarial Bond**

[18] As had been foreshadowed by the Loan Agreement, a General Notarial Bond (BN 245611/2019) was registered in the applicant's favour on 15 May 2019 at PRETORIA, which is the bond pertinent to this case (referred to below as the "Notarial Bond").

[19] In its recital, the Notarial Bond describes the security provision and subject assets read as follows:

*"...AND as a continuing covering security for every such present and/or future indebtedness or obligation as aforesaid as well as all of the Mortgagor's obligations hereunder, the Appear on behalf of the Mortgagor hereby declared to bind and hypothecated... ALL OF THE MORTGAGOR'S MOVABLE PROPERTY AND EFFECTS, OF WHATEVER NATURE AND DESCRIPTION AND WHERESOEVER SITUATE, BOTH CORPORAL AND IN CORPORAL AND BOTH SUCH AS THE MORTGAGOR MAY NOW OWN OR AS IT MAY IN THE FUTURE ACQUIRE, NOTHING ACCEPTED (hereinafter referred to as the "Assets")..."*

[20] The bond provides *inter alia* as follows:

"7. **EVENT OF DEFAULT**

*An event of default shall occur if-*

7.1. *The Mortgagor refuses and/or neglects-*

7.1.1. *to carry out the provisions of the Facility Agreement or if the Mortgage or commit any act which constitutes a breach of any of the provisions of the Facility Agreement;*  
*or*

7.1.2. *to carry out, or breaches of any of the other terms, conditions or stipulations of this bond; or*

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<sup>2</sup> Loan Agreement, clause 7.

<sup>3</sup> Loan 2, within 72 hours of receipt from the Department of Trade and Industry (DTI) of the DTI bridging loan; and Loan 4, as soon as the refund is received from the South African Revenue Services.

7.1.3. to carry out, or breaches any of the terms, conditions or stipulations of any agreement between the Mortgagor and the Mortgagee or any bond passed by the Mortgagor in favour of the mortgagee which is collateral hereto; or

7.2. The Mortgagor-

...

7.2.3. Commits any event which would be an act of insolvency under the Insolvency Act, No. 24 of 1936 or business rescue proceedings are commenced in respect of the Mortgagor or any application is made to commence business rescue proceedings in respect of the Mortgagor, or a resolution is processed or past for the entering into business rescue proceedings by the Mortgagor;...

7.2.6. Commit any breach of any material contract binding upon it entitling the other party to that contract to cancel the same or to a separate performance by the Mortgagor of any obligation due thereunder; ...

8. **THE MORTGAGEE'S RIGHT ON THE HAPPENING OF AN EVENT OF DEFAULT**

Upon the happening of an event of default referred to in 7 above, the Mortgagee shall, without prejudice to any other rights which it has in terms hereof or at law, be entitled-

...

8.2. if the Mortgagee has not already been placed in possession of the Assets, to forthwith take possession and thereby perfect its pledge of the Assets;

8.4. to dispose of the Assets or any of them by public auction, public tender or by private treaty or otherwise in the Mortgagee's sole discretion and on such terms and conditions as the Mortgagee in its sole discretion may deem fit and to convey good valid and free title to the purchaser or transferee thereof;

...

10. **RIGHTS TO APPLY TO COURT AND JURISDICTION**

10.1 Any application to any competent Court to be brought by the Mortgagee in terms of or arising from this bond and/or the Facility Agreement, may be brought, at the Mortgagee's election, either ex parte or on notice to the Mortgagor...."

17. **COSTS**

All fees, charges and disbursements... in instituting or prosecuting any legal proceedings... shall be borne and paid on demand by the Mortgagor on the scale as between Attorney and his own client whether or not action has been or is instituted by the Mortgagee against the Mortgagor."

**The applicant's case**

[21] The applicant states that under the Loan Agreement and advances thereunder, the parties have restructured the Loans to defer repayment for Loans 1 and 3 to 1 September 2022, which the respondent failed to meet. The Certificate of

Balanced dated 21 September 2022 confirms the total due by the respondent to the applicant on 20 September 2022 amounted to R173,863,744.72 plus interest calculated at applicable rates from 21 September 2022 until the date of payment.

[22] The applicant describes the respondent's financial position, *inter alia*, as "being in financial distress and thus in a precarious position which is impacting on its ability to fulfil its obligations to PMC", "...severe financial distress...", "...not able to pay its debts...", "...precarious financial position...". Further, Richline, the respondent's alleged landlord, refused to release some assets because the respondent failed to pay money due and payable to it, including storage costs.

[23] Concerning the project's status, as a general proposition, the project has been delayed, for various reasons, since the applicant's involvement in 2018. The delays caused costs to spiral out of control. According to the applicant's assessments made during December 2021, the completion costs amounted to R59 million, and commercial operations were expected to commence in July 2022. The applicant contends that the respondent's inability to perform precariously impacts its ability to meet its loan repayment obligations. The applicant is not in a position to invest any further funds where the project is not generating income and where the respondent is in arrears.

[24] On 2 September 2022, PMC issued a notice to the respondent to suspend all construction activities due to the sudden resignation of the Subordinated Project Engineer. On 16 September 2022, PMC informed the applicant that PMC considered terminating the PMC contract due to continued delays. On 30 September 2022, PMC issued a "Notice of Breach Letter" in which it threatened to cancel the PMC contract.

[25] All in all, the applicant contends that there is a material risk that the respondent may be wound up or placed under business rescue, either voluntarily or by its creditors (if they were to get wind of the respondent's financial difficulties), or that its immovable assets may be attached pursuant to legal action by other creditors. Should any of these risks materialise, so the applicant contends, then the security envisaged by the Notarial Bond may be relinquished in whole or in part.

[26] The applicant contends that the respondent has breached clauses 7.1, 7.2.3 and 7.2.6 of the Notarial Bond.

[27] Concerning the reconsideration of urgency (order 1), the applicant contends that urgency is a preliminary issue. It is a matter of form and not substance. A court considers the grounds for urgency before the merits of the application. The applicant submits that the court has already considered and adjudicated the issue of urgency and that the "posthumous" reconsideration of urgency is irrational, illogical and without legal basis.

[28] Regarding reconsidering the perfection order, the applicant contends that orders 3, 4 and 5 are final in nature and, accordingly, *res iudicata*.

[29] Accordingly, the applicant seeks that orders 2.1 and 2.2 be confirmed and made final and that these should not be reconsidered and set aside, as the respondent contends they should.

[30] During oral argument, counsel for the applicant submitted that even if the founding and supplementary founding affidavits were found to be incorrect or incomplete, those deficiencies were not material and relevant to the applicant's case. For this reason, the perfection order should not be set aside.

### **The respondent's main contentions**

[31] Respondent's opposition was essentially three-pronged. First, it sought numerous paragraphs of the founding affidavit and the supplementary founding affidavit to be struck out in terms of Rule 6(15) because the contents of the relevant paragraphs constituted inadmissible hearsay evidence. I shall revert to this aspect. Second, the respondent proffered facts and circumstances based on which it contended that setting aside the perfection order is warranted and that the application was never urgent. Third, the respondent dealt with the grounds on which the applicant relied to the extent that the perfection order was not set aside.

[32] The respondent contends that when the applicant moved the application *ex parte* on 4 October 2022, the applicant provided an incomplete and inaccurate account of the case's material facts. According to the respondent, the materially incomplete or distorted picture painted by the applicant engages and stands in contrast with the full facts and true state of affairs relevant to the respondent's financial affairs, its financial ability to complete the project, the respondent's alleged indebtedness to the "landlord" (Richline) and its refusal to release some assets, the status of the project and that it is near completion, the possibility of the respondent placing itself in business rescue (which is not even considered), the "Notice of Breach Letter" of 30 September 2022. The respondent admits not making payment by 1 September 2022 as it was obliged to do. It, however, submits that its application for an extension of the repayment terms (which the applicant had approved before in comparable circumstances), made prior to the launch of the perfection application, was still under consideration by the applicant. The project was near completion (estimated at the time as latest, end of April) and once attained, the respondent will earn income from PMC by rendering the envisaged oxygen supply services. The respondent submitted further that the matter was not urgent.

[33] In the event of the perfection order not being reconsidered and set aside for the reasons summarised above, the respondent denies any default event as contemplated by clauses 7.2.3 and 7.2.6 of the Notarial Bond.



## **The abandoned application to strike-out**

[34] As stated above, the respondent delivered a notice of its application to strike out specific paragraphs from the founding and supplementary founding affidavit deposed on behalf of the applicant. In respect of the founding affidavit, the respondent contended that the version offered by the deponent was at odds with the progress of the project and what occurred on the operational side of the respondent's business, which shows that the deponent to the founding affidavit did not have the requisite personal knowledge or that he did not identify the sources of his information, which he believed to be true. Accordingly, the deponent's relevant allegations constitute inadmissible hearsay evidence. The supplementary founding affidavit (deposed by the applicant's attorney) introduced PMC's "Notice of Breach Letter" dated 30 September 2022. Furthermore, the applicant's attorney made various statements regarding the respondent's business affairs, financial difficulties, inability to perform its obligations owed to PMC, and the project status. Respondent contended that the relevant content constituted inadmissible hearsay evidence.

[35] At the hearing of the matter, in response to a question by this court, counsel for the respondent indicated that the respondent does not persist with the strike-out application. I believe the abandonment of the strike-out application was appropriate and justified. I shall briefly explain. As a general observation, the respondent's contentions that the impugned allegations constituted hearsay evidence are *prima facie* meritorious. However, the admission of hearsay evidence is governed by section 3 of the Law of Evidence Amendment Act, 45 of 1988, which gives the court a wide discretion on whether or not to admit hearsay evidence.<sup>4</sup>

[36] It is trite that parties are afforded some latitude concerning the admission of the hearsay evidence in urgent applications. The applicant's application is essentially one for specific performance and entails various procedural considerations. To arrive at conclusions and ultimately decide the matter, this court must exercise its discretion and make value judgements about various aspects. I believe it is in the interest of justice to arrive at discretionary findings and conclusions by permitting all the parties' allegations, even though specific allegations constitute or may constitute hearsay evidence. Permitting hearsay evidence in the instant matter, however subject to and taking into consideration the factors referred to in section 3(1)(c)(i)-(vii) of the said act. The supplementary founding affidavit serves as an appropriate

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<sup>4</sup> Section 3 of the Law of Evidence Amendment Act, 45 of 1988 provides as follows, *inter alia*:

**"3. Hearsay evidence**

(1) *Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—...*

(c) *the court, having regard to—*

*(i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice."*

example. Save for introducing PMC's letter of 30 September 2022, the allegations and contentions set out by the deponent to the supplementary founding affidavit carry no weight. For these reasons, albeit briefly stated, I believe the respondent correctly abandoned the strike-out application.

### **Interpretation of the perfection order**

[37] Orders 1, 2.2 and 6 are not pertinent to this discussion and order 3 is of limited relevance. The relevant provisions of the perfection order for present purposes comprise, on the one hand, the rule *nisi* in terms of orders 2.1, authorising the sale of the assets in question, returnable as indicated above, and on the other, the provisions of orders 3, 4 and 5 that provide for the taking the respondents assets in possession to perfect the Notarial Bond.

[38] It is common practice that urgent *ex parte* relief is granted by way of an interim order pending the institution and finalisation of proceedings for final relief or, where circumstances justify it, a rule *nisi*, subject to a return date upon which a respondent is to demonstrate why the rule should not be made final.

[39] At first glance, orders 3, 4 and 5 appear final. This is so, *inter alia*, because on the express wording of order 2, "...a rule *nisi* is hereby issued calling on the Respondent to show cause, if any, on [the return date] why the provisional orders into point one and 2.2 below cannot be confirmed and made final." Order 2 does not incorporate the remainder of the orders into the *rule nisi*.

[40] In the applicant's heads of argument, it is submitted that the perfection order was twofold in that only order 2 (incorporating orders 2.1 and 2.2) was a provisional order with a return date and that orders 3, 4 and 5 were final. The applicant was entitled, *ex contractu* and at its election, to approach the court on an *ex parte* basis, and it is further submitted that orders 3, 4 and 5 are final and are *res iudicata* in that a competent court has adjudicated the same and therefore may not be pursued further by the same parties.

[41] The first difficulty with interpreting orders 3, 4 and 5 as final relief stems from the wording of the perfection order itself. Order 4 provides that the applicant, through the Sheriff, is authorised to take possession of the respondent's assets (thereby perfecting the notarial bond) and that such possession may be obtained through removal (order 4.2) or by compiling an inventory (order 4.2.1) and by affixing a mark/sticker identifying same (order 4.2.2). Order 4.2.3 then states that "...the Sheriff [is authorised] to keep possession of such assets pending finalisation of this application on the return date..." [*emphasis added*].

[42] As quoted above, I cannot ignore the emphasised portion of order 4.2.3. On the express wording of order 4.2.3, the Sheriff's continued possession of the assets (whether removed, inventoried or identified by a mark/sticker) is conditional on the "*finalisation of this application*" on the return date. The scope phrase "*finalisation of*

*this application*" is wider than what is envisaged to be confirmed and made final under the rule *nisi*. If it was intended for order 4.2.3 to be conditional upon the confirmation of the rule *nisi*, it should have stated as much.

[43] Orders 4.1 and 4.2 should be read in the context of the remainder of the perfection order, specifically order 5, which states that "...*The orders in 4.1 and 4.2 above shall operate with immediate effect.*" If a court makes a final order, it is operative with immediate effect unless the order provides otherwise. If it were true that orders 4.1 and 4.2 were final, these orders would have operated with immediate effect, and then there would have been no need to state as much in order 5.

[44] Accordingly, based on the wording of the perfection order, I believe that it is subject to the finalisation of the application on the return date.

[45] There is a further and more important consideration. One needs not to be reminded that the principle of *audi alteram partem* (the right to be heard) is sacrosanct in the South African legal system and that section 34<sup>5</sup> of the Constitution of the Republic of South Africa, 1996 (the Constitution) warrants a person's access to court and the right to a fair hearing. These values must prevail save for exceptional circumstances. Considering the nature of the application and the perfection order granted, there is no justification to treat this matter as exceptional.

[46] The applicant relied on clause 10.1 of the Notarial Bond to have moved the application to remove the respondent's movables without notice to the respondent. It is trite that where an application is brought without notice to an affected party, the applicant must explain why notice has not been given, i.e., that the giving of notice may defeat the purpose of the application<sup>6</sup> or where immediate relief is essential because harm is imminent.<sup>7</sup> An applicant's entitlement to approach a court *ex parte*, as of right, does not arise *ex contractu*. At best, a contractual provision to this effect may be a factor for a court to consider hearing a matter *ex parte*.

[47] Therefore, to arrive at the applicant's proposed interpretation would mean that, in interpreting the perfection order, one must ignore the aforesaid constitutional imperatives. This simply cannot be correct.

[48] Accordingly, the perfection order, in its entirety, should be treated as a provisional order.

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<sup>5</sup> **34 Access to courts**

*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*"

<sup>6</sup> *Universal City Studios Inc v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) 753C.

<sup>7</sup> *Turquoise River incorporated v McMenamin* 1992 (3) SA 653 (D) at 657D.

## **Common cause**

[49] On an analysis of the parties' affidavits, the following main aspects are common cause:

- 49.1 The description and *locus standi* of the parties;
- 49.2 The conclusion of the Loan Agreement on 28 March 2019 for an aggregate amount of R135,2 million plus R10,7 million for further expenses and the purpose of the loan;
- 49.3 As security for the loans under the Loan Agreement, the respondent passed and registered the Notarial Bond in the applicant's favour;
- 49.4 The fact that the respondent is indebted to the applicant and in arrears (although the respondent denies the amount reflected in the applicant's Certificate of Balance); and,
- 49.5 In the event of default referred to in clause 7 of the Notarial Bond, the applicant shall have the remedies set out under clause 8 (incorporating 8.1 to 8.7).

## **The issues**

[50] No Joint Practice Note appears from the record, and the parties have different views on defining the issues to be decided.

[51] According to the applicant's Heads of Argument, "[T]he only issue that stands to be considered by the Honourable Court is the determination of the rule nisi, wherein the Applicant seeks an order confirming and making final the provisional orders granted therein, namely order 2.1 and 2.2 of the Court Order dated 04 October 2022...". The applicant contends that the aspect of urgency (order 1) proverbially is water underneath the bridge, and orders 3, 4 and 5 are *res iudicata* and not capable of reconsideration and set aside.

[52] The respondent defines the (remaining) issues as: First, whether, in terms of the reconsideration of the perfection order, it should be set aside and replaced with an order that the application be struck from the roll for lack of urgency. More specifically, whether the applicant, as an *ex parte* litigant, complied with its obligations of utmost good faith. Second, if the perfection order is not set aside as aforesaid, whether paragraph 2 of the perfection order should be confirmed or discharged.

[53] In my view, this matter turns on the following main issues:

- 53.1 The powers of a court concerning an order under reconsideration in terms of Rule 6(12)(c). More specifically, *in casu* and under this subrule, whether the hearing of the matter as one of urgency, the

granting of the rule *nisi* in terms of orders 2.1 and 2.2, and the granting of orders 3, 4 and 5 are capable of reconsideration, amendment or set aside, and whether these ought to be maintained, amended or set aside, in whole or in part.

- 53.2 Regarding the applicant's duty of disclosure in its *ex parte* application, whether the applicant proffered an incomplete or incorrect statement of material facts.
- 53.3 If there were relevant and material nondisclosures, whether those were material and relevant?
- 53.4 If so, what is the applicable test for setting aside or maintaining a particular order or finding, and applying the test to the facts of the matter, should any finding or order be set aside?
- 53.5 If the perfection order falls to be set aside, in whole or in part, what order should be granted in its place?

### **Reconsideration under Rule 6(12)(c)**

[54] As stated above, the applicant contends that order 1 (urgency), the granting of the rule *nisi* in orders 2, 2.1 and 2.2, and orders 3, 4 and 5 could not be reconsidered. According to the applicant, the only aspect to be considered and decided is whether or not the rule *nisi* (orders 2, 2.1 and 2.2) should be confirmed and made final.

[55] Rule 6(12)(c) reads as follows:

*"A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order."*

[56] Where an order has been granted in the absence of a party, as in the instant case, rule 6(12)(c) provides a mechanism through which the imbalance of hearing only one side of the case can be corrected. It follows that the *audi alteram partem* principle and the provisions of section 34 of the Constitution form the bedrock of Rule 6(12)(c).

[57] In *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others*<sup>8</sup>, the court elaborated on and interpreted the rule as follows:

- 57.1 The rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to reconsider that order, provided only that it was granted in his absence. The underlying pivot to which the exercise of power is coupled is the absence of the aggrieved party at the time of the grant of the order.

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<sup>8</sup> *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and others* [1996] 4 All SA 58 (W) at 60-61.

- 57.2 It affords an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as urgent in his absence.
- 57.3 The order in question may be either interim or final in its operation. Reconsideration may involve the deletion of the order, either in whole or part or the engraftment of additions.
- 57.4 The framers of the rule have not sought to delineate the factors which might legitimately be taken into reckoning in determining whether any particular order falls to be reconsidered. What is plain is that wide discretion is intended. Each case will turn on its facts and the peculiarities inherent therein.

[58] Considering the extent of a court's discretion when reconsidering the matter, there is, in my view, nothing that precludes a court from reconsidering and, where justified, amending or setting aside an order granted against a respondent in his/her absence. A respondent need not even deliver an answering affidavit. In my view, it would be competent for a court under this subrule to reconsider the matter on the applicant's founding papers and, after having had the benefit of hearing the respondent's arguments, for example, to set aside the initial order and strike the matter from the roll for lack of urgency or to dismiss the application because the applicant failed to make out a proper case in its founding affidavit.<sup>9</sup>

[59] A respondent may opt to deliver an answering affidavit, which in many instances, will be desirable.<sup>10</sup> When a court then reconsiders an order under this sub-rule, it would do so with the benefit of considering affidavits filed by all the parties and hearing arguments on their behalf. This involves the approach by the court as a comprehensive revisit of the circumstances as they present at the time of the reconsideration<sup>11</sup> and taking into account, e.g., facts relating to the execution of the order.<sup>12</sup> The issues at the reconsideration may differ from those the court had to deal with in the original application. It has been held that the subrule is wide enough to permit the reconsideration of an order granted *ex parte*.<sup>13</sup>

[60] Having regard to the above, therefore, I cannot see any reason why, in principle, it would be incompetent for me, on the grounds advanced by the respondent, to reconsider the perfection order in its entirety and, to the extent justified, to amend or set it aside, in whole or in part.

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<sup>9</sup> *Afgru Grain Marketing (Pty) Ltd v Trustees for the Time Being of Copenship Bulklers A/S (in liquidation) and others* [2019] 3 All SA 321 (SCA) at [12].

<sup>10</sup> *Ibid* at [13].

<sup>11</sup> *South African Airways SOC v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ) at 565 I.

<sup>12</sup> *The Reclamation Group (Pty) Ltd v Smit* 2004 (1) SA 215 (SE) at 218 D-F.

<sup>13</sup> *Ibid* at 218 D-G.

## Legal principles relevant to general notarial bonds

[61] The *Security by Means of Movable Property Act*, 57 of 1993 ("SMMPA") governs a notarial bond hypothecating corporeal movable property specified and described in the bond in a manner which renders it readily recognisable is registered after the commencement of this Act under the *Deeds Registries Act*, 47 of 1937.

[62] It appears from the description of the "Assets", as quoted above that the Notarial Bond is not a special notarial bond and does not fall within the purview of the SMMPA.

[63] *Development Bank of Southern Africa Ltd v Van Rensburg*<sup>14</sup> confirmed that in a general notarial bond, the mortgagor bound its movable property as security for the repayment of all amounts payable in terms of the notarial bond. However, that did not constitute the mortgagee a secured creditor. In order to qualify as a secured creditor, the mortgagee had to obtain possession of the hypothecated property. Once the mortgagee obtained such possession, it would have been in the position of a pledgee, with all the security attached to a pledge.

[64] In *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd*,<sup>15</sup> the court granted a rule *nisi* perfecting the notarial bond, authorising the creditor, through the Sheriff, to take possession of the debtor's movable assets for as long as the debtor's indebtedness existed, and pending the institution of an action against the debtor within 30 days from the order. After the sheriff had executed the rule *nisi* by taking possession of the movable assets in question, but before the return date, the respondent was provisionally wound up. The court held what had been laid down by the Supreme Court of Appeal in *Development Bank of Southern Africa Ltd v Van Rensburg* as follows: "*The fact that the order authorising the appellant to take possession of the movables was provisional therefore does not detract from the fact that the moment the appellant obtained possession of the movable property hypothecated in terms of the notarial bond it was in the position of a pledgee who had obtained possession of the movable property before the commencement of the winding-up of Serious Mills.*"<sup>16</sup>

[65] It follows from the above that it is of pivotal importance for a creditor, where a debtor is in arrears, to take possession of the debtor's movable assets set up as security in terms of a general notarial bond to become a secured creditor.

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<sup>14</sup> *Development Bank of Southern Africa Ltd. v Van Rensburg NO and Others* (490/2000) [2002] ZASCA 39; [2002] 3 All SA 669 (SCA) at [20].

<sup>15</sup> *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* (17/2002) [2002] ZASCA 143; [2003] 1 All SA 267 (SCA).

<sup>16</sup> *Development Bank of Southern Africa Ltd. v Van Rensburg NO and Others* (*supra*) at par [22].

## Legal principles relating to utmost good faith in ex parte applications

[66] The failure to make full disclosure of all known material facts (i.e., facts that might reasonably influence a court to come to a decision) may lead a court to refuse the application or to set aside the rule nisi on that ground alone, quite apart from considerations of wilfulness or *mala fides*. In *Thint (Pty) Ltd v National Director of Public Prosecutions*<sup>17</sup>, this principle was approved by the Constitutional Court in the following terms:

*"It is by now axiomatic that in an ex parte application, the applicant is required to observe the uberrima fides (utmost good faith) rule. This rule requires that all material facts which might influence a court in coming to a decision must be disclosed. This rule is stated in the following terms by Herbstein and Van Winsen:*

*"Although, on the one hand, the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts which might affect the granting or otherwise of an ex parte order.*

*The utmost good faith must be observed by litigants making ex parte applications in placing material facts before the Court; so much so that if an order has been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently, which might have influenced the decision of the Court whether to make an order or not, the Court has a discretion to set the order aside with costs on the ground of nondisclosure. It should, however, be noticed that the Court has a discretion and is not compelled, even if the nondisclosure was material, to dismiss the application or to set aside the proceedings. (Footnote omitted.)"*  
*[Emphases added]*

[67] In *Thint*, the Constitutional Court furthermore stated that "...[W]hat these cases emphasise is the need for an applicant for an ex parte order to set out fully the facts known to him or her which might influence the Court in coming to its decision. This includes facts that are against the issuing of the search and seizure warrant."<sup>18</sup>

[68] In *National Director of Public Prosecutions v Basson*<sup>19</sup> the Supreme Court of Appeal expressly approved of *Schlesinger v Schlesinger*<sup>20</sup>, in which the following was stated:

*"(1) in ex parte applications, all material facts must be disclosed which might influence a court in coming to a decision;*

<sup>17</sup> *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at [296].

<sup>18</sup> *Ibid* at [301].

<sup>19</sup> *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) [21]; [2002] 2 All SA 255 (A)].

<sup>20</sup> *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348E–349B.



- (2) *the nondisclosure or suppression of facts need not be wilful or mala fide to incur the penalty of rescission;*
- (3) *the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it."*

[69] In *Powell NO and others v Van der Merwe and others*, the Supreme Court of Appeal stated that the approach followed in *Schlesinger* should apply equally to the relief obtained on facts which are incorrect because they have been misstated or inaccurately set out in the application for the order or, as in that case because they have not been sufficiently investigated.<sup>21</sup>

### **Were the facts presented by the applicant incomplete or incorrect?**

[70] The founding affidavit was deposed to by Mr Sean Renders, a Manager: Recoveries, Business Rescue & Insolvencies Department of the applicant, and the supplementary affidavit, by the applicant's attorney of record. These deponents, *inter alia*, made allegations regarding the status of the project, the possible cancellation by PMC, the (desperate) financial affairs of the respondent, and that respondent is in arrears with payments to its alleged landlord, Richline, who refused to release certain assets.

[71] The grounds proffered in respect of urgency relates to the respondent's alleged severe financial distress, Richland's refusal to release some of the assets that were held in storage, PMC's consideration to cancel the "gas supply contract", which is the lifeline of the respondent's existence, PMC's notice of suspension of all construction activities due to the resignation of the subordinate project engineer, applicant's information from "trusted sources" that the only reason why PMC has not cancelled the said contract was of the absence of a recommendation to this effect by a subordinate project engineer (which position was vacant at the time), if PMC were to cancel the "gas supply contract" then applicant's investment (funding) of the project would be permanently lost, the precarious financial position of the respondent and the risk of it being placed in business rescue, the risk of legal action by other creditors and consequential attachment of the assets relevant to the Notarial Bond, the nature of the application itself, the absence of prejudice on the part of the respondent flowing from an order perfecting the Notarial Bond, the submission that the grounds stated hereinbefore are compelling that the applicant will not be afforded regress in the ordinary course, to protect the assets referred to in the Notarial Bond from being attached or disposed, the application has been brought promptly, and if the Notarial Bond is not perfected then the applicant would be severely prejudiced as its security may be irretrievably lost.

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<sup>21</sup> *Powell NO and others v Van der Merwe and others* [2005] 1 All SA 149 (SCA) at [75].

[72] The respondent contends that the applicant painted a distorted picture concerning the urgency of the application.

[73] It is appropriate first to assess whether the applicant failed to disclose a full and correct picture when it moved for an urgent *ex parte* order. The outcome of this enquiry will then be applied to the order granted on 4 October 2022.

#### The status of the project

[74] It is common cause that the project was not running on schedule in all regards. The extent of these delays is, however, disputed vehemently.

[75] In the founding affidavit deposed on 22 September 2022, the applicant stated that the respondent could not perform in terms of the PMC contract. There have been significant delays in the project since 2018. The respondent's inability to perform impacts its ability to meet its loan repayment obligations and is in severe financial distress. The costs of the project are spiralling out of control. The PMC smelter is ready, but the respondent cannot supply gas to PMC due to continued delays. Since September 2022, PMC has issued notices to suspend the project or threaten to cancel the PMC contract. These notices will be dealt with under a separate heading below.

[76] In the answering affidavit, the respondent relied on a letter dated 31 May 2022 by the respondent to the applicant, in which the respondent had explained the causes for delays of the project, *inter alia*, that late payments by the applicant caused project delays. In a responding letter dated 17 June 2022, the applicant stated that it was encouraged by all the progress and indicated its intention to continue cooperating with the respondent and all other stakeholders to ensure the project is commissioned. The applicant furthermore acknowledged that payments by it were delayed due to the applicant's internal processes and the Covid-19 pandemic.

[77] On 22 September 2022 (which date coincided with the date on which the applicant's founding affidavit was deposed), a routine project status meeting was held between representatives of the applicant, the respondent and PMC, which meeting was attended by the deponent to the respondent's answering affidavit. According to a transcription of the meeting (which the applicant did in dispute in reply), participants discussed aspects of the project that were behind schedule and another aspect that had been completed, the rescheduling of works, discussing plans for the weeks to follow, and the measures to be implemented to curb excessive noise levels. The meeting recognised delays caused by Covid-19 and the belated shipment of equipment from China. The meeting noted that Mr Ripfumelo was appointed as an acting project engineer (with Mr Laing noting that he should not be blamed if the project were to come to a standstill), that Mr Galante (PMC) will oversee Mr Ripfumelo's work, and discussed the process and qualifications required for a full-time appointment. The meeting was concluded with Mr Galante, PMC's representative, saying, "*All right. Excellent. Thanks Rolland. All right guys. Ladies.*"

*Thank you for today. I see we are progressing well although we are slightly behind our initial schedule. Keep up the good work. Maintain the safety and we will be able to make sure that this is a successful project. Thank you guys. Thank you ladies. Bye bye."*

[78] In reply, the applicant did not deal with the discussions during this meeting, save for stating that the respondent focuses on irrelevant issues rather than dealing with the real issue, i.e., that the respondent has failed to meet its payment obligations.

[79] The applicant further relied on an allegation that the smelter was ready but that the respondent could not perform in terms of the PMC contract by supplying oxygen to the plant. The respondent explained that the construction of the oxygen plant was only a component of the construction work in respect of the project as a whole and that the smelter would only be ready towards the latter part of 2023. According to an email between Mr Laing and Mr Wei (both of PMC) dated 17 May 2022, the hot commissioning of the DSB furnace (to which the plant under construction by the respondent will supply oxygen) was not a priority until the latter part of 2023 or even 2024, and that PMC should provide the respondent with a date for hot commissioning that will suit the PMC business plan.

[80] In its answering affidavit, the respondent stated that the civil and structural works on the project had been completed and electrical works were well advanced. All the equipment for the oxygen plant had been imported, installation had already commenced, and the project was nearing completion. The respondent estimated that the oxygen plant would be commissioned in April 2023 (at the latest). In reply, the applicant states that *"it is common cause that the respondent is far behind schedule and as such, it is not in a position to supply oxygen within the timeframe as was envisaged by the agreement with PMC."*

#### Possible cancellation by PMC

[81] In its founding papers, the applicant relied heavily on communications emanating from PMC: The notice to suspend all construction activities dated 2 September 2022, an alleged oral statement during the meeting of 16 September 2022 that PMC is considering terminating the contract and the "Notice of Breach Letter" of 30 September 2022 in which it threatened to cancel the oxygen supply contract.

[82] The respondent stated that it had appointed an acting engineer and was seeking a suitably qualified engineer for permanent employment (which was discussed at the meeting on 22 September 2022). The respondent further pointed out that the "Notice of Breach Letter" of 30 September 2022 complained (in vague terms) of the breach in November 2019, which has not been remedied. Respondent stated that these breaches had been remedied to the applicant's knowledge, and on 14 October 2022, the respondent declared a dispute regarding the "Notice of Breach

Letter" of 30 September 2022. The applicant, in reply, further referred to this "Notice of Breach Letter" and stated that it is common cause between the parties that the respondent was experiencing financial distress to the extent that it could not meet its Loan repayment obligations and had to seek additional funding to progress the current state of the project.

[83] In its replying affidavit, the applicant incorporated a further "Notice of Breach Letter" dated 18 November 2022, addressed to the respondent and applicant (referring to a letter dated 19 October 2022 for the further suspension of the project because of respondent's alleged failure concerning the appointment of an engineer) and affording respondent 30 days to rectify its breaches about the appointment of an engineer, "...*failing which PMC will exercise its legal rights, which may include a termination...*".

#### Respondent's financial affairs

[84] In the founding papers, the applicant stated that due to the respondent's inability to perform in respect of the project and delays in the completion of the project, the applicant was in dire/severe financial distress and was in arrears with the repayment of Loan 1 and Loan 3 since 1 September 2022. It is in arrears with payments due to its "landlord", Richline, who refused to release certain assets (which I shall refer to more fully below).

[85] The respondent states in its answering affidavit that on 31 August 2021, prior to the January 2022 amendment of the repayment terms of Loan 4 to commence on 1 March 2022, the respondent sent an email to the applicant stating that SARS had started paying VAT refunds and requesting confirmation of the account into which VAT refunds must be paid. The respondent has not received a response to the email and tenders to pay the VAT refunds received to date upon confirmation by the applicant of its designated bank account. In the replying affidavit, the deponent states that he was unaware that the respondent had sought confirmation of the applicant's bank account.

[86] According to the answering affidavit, in a letter dated 16 August 2022, the respondent requested a further extension of the loan repayment dates. The respondent further stated that it could not commence repayment of Loans 1 to 3 because the oxygen plant was not yet operational, and the applicant was previously prepared to extend the repayment terms under those circumstances. In the respondent's letter of 16 August 2022, the respondent explained that Covid 19 restrictions prevented employees of a supplier in China from travelling to South Africa. This necessitated the new commissioning date of February 2023. On 16 August 2022, Mr Patrick Khetani, employed by the applicant as Senior Associate, emailed the respondent stating that "...[t]he request has been noted and I will attend to it..."

[87] In the founding papers, the applicant did not mention the respondent's extension of the loan repayment dates, the fact that the request was under consideration by the applicant, or even that the request had been declined. In respect of the request for extended repayment terms, the applicant states that "... *the reason given for the Respondent's failure to commence repayment of Loan 3 is that on or about 16 August 2022, the Respondent had allegedly sent a request for further Loan Repayment Dates Extension to the IDC, which it alleges was not responded to...*" Save for the implicit denial by using the words "*allegedly*" and "*alleges*", the applicant does not say why it suggests that the request had not been received, why the applicant, by email, acknowledged receipt of the request and that it would be considered. Further, the applicant does not even explain why it did not mention the request in its founding papers.

#### Richland

[88] In the founding papers, the applicant relies on the respondent's alleged landlord Richland, who allegedly "*refused to release some of the assets it is holding in storage (on behalf of the respondent) as a result of Respondent's failure to pay it the money due and payable to it, including storage costs*". No more details are given as to who demanded the release of assets, when this occurred, what assets were to be delivered, and why Richland was obliged to surrender the assets to whoever made the demand.

[89] The respondent states that Richland is its electrical contractor and not its landlord, that the storage facility was shared between Richland and the respondent, and that respondent was not indebted to Richland. In the replying affidavit, the applicant contends that the respondent should have attached proof of the arrangement with Richline or that it shared costs as alleged. The applicant does not advance any further facts to displace the respondent's version.

#### Conclusion

[90] The above analysis reveals that the applicant has omitted or misstated facts of which the applicant deponent(s) had actual or constructive knowledge, that the applicant presented allegations beyond the deponents' personal knowledge and which the applicant failed to investigate adequately or at all. These include the following:

- 90.1 The applicant failed to disclose the respondent's letter of 31 May 2022 concerning delays, including delays caused by the applicant's late payments and the applicant's letter dated 17 June 2022, which recognises the respondent's progress on the project and the applicant's commitment to support the respondent in future.
- 90.2 The applicant failed to disclose that routine project status meetings were held and that such a meeting was scheduled for or held on 22 September 2022 and, in particular, the operational plans discussed

thereat and the applicant and PMC's overall satisfaction with the respondent's progress on the project whilst recognising certain delays.

- 90.3 The applicant misstated the actual project progress by exaggerating prevailing delays through sweeping and unsupported statements and by failing to state facts about the respondent's progress, such as that the civil and structural works have been completed and the electrical works are well advanced. The applicant's portrayal of the project's status is a world apart from that which appears from the transcription of the meeting of 22 September 2022.
- 90.4 The applicant incorrectly stated that the smelter was ready to receive oxygen, suggesting that the delays caused by the respondent prevented the smelter from operating. However, on 17 May 2022, Mr Laing and Mr Wei of PMC expressed that the smelter's commissioning was not a priority until the latter part of 2023 or even 2024. The applicant should not have relied on its version without investigating and determining the true state of affairs.
- 90.5 The applicant failed to state that the respondent has requested confirmation of the applicant's bank account for the respondent to make payment of VAT refunds and that applicant has not responded to this request. The fact that the applicant's deponent to the founding affidavit was unaware of this state of affairs does not redeem the applicant.
- 90.6 The applicant failed to disclose that on 16 August 2022, the respondent requested a further extension of the loan repayment dates, which the applicant received and considered. The applicant should have disclosed this fact and the status of its consideration or outcome of the request.
- 90.7 The applicant relied on scant, incorrect and unsupported allegations that the respondent was in default regarding payments due to Richland, which was portrayed as the respondent's landlord, who the applicant stated refused to release assets held in storage. Richland was not the respondent's landlord, they shared certain storage facilities, and the respondent was not indebted.

[91] It follows that when the applicant moved the application on an *ex parte* and urgent basis, it relied on an incorrect and incomplete version of the state of affairs, as alluded to above. Whether the applicant wilfully or negligently omitted or misstated the facts is immaterial.

[92] The next stage of the enquiry concerns whether the incomplete and incorrect picture portrayed by the applicant was material and relevant to the relief sought and granted urgently.

[93] For reasons that will become apparent, I believe that concerning urgency, a distinction ought to be drawn between orders, on the one hand, relating to the perfection of the notarial bond (excluding the order authorising the removal of the assets) and on the other hand, the removal and the rule *nisi* providing for the sale of respondent's movable assets.

**Orders relating to the perfection of the notarial bond (excluding the order authorising the removal of the assets)**

[94] As indicated above, the question is whether the nondisclosures by the applicant were material and relevant to the urgent application for the perfection of the notarial bond (excluding the order authorising the removal of the assets). For clarity, where I refer to orders 4.1 and 4.2 in this discussion, such references shall notionally exclude those relevant to the Sheriff taking possession by physically removing the relevant assets from the respondent's premises.

[95] As I have stated above, the respondent's movable assets were attached by the Sheriff on 5 October 2022 through inventorying and affixing identifying markers/stickers as envisaged by orders 4.2, 4.2.1 and 4.2.2. As matters stand, the applicant's Notarial Bond has thus been perfected.

[96] Where there is a failure to disclose all material facts, the court could exercise its discretion to preserve the orders granted in the *ex parte* proceedings, provided there were very cogent practical reasons to do so.<sup>22</sup> In exercising that discretion, this court will also regard the extent of the nondisclosure, whether a proper disclosure might have influenced the court that granted the perfection order, the reasons for nondisclosure and the consequences of setting the provisional order aside.<sup>23</sup> The test is objective.<sup>24</sup>

[97] It is worthwhile to appreciate the following remark by Harms J in the *Contract Forwarding* matter: "*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.*"<sup>25</sup>

[98] This passage quoted immediately above emphasises the inherent vulnerability of a notarial bondholder. However, if an applicant fails to make out a case in its founding papers that it is entitled to have its notarial bond perfected, or if the respondent demonstrates that the applicant failed to disclose facts that the

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<sup>22</sup> *Thint (Pty) Ltd v National Director (supra)* at [117]

<sup>23</sup> *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 at 455B-C.

<sup>24</sup> *Cometal-Momenta SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W) at 414H.

<sup>25</sup> *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others (supra)* at [6].

applicant was not entitled to such relief, then there would be no reason whatsoever to find that the application is urgent. I am therefore of the view that the nature of the application, i.e., the perfection of a notarial bond, and the applicant's concomitant right to have an order to this effect granted, are factors that a court can (and should, in my view) take into account when considering the issue of urgency in matters of this nature.

[99] The Supreme Court of Appeal stated that a court, in the exercise of its discretion, cannot refuse an order to an applicant who has a right to possession of a pledged article to take possession and the principles relating to the limited discretion to refuse specific performance do not apply to the enforcement of any such right. In the absence of a conflict with the Bill of Rights or a rule to the contrary, a court may not, under the guise of the exercise of discretion, have regard to what is fair and equitable in that particular court's view and so dispossess someone of a substantive right.<sup>26</sup> A rule relevant to the perfection of a notarial bond can only be discharged on grounds that go to the root of the creditor's entitlement to possession.<sup>27</sup>

[100] I consider the applicant's incorrect and incomplete statements, that the applicant has not made any serious or plausible attempt to explain its nondisclosures, and that the applicant has not shied away from making sweeping allegations of which it did not have personal knowledge and without investigating relevant aspects.

[101] It is, however, common cause that the respondent was indebted to the applicant and in breach of its repayment obligations. The fact that the respondent denies the amount reflected in the applicant's Certificate of Balance makes no difference. These common cause facts entitled the applicant to perfect its security as is provided for in clause 8.2 of the Notarial Bond. On the respondent's version, it sought a further indulgence for extended repayment terms. The denial by the respondent of a breach of clauses 7.2.3 and 7.2.6 of the Notarial Bond is of no assistance.

[102] Applying the principles enunciated in the *Contract Forwarding* matter to this application, I am of the view that the applicant's inadequate and incorrect disclosures and the facts in its founding papers, read with the facts put up by the respondent in opposition, do not strike at the heart of the applicant's right to perfect its security and to have approached the court by way of an urgent application for the perfection of the notarial bond. Accordingly, the applicant's incorrect and incomplete disclosures were not material and relevant to the applicant's urgent application for the perfection of the Notarial Bond through the attachment *in situ*.

[103] It follows that the orders for the perfection of the applicant's Notarial Bond through inventorying and affixing identifying markers/stickers to the items in

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<sup>26</sup> *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others (supra)* at [10].

<sup>27</sup> *Ibid* at [8] and [10].



question, as envisaged by orders 4.2, 4.2.1 and 4.2.2 (excluding the order authorising the removal of the assets) ought to be, confirmed and made final.

[104] Even if I were wrong in arriving at this conclusion (that applicant's nondisclosures were material and relevant to urgency), I believe that the relevant orders should not be set aside in any event.

[105] In *Schlesinger (supra)*, Le Roux J also considered when a court would exercise its discretion in favour of a party who has been remiss in its duty to disclose rather than to set aside the order obtained by it on incomplete facts. He concluded (at 350B–C):

*"It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained ex parte on incomplete information and will set it aside even if relief could be obtained in a subsequent application by the same applicant."*

[106] The Constitutional Court approved of the approach stated in *Schlesinger* quoted immediately hereabove by stating that where there is a failure to disclose all material facts, the Court would be able to exercise its discretion to preserve the orders granted in the *ex parte* proceedings, provided there were very cogent practical reasons to do so.<sup>28</sup>

[107] On the one hand, the attachment *in situ* of the respondent's movable assets perfected the applicant's security. If the order were to be set aside, it would leave the applicant exposed as far as its security is concerned, contrary to its entitlement to have its security perfected as envisaged by the Notarial Bond. On the other hand, no facts have been advanced that the attachment of the respondent's movable assets *in situ* has hampered or will hamper its business operations and ability to complete the PMC contract.

[108] I believe, therefore, that these circumstances constitute cogent practical reasons why the orders for the perfection of the applicant's Notarial Bond through inventorying and affixing identifying markers/stickers to the items in question, as envisaged by orders 4.2, 4.2.1 and 4.2.2 (excluding the order authorising the removal of the assets), should not be set aside.

### **The removal and sale of the respondent's assets**

[109] The next enquiry is whether the applicant's nondisclosures were material and relevant to the urgency of the relief sought and granted for the removal or sale (albeit provisionally) of the respondent's movable assets.

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<sup>28</sup> *Thint (Pty) Ltd v National Director (supra)* at [117].

[110] The applicant failed to make full and correct disclosure to the court that considered the application on 4 October 2022. As more fully set out above, these inadequacies, broadly stated, related to the status of the project, the respondent's ability and prospects to complete the project, and the respondent's financial position and means.

[111] On the applicant's version in the founding affidavit, the PMC contract is the respondent's lifeline. Given that the project commenced in 2019, that the commissioning of the furnace was envisaged for July 2022 to have been completed (on the applicant's version), and on the respondent's estimates of 7 November 2022 (on which date it deposed to its answering affidavit), the project would have been completed by April 2023 at the latest. The transcript of the routine project status meeting further reveals that all the parties worked full steam towards completing the project. The removal or sale of the respondent's movable assets will undoubtedly detrimentally impact the respondent's business operations and is likely to affect the respondent's ability to complete the project in terms of the PMC contract.

[112] In this context, removing the respondent's movable assets (under attachment) is a drastic remedy, considering that the order was granted through urgent and *ex parte* proceedings. One should also bear in mind that the Notarial Bond provided for far less drastic and invasive measures to perfect the applicant's security than the removal of respondent's movable assets, i.e., inventorying or affixing a marker/sticker, as envisaged by orders 4.2.1 and 4.2.2 respectively.

[113] Further, the grounds proffered in support of the matter being heard on an urgent basis do not set forth explicitly (as is required by rule 6(12)(b)) why the relief for the removal of the respondent's assets (over and above orders 4.2.1 and 4.2.2) could not have been sought in the ordinary course, especially considering the status of the project. Put differently, the applicant did not demonstrate why the attachment of the respondent's movable assets through inventorying and affixing of identifying markers/stickers by the Sheriff would or may be inadequate to perfect the Notarial Bond and why the granting of relief authorising the removal of the said assets was urgent.

[114] The same reasoning applies to the order to sell the respondent's movable assets (under attachment). The applicant similarly did not demonstrate any grounds why that relief (albeit in the form of a rule *nisi*) was urgent and why it could not have been sought in the ordinary course, especially considering the status of the project.

[115] It follows that the applicant's inaccurate and incomplete disclosures are material and relevant to the urgent application for the removal and sale of the respondent's movable assets. In my view, the correct and full facts might (and probably would) have influenced that court in its decision to hear the matter on an urgent basis for relief, authorising the (immediate) removal of the respondent's movable assets and authorising the sale of the said assets, albeit in terms of a rule

*nisi*. The applicant's application inasmuch as it relates to the removal or sale of the was not urgent.

[116] There are no cogent practical considerations why the orders authorising the removal and sale of the respondent's assets (presently under attachment as security under the Notarial Bond) should be maintained.

[117] The parts of the perfection order providing for the removal or sale of the respondent's movable assets as aforesaid should be set aside.

## **Conclusion**

[118] When this court asked counsel for both parties during the hearing whether the work on the project was in progress, they did not agree. The project's present status and the respondent's financial and otherwise affairs are unknown to this court.

[119] For the reasons stated above, inasmuch as it relates to the orders for the perfection of the applicant's Notarial Bond through inventorying and affixing identifying markers/stickers to the items in question, as envisaged by orders 4.2, 4.2.1 and 4.2.2 (excluding the order authorising the removal of the assets), the perfection order ought to be confirmed and made final.

[120] Further, the applicant's application for the relief authorising the removal of the respondent's assets envisaged by order 4.2 (excluding orders 4.2.1 and 4.2.2) or for the sale of those assets as envisaged by orders 2 and 2.1 are to be set aside. If the Sheriff has removed any of the respondent's movable assets referred to in the Sheriff's return regarding the attachment on 5 October 2022, those movable assets must be returned whilst remaining under attachment *in situ*.

## **Costs**

[121] Although the issue of costs remains the discretion of the court, the discretion cannot be exercised arbitrarily but judicially on grounds upon which a reasonable person could have arrived. The approach to awarding costs is succinctly set out in *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others*<sup>29</sup> in paragraph 3:

*"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either*

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<sup>29</sup> *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC).

*comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation..."*

[122] Recently, in *Dhlamini v Schumann, Van den Heever and Slabbert Inc and Others*<sup>30</sup>, the Supreme Court of Appeal dealt with a matter in which both parties were partially successful. In that matter, the court ordered each party to pay its own costs.

[123] In this case, both parties were partially successful.

[124] However, in *Schlesinger*, where there had been a material nondisclosure by an applicant in *ex parte* proceedings, the court granted costs against the successful applicant as a mark of the court's displeasure, and punitive costs may even be granted where the original application was with a reckless disregard of a litigant's duty to a court in making a full and frank disclosure of all known facts which might influence the court in reaching a just conclusion.<sup>31</sup> Even though partially successful, an applicant may be ordered to pay the costs of the application if he/she/it has negligently failed to disclose material facts.<sup>32</sup>

[125] In making the below cost order, I take into account that the applicant, when it approached the initial court on an *ex parte* basis, made material nondisclosures, incorrect and unsupported statements to the extent set out above and the absence of any satisfactory explanation by the applicant for the same.

## **Order**

The following order is made:

1. The order made in this matter on 4 October 2022 (the "initial order") is set aside and substituted by the below order.
2. It is declared that the applicant's security under General Notarial Bond BN000024611/2019 (the "Notarial Bond") was perfected on 5 October 2022 through the Sheriff inventorying of or affixing identifying marker/stickers to the

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<sup>30</sup> *Dhlamini v Schumann, Van den Heever and Slabbert Inc and Others* (505/2021) [2023] ZASCA 79 (29 May 2023).

<sup>31</sup> *Schlesinger (supra)* at 354D-E.

<sup>32</sup> *Van Loggerenberg*, ERASMUS SUPERIOR COURT PRACTICE, Second Edition at D1-62 and the authorities referred to in footnote 4.

respondent's movable assets at 1 Copper Road, Phalaborwa, as listed or referred to in the Sheriff's return at Caselines 02-5 to 02-7.

3. Any movable assets of the respondent removed by the Sheriff under the initial order shall be returned to the respondent's address, which shall not prejudice the perfection of the applicant's security under the Notarial Bond.
4. Inasmuch as it relates to the orders to remove or sell the respondent's movable assets, the applicant's application is struck from the roll for lack of urgency.
5. The respondent's movable assets at the respondent's address shall remain attached as the applicant's security under the Notarial Bond until released by the applicant or removed or sold under an order authorising such removal or sale.
6. The applicant is ordered to pay the costs of the application, including the respondent's costs of opposition and the reconsideration in terms of rule 6(12) (c) of the Uniform Rules of Court.

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**C A C KORF**  
**ACTING JUDGE OF THE HIGH COURT**

PLAINTIFF'S ATTORNEY: Shaheem Samsodien Attorneys

PLAINTIFF'S COUNSEL: Adv BF Gedeger (with Ms Relebogile Moabelo as instructing attorney)

DEFENDANT'S ATTORNEY: Adams & Adams Attorneys

DEFENDANT'S COUNSEL: Adv Hendrik Pretorius