

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: **2024-012775**

REPORTABLE: No OF INTEREST TO OTHER JUDGES: No REVISED: NO	
DATE	SIGNATURE
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In the matter between:

**PICK AND PAY RETAILERS PROPRIETARY
LIMITED**

APPLICANT

and

**KEMPTONGATE FOODLANE PROPRIETARY
LIMITED**

FIRST RESPONDENT

**BONAEROPARK FOODLANE PROPRIETARY
LIMITED**

SECOND RESPONDENT

**BIRCHLEIGH FOODLANE PROPRIETARY
LIMITED**

THIRD RESPONDENT

**EDEN TERRACE FOODLANE PROPRIETARY
LIMITED**

FOURTH RESPONDENT

**VAN RIEBEECK PARK FOODLANE PROPRIETARY
LIMITED**

FIFTH RESPONDENT

ELGIN FOODLANE PROPRIETARY LIMITED

SIXTH RESPONDENT

**GLEN BALAD FOODLANE PROPRIETARY
RESPONDENT
LIMITED**

SEVENTH

**BRENTWOOD PARK FOODLANE PROPRIETARY
LIMITED**

EIGHTH RESPONDENT

**EDENVALE FOODLANE PROPRIETARY
LIMITED**

NINTH RESPONDENT

**STONEHILL FOODLANE PROPRIETARY
LIMITED**

TENTH RESPONDENT

JUDGMENT

Introduction

1. In preparing this judgment I have utilised extracts from heads of argument filed by the parties on factual issues which are not contentious. The Applicant seeks an order perfecting various general notarial covering bonds (“the bonds”) registered by the First to Tenth Respondents in its favour. The amount secured by way of the bonds and in respect of each of the Respondents is dealt with in

paragraph 28 of the founding affidavit on behalf of the Applicant. Thus for instance, in respect of the First Respondent, the amount is R1 million and in respect of the Tenth Respondent, the amount is R6 million. The capital sum in respect of all the Respondents, cumulatively speaking, is R47 million.

2. The effect of general notarial bonds is trite. The holder of a general notarial bond does not enjoy a real right of security in the assets subject to the bond. There is nothing to prevent the owner from dealing with and disposing of assets subject to the bond, or of bonding them to another creditor. The creditor cannot prevent an alienation or pledge of the assets subject to the bond, cannot follow up the property in the hands of the acquirer and cannot prevent a judicial attachment. The rights of the bondholder as observed in Joubert (ed) *The Law of South Africa* vol 17 (1st re-issue) paragraph 517 are of importance mainly upon insolvency.
3. The bondholder is not a secured creditor and is entitled to a preference over the concurrent creditors of the insolvent only with respect to the proceeds of assets subject to the bond. This is why our courts have emphasized that the bondholder “has a right to take possession of a pledged article” (*Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others* 2003 (2) SA 253 SCA at para 10). It is this right to take possession that is its security.

The material facts concerning this application

4. The Applicant, which seeks to perfect its security, entered into franchise agreements with each of the Respondents and provided credit to the Respondents upon the terms and conditions set out in the bond agreements and which also enabled the Respondents to have access to and utilise the intellectual property of applicant and enjoy the advantages of similar retail supermarkets. In turn the ten separate legal entities, the Respondents, who all fall within the AJP group of companies executed various general notarial covering bonds giving security of stock in the ten separate legal entities to the cumulative value of R47 million in favour of the Applicant.

5. The family controlling the AJP group of companies has been in a business relationship with the Applicant for some 30 years and currently employs 2000 employees in its retail, property and food sectors.
6. Prior to analysing, to the extent necessary, the terms of the bonds, I propose to deal with the defences raised by the Respondents.

The Defences

7. There are in substance four defences. First, urgency is an issue, and second, whether there is a debt without which it is contended that the jurisdictional requirements for declaring the bonds executable is lacking. Third, defences are raised in terms of the Consumer Protection Act 68 of 2008 (“**CPA**”) as well as the Competition Act 89 of 1998 (“**the Competition Act**”).
8. As to urgency, the application was served on the Respondents attorneys on the 6th of February 2024 and the Respondents filed substantial papers on Friday, the 16th of February 2024. They had some nine days to do so. Proceedings as is appreciated in the commercial world to perfect security are in their very nature, almost invariably urgent. Binns-Ward J pointed out that generally such proceedings are *ex parte* with a rule *nisi* provisionally as an effective order. Prior notice to the debtor that the creditor was about to perfect its security would put the security sought to be obtained at risk (*David Simon Green N.O. and Others v Vista Marina*; case numbers 1141/2018 and 15887/2018, Cape High Court).
9. Korf AJ in the case of IDC and Bokona Group of Companies case number 2022/027186 in this division aptly sums up why a party seeking to perfect its security is entitled to do so as a matter of urgency. This is what he says in paragraphs 95 - 99:

“[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. 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. The test is objective.

[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."

[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 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. 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."

I agree with the reasoning.

10. Mr. McNally SC who appeared together with Mr. Rowan however raised four factors which he contended ought to result in the matter being struck off the roll for lack of urgency. First, he argued that there has been a dispute for a period commencing in 2018 in which the Respondents contend that they have, for want of a better term, a substantial claim arising from Applicant's wrongdoing, and which will material impact on whether there is a debt. He referred to the fact that there has been an ongoing mediation process and the parties met on some twenty-four occasions to try and resolve the dispute. Thus, he argued the matter is not urgent and ought to be heard in the ordinary course or in an arbitration.
11. Second, he argued that by reference to the sheer weight of the issues involved and the volume of the documentation that I should colloquially speaking "kick for touch" and avoid burdening myself with complex issues. Third, by reference to the directives of the Court dealing with urgent matters, he contended that as the beneficiary of the directive, the Respondents can take the point that the matter is not so urgent that it must be heard in this week regardless of the fact that I have read the papers. Fourth, Counsel submitted that the Applicant could get substantial redress at a hearing in due course.

12. I am not persuaded that there is any merit in any of these submissions. A bondholder, as Justice Harms pointed out, is an applicant who has a right to possession of a pledged article and is entitled to take possession. If the jurisdictional requirements trigger the perfection of a pledge, then the applicant is entitled to appropriate relief. The risk is inherent and that is that the applicant loses its security on an insolvency, and that factor appeared not to matter to Respondents counsel.

13. The suggestion that because the matters are complex and the volume of papers are overbearing that the matter should not be heard as one of urgency is regrettably a submission one would not expect from senior counsel. It is the duty of the Judge to grapple with complex issues and if the Judge is in a position to deal with the voluminous amount of paper generated by an application of this nature¹, then the Judge is duty-bound to deal with the matter. The fact that the parties have been in protracted mediation negotiations is not a factor to shirk one's responsibility and deal with the material issues the Court is confronted with.

14. On my understanding of the authorities, the issues are not complex and I deal with this more fully in the further defences raised by the Respondents.

Risk

15. There was no critical analysis on the part of the Respondents with the risk element inherent in a mortgagor pledging its goods in favour of a mortgagee in a determinable amount. The Applicant's case is that the Respondents lossmaking, poor financial performance and failure to pay the Applicant promptly causes it to come to Court on an urgent basis to perfect its security. In paragraph 66 of its founding affidavit, it avers "*it appears that the Respondents are in severe financial distress and that their winding-up may well be unavoidable.*" On this premise it would not be afforded substantial redress at a hearing in due course. On insolvency, the very purpose of this security bond is defeated. The delay in

¹ The Respondents' Answering Affidavit is 78 pages and, together with annexures, exceeds 1000 pages.

instituting the application arising from whatever considerations there may be is not *per se* a reason to find that there is no urgency. The critical issue is whether, despite the delay, the Applicant can or cannot be afforded substantial redress at a hearing in due course (*East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2022)).

16. In the answering affidavit the Respondents attach their latest audited financial statements for the year ended 30th of September 2023. This shows that nine of the Respondents reflect a trading loss and that the financial position of all the Respondents is worsening significantly year on year. The analysis in the replying affidavit at 01-1028 makes two telling points. First, insofar as substantial redress in due course is concerned, the Applicant is entitled to approach this Court on an urgent basis because it, in all probability, will lose its security if it does not take remedial steps at this point in time bearing in mind the precarious financial position of the majority of the Respondents. Second, in terms of clause 8.2.13 of the bonds, in terms of each of the bonds in respect of all of the Respondents other than Brentwood Park, the Eighth Respondent, they are in default. Their annual financial statements for the period ending September 2023 reflect a trading loss.

17. Insofar as risk is concerned, I also point out that despite the passing of the bonds, the secured movables remained in the possession of the Respondents. Thus, to obtain a real right over security, the Applicant needs to take possession, either by procuring the Respondents consent and cooperation or by judicial sanction (*Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA)). This is why urgent applications in matters of this nature are recognised by our courts.

Is there a debt and have the jurisdictional requirements for perfection been met?

18. Clearly, if Applicant fails to prove on the *Plascon-Evans* test that the jurisdictional requirements for invoking the pledge have not been met, then the application must fail.

19. Respondents' Counsel conflated the issue as to the quantum of the claim as distinguished from the question as to whether there is in existence a debt. In this application the Applicant does not seek an order to realise the Respondents' property and to apply the proceeds in settlement of its claim. That is not its case. This is a case in which it is sought to perfect the pledge, that is to take possession of the stock, equipment and the value of the goodwill which is attached to the businesses. The material terms of the bonds manifest a clear agreement and intention that should the Respondents default or the business fail, the Applicant would have the right to keep the lease of the premises alive, take over operation of the store and continue the business at the same locations. This would further afford the Applicant an opportunity of finding a new franchisee who would be able to takeover an existing business. It follows that the reliance on the part of the Respondents on the existence of a dispute about the computation of the precise sum in which they are indebted to the Applicant is of no moment in the case before me.

20. Clause 6 of the bonds provides that if the bond becomes executable under clause 8, the Applicant -

"shall be entitled (but not obliged) without notice to the mortgagor and without first obtaining any order or judgment

6.1.1 *to claim and recover from the mortgagor forthwith all and any sums for the time being secured by this bond, whether then due for payment or not; and/or*

6.1.2 *for the purpose of perfecting its security hereunder to enter upon the premises of the mortgagor or any other place where any of its assets are situated, and to take possession of its assets"*

21. This is the classical *parate* execution. It is enforceable in the common law provided that the stipulations are not far-reaching as to be contrary to public policy, are valid and enforceable. The Applicant has taken the precaution of applying for judicial sanction before executing on the pledge and has, in this respect, afforded the Respondents the opportunity to protect themselves against prejudice at the hands of the Applicant. It may well be that in the present constitutional era that the practice of seeking judicial sanction is not only salutary but ought to be prescriptive. This however is not an issue before me as the Applicant correctly chose to approach the Court, afford *audi* to the Respondents and seek judicial sanction to assert its rights.

22. Clause 8 of the respective bonds prescribe when each bond becomes executable against the respective Respondent. Of application in this matter is clause 8.2.5 which is triggered when the Respondent “*shall fail to pay any amount due to the Applicant promptly on due date therefore.*” Respondents’ Counsel’s submission that the trigger date is when the application is heard as distinguished from when payment is due is incorrect. Counsel could not refer me to any authority to this effect but, in any event, is contrary to the clear terms of 8.2.5 of the bonds. Clause 8.2.13 states that it will be a trigger event when “*any audited financial statements of the Respondent for any financial period reflect a trading loss.*” I have already dealt with this aspect implicating all of the Respondents, save for the Eighth Respondent to be in breach. Clause 8.2.1 is a further jurisdictional factor that has been demonstrated by the Applicant to exist namely where a Respondent commits a breach of any terms and condition of the bond and clause 8.2.11 arising from the death of Alexander Baladakis, the surety in respect of the obligations of the First and Second Respondents. Similarly, the breach notice which was not remedied (clause 8.2.1).

The debt

23. The application is based on the non-payment by the Respondents of weekly statements that became due and payable to the Applicant in the period 6 November 2023 to 22 January 2024. There is no dispute that this debt remained

unpaid, other than the past “*parked*” or “*historic debt.*” It is not insignificant to record that the Respondents, on an ongoing basis, ordered stock, received the stock, sold the stock and ordinarily would have to honour payment. The Applicant on the other hand of the spectrum would not want to refuse the sale and delivery of stock to protect and enhance its brand.

24. Subsequent to the institution of the application, the Respondents made payments totalling R72,046,849.84. Thus, when the application was instituted, the Respondents admit a debt, by virtue of the subsequent payment being made. The argument advanced by the Respondents’ counsel that it was unreasonable for the Applicant to allocate payments to past indebtedness is intertwined with the issue of the historic debt. I find no merit in the contention that a debtor can prescribe to creditor how allocation is to be made on an ongoing debtor-creditor account. Counsel could not direct me to any authority to support such contention. In any event, this argument is intertwined with the submission that there is an historic debt, which I will deal with more fully below. The terms of the agreement also do not accord with counsel’s submission that the respondents can prescribe allocation of payments. I deal with this more fully below.

25. Insofar as the current indebtedness of the Respondents owed to the Applicant, the Applicant has analysed with the aid of the SAP system and certification by its finance manager, Willine Webb, in terms of section 15 of the Electronic Communications and Transactions Act 25 of 2002 that there is an amount of R188,853,497.14 due and payable by the Respondents as at 16 February 2024. The detailed analysis in respect of each of the Respondents other than the Sixth and Eighth Respondent appears on the chart at 01-1040 with reference to annexures RA7.1 and onwards. There are separate certificates of indebtedness issued by Willine Webb. Clause 13 of the bonds entitles the Applicant to allocate payments either to the capital sum or interest as the applicant may in law determine. Clause 9.3 of the bond agreements entitle the Applicant to allocate any payments received from the Respondents to any cause or debts or amount then owing by the franchisee in terms of the agreement in its reasonable discretion.

The parked debt

26. Clauses 9.2 and 9.3 of the agreements does not permit any deduction or set-off of whatsoever nature without the Applicant's prior written consent. Nor can the Respondents delay the timeous and full payment of all and any monies due and payable under or in terms of the agreements. Agreements must be complied with and adhered to, otherwise commercial ventures become imperilled. Nevertheless, I will consider the parked debt in the context of what has been presented on the papers and by reference of the arguments advanced in the hearing.

27. The genesis of this complaint is a purported damages claim by the Respondents against the Applicant. This is dealt with in paragraphs 130 to 157 of the answering affidavit. There are two legs to this claim. First, it is alleged that the implementation of a 'new' discount model introduced in 2018 by the Applicant has resulted in respondents suffering extensive losses, which include loss of profits and additional indebtedness and interest yet to be qualified. The second leg is premised on the provisions of the CPA and I gathered from the argument presented to me that it rest on bad conduct on the part of the Applicant in imposing unfair, unreasonable, or unjust prices.

28. Both causes are action are vague and with reference to the argument before me – superficial. In my debate with counsel, I put to him that insofar as the respondents rely on a breach of the contractual terms (and none were identified in the papers or in argument), the remedy of the respondent (the 'innocent party' in the circumstances) is to accept that the Applicant is in breach, cancel the agreement and sue for damages or to sue for specific performance, i.e. the enforcement of the terms of the contract. Counsel's response was to the effect that if the agreement was illegal, then the innocent party is not required to make payment for goods received and consumed, as this would amount to enforcing an illegality. Applicant's recourse is to claim monies based on unjustified

enrichment. No authority was advanced for this startling proposition, but in fairness, counsel contended that it is not a matter for me to come to grips with as it would, in due course, be debated in arbitration proceedings which is the forum the parties agreed upon to ventilate their disputes. Clearly I disagree.

29. First, set-off is not permitted in terms of the agreement. Second, the terms of the agreement has the usual non-variation clause and it is not contended that the terms of the agreement were unilaterally changed by reference to any documentation. Third, contract law is trite, the innocent party can either cancel upon a breach and sue for damages or claim specific performance. The reliance on the CPA was similarly vague and possibly contrived because there was no proper submission on what remedy would follow when two commercial parties continue in the commercial relationship for some five years and no cause of action is articulated and no relief arising therefrom substantiated. I must agree with Mr. Smit, who appeared on behalf of the applicant that, in any event, any such claim or counterclaim may have prescribed, there has been no referral to arbitration, there has been no waiver by the Applicants of its rights and there is no impediment by the terms of the provisions of the bonds to enable applicant to perfect its security. In any event, I conclude that such claims, if such exist, are in any event, in my view, frivolous. The Applicant points out that there is no contractual terms in these agreements that oblige the Applicant that ensure that policies, procedures or strategies are profitable, benefit the Respondents or attract a specific margin. Thus, it contends that in adopting certain commercial promotional strategies in 2018 and implementing an interim business model in June 2023, were aimed at ameliorating adverse business conditions arising from poor economic conditions aggravated by COVID-19 and like matters. Its commercial strategies applied to all of the applicant's franchised stores (about 223 supermarkets in South Africa) and its own some 300 corporate supermarket stores.

30. Moreover, the projections it made emphatically required the franchisees to take independent financial advice. This appears in its disclosure document attached to answering affidavit and which emphasises that the projections are no more

than projections and no guarantees are proffered. There is further a disclaimer by the Applicant on its own behalf and its employees in the preparation of the projections. There is considerable material placed before me by the Applicant to demonstrate good faith insofar as models are concerned and adjustments on profit margins and rebates in an endeavour to assist its franchisees financially.

31. I am not persuaded that there is much merit in the Respondent's damages claim but it is at liberty to pursue this in the appropriate forum. I reiterate that no cogent particularity has been provided to me to demonstrate a viable cause of action.

The defence based on The Competition Act

32. In the course of argument, it became apparent that the reliance on the provisions in The Competition Act are without substance. In the founding affidavit, it is stated that should an order be granted in applicant's favour, the Applicant would establish control over the business of the Respondent's as defined in The Competition Act. This would result in a merger between the Applicant and the Respondents. Accordingly, this action would contravene provisions of The Competition Act as a merger necessitates (i) a formal notification to the competition authorities and such notification has not been delivered, as well as (ii) approval of the merger, which likewise has not occurred. My jurisdiction is ousted as the competition authorities have exclusive jurisdiction in this regard. Mr. Wilson SC, appearing for the Applicant cogently demonstrated that if the Respondent's contention is correct then no security could be perfected without obtaining merger approval. This would have a drastic consequence for commercial life in South Africa as the process of merger approval typically takes months to finalise in circumstances where perfection must typically take place on an urgent basis in order to protect the commercial interests of the security holder.

33. This novel approach to section 12 of The Competition Act is unsustainable. First, applying a sensible and business-like approach to the matter, perfection of the bonds does not constitute control of any of the businesses. The definition of

merger is intended to capture only those transactions that carry the potentiality of effecting long-lasting structural changes in the relevant markets (*Caxton and CTP Publishers and Printers and others v Multichoice (Pty) Ltd and others*, Case No. 140/CAC/Mar16, paras 2 – 3). In giving effect to its pledge, the applicant becomes an agent of the businesses, to conduct the businesses to protect its security and if, of course, the business is sold to a third party, it would require merger approval (*Competition Commission v Shashe Trading (Pty) Ltd and Another*, Case No. FTN154Nov202, in the Competition Tribunal).

34. In my view, imposing further restraints in the business world unduly restrains freedom of trade and competition. Say, for instance, a newcomer in the industry wishes to do business with the Applicant. The newcomer does not have financial resources but is given the opportunity by the applicant of credit provided the newcomer pledges its movable assets as security. Imposing merger authorisation by the competition authorities in the event of executing of security would deter opportunities to such newcomers.

35. In my view, bearing in mind the financial resources of the Respondent as articulated in the answering affidavits, namely, that the businesses involve millions of rands, this defence is opportunistic and frivolous.

Constitutional values, oppressive and unconscionable conduct

36. The business relationship between the parties in substance is the supply by the applicant to retail stores of consumable goods, under its brand and intellectual property, its ability to supply and procure the supply of the products and check out packaging to each of the respondents for the purposes of the respondents conducting the business of a retail supermarket. Turnover figures are in the multimillion rands.

37. When they entered into the business relationship and concomitant agreements to regulate the business relationships, the parties did so knowingly and, no doubt, by taking appropriate financial and legal advice. Our courts have

occasioned to deal with bonds of the nature before me. In *Juglal No and Another v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 SCA, Justice Heher found that the kind of remedy available to the applicant is not contrary to public policy and enforceable in our law. This is understandable because that is what the parties bargained for and parties appreciate the consequences of a default. Nothing new was argued before me and agreements of this nature have stood the test of constitutional scrutiny.

38. I endeavoured to encourage the parties to resolve the matter by reference to what I understood in the financial statements that the Respondents could raise alternative security or isolate some of the stores by tendering securities as attached to individual stores. I also ask the parties to consider other practical arrangements that would, in a manner of speaking, ease the burden if I were to give orders perfecting the security.

39. On 22nd of February 2024, after I had worked through my judgement in the early hours of the morning, I received further submissions on behalf of the Applicant which reiterated matters I had already canvassed with the parties, and more importantly, a draft order marked with prejudice which in paragraph 2 provides for arbitration (and as I understand the tender, it is expedited arbitration) and provision is made in paragraph 1.13 for the Respondents to participate on matters incidental to the running of the businesses. I did receive notification that the respondents are considering the offer and would revert to me. This being my last day as Acting Judge and having completed my roll and all my judgements, I see no reason to delay finalising this matter. The alternate draft order proposed by the Applicant is an attenuated order from that sought for in the notice of motion.

40. Because of my findings in this matter, I see no need to delay my judgement and the orders.

41. In the result, I grant the alternative draft order which I have made an order of court signed and initialled. If the alternative order, as proposed by the Applicant is not acceptable, by the Respondents, then the order sought for in the notice of motion is granted.

**N CASSIM AJ
ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

APPEARANCES.

COUNSEL FOR THE APPLICANT: ADV J WILSON SC and ADV JE SMIT

INSTRUCTED BY: DLA PIPER SOUTH AFRICA (RF) INC.

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