HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

20 June 2022
Date

Judge M.L. Senyatsi

Case no: A5035/21 / 15771/21

In the matter between:

THE SPAR GROUP LIMITED Applicant

and

LIFESTYLE DINERS (PTY) LTD t/a DIEPSLOOT SPAR AND

DIEPSLOOT TOPS Respondent

***Case Summary*: DISMISSAL OF AN APPLICATION FOR PERFECTION OF A GENERAL NOTARIAL COVERING BOND, appeal upheld with costs.**

JUDGMENT

SENYATSI J (TWALA et OPPERMAN JJ Concurring)

[1] The appeal before us concerns a dismissal of an application for perfection of a general notarial covering bond registered in favour of the appellant by the respondent.

[2] The issue for determination is whether or not the court a quo was correct in dismissing the perfection application and accepting the respondent's version that there was an indefinite extension for payment of arrears as was agreed upon in the meeting of the parties held on 5 March 2021 based on the Business Lease Agreement.

[3] The appellant is a wholesaler of groceries and household goods who also sells stock and equipment and franchises its brands to various customers in the retail(s) business. The respondent is a retailer and carries on business as a Spar supermarket and Tops liquor store under the trading names of "Diepsloot SPAR" and "Diepsloot TOPS" respectively. The brands used by the respondent are the intellectual property of the applicant.

[4] The appellant supplied trading stock to the respondent on credit. The trading stock was supplied either in the form of direct purchases from the appellant's warehouse or by way of drop shipment purchases. The payment terms agreed to were 19 (nineteen) days from date of weekly statement in respect of warehouse transactions, and 31 days from date of weekly statement in respect of drop shipment transactions.

[5] It is common cause that on 10 July 2020 a general notarial covering bond was registered in favour of the appellant as security over the respondent's movable assets following an agreement between the parties that the respondent will become a Spar retailer and purchase stock on credit. In terms of the notarial bond, the respondent declared itself indebted in the total sum of R37 400 000 (thirty seven million four hundred thousand rand) in respect of the capital and additional sums and as security for the due payment of its indebtedness to the appellant. The respondent also bound and hypothecated generally all of its movable property as defined in the bond (that is corporeal and incorporeal property) which it then had or which it might from time to time thereafter acquire or be possessed of.

[6] The notarial bond provided for the remedies to which the appellant would be entitled in any circumstances involving default in payments. The remedies included taking

possession and retaining all or any of the respondent's movable property, carrying on the business of the respondent in the name of and at the expense of the respondent and to realize all or any of the respondent's movable property (perfection).

[7] In terms of a reservation of ownership, in the event of the occurrence of any of the mentioned circumstances, the appellant was afforded the right to repossess all goods sold and delivered by the appellant to the respondent and which the respondent continued to hold in stock, up to an amount sufficient to discharge the respondent's indebtedness to the respondent, and to cancel the sales in respect of such repossessed goods. The account of the respondent would be credited by the value of the goods repossessed.

[8] The respondent fell into arrears with the payments due on its warehouse and drop shipment accounts and as of the 30th of March 2021 the respondents were indebted to the appellant, on the appellant's version, in the total sum of R10 964 381.71 (ten million nine hundred and sixty four thousand three hundred and eighty one rand seventy one cent), all of which was due, owing and payable.

[9] As a consequence of the amount owing and payable and in arrears, the respondent was in breach of the notarial bond. This caused the appellant to believe that its interests were being imperiled by the respondent's conduct.

[10] It was because of the breach of the bond that an application was brought for perfection of the general covering notarial bond.

[11] The appellant relied on three distinct types of breaches of the bond by the respondent, namely a breach of each of clauses 10.1, 10.2 and 10.4 thereof. The court *a quo*, so contends the appellant decided the matter on consideration of the alleged breach in terms of clause 10.1, but overlooked and failed to deal with the alleged breaches in terms of clauses 10.2 and 10.4 at all.

[12] The first breach in clause 10.1 is that the respondent was in default of the terms of the bond, in particular its obligation to pay, duly and promptly, its trading debt for warehouse and drop shipments to the appellant.

[13] In opposing the perfection application, the respondent did not dispute the amount owing but alleged that at a meeting held with the appellant's representatives on 5 March 2021 pursuant to the Business Lease Agreement, the appellant undertook to assist the respondent and gave the respondent an extension of time for the payment of its debts to the appellant and undertook to restructure the debt. As a result, it was alleged that none of the amounts had become due and payable.

[14] The alleged arrangement as contended for by the respondent was disputed by the appellant in its replying affidavit. The appellant contended that it had not agreed to restructure payments or to any other extended terms for payment, save for the further freezing of the opening stock debt of R2.5 million. It further alleged that the respondent had expressly agreed to pay its current debt timely as and when it fell due and that the so-called agreement was in breach of the non-variation clause in the bond as it had not been reduced to writing and signed by both parties.

[15] The court *a quo* held that the respondent's version of an extension of time and promised assistance by the appellant was not so implausible that it could be rejected out of hand. The court *a quo* found corroboration for its acceptance of the respondent's version in clause 3.14.1 of the Business Lease Agreement, which provides for bi-monthly business performance review meetings. In terms of this clause, if the business is not performing satisfactorily, the parties jointly will decide on appropriate actions to remediate the non-performance of the business. According to the court *a quo's* finding, the non-payment of its debts had to be regarded as a form of non-performance of the business and could be the subject-matter of such agreed remedial actions.

[16] The court *a quo* was concerned by the fact that within a few days, that is 14 March 2021, the appellant had made demand for payment when a deferment of payment arrangement was in place for payment of a variety of debts amounting in total to R8 671 674 -61 (eight million six hundred and seventy one thousand six hundred seventy four rand and sixty one cent) and upon the respondent's failure to pay the amount demanded in five days, cancelled the Business Lease Agreement on 24 March 2021.

[17] The court *a quo* was also interested in what the payment date would be for the deferred opening stock debt. It held that as there was no definite date agreed, the law

determines that payment can only be called up on giving a reasonable period of notice to the respondent.

[18] At the hearing of the application before the court *a quo*, the opening stock formed part of the total debt certified in the certificate of indebtedness (based upon the acceleration of the payment date because of the defaults on the account). The court *a quo* found that the appellant had not given reasonable notice for the calling up of the opening stock debt. Consequently the court *a quo* held that the appellant had acted unreasonably and that this was sufficient to dismiss the application in its entirety.

[19] One of the defenses raised by the respondent was that it did not have property available for attachment pursuant to the bond. The respondent claimed that ownership of the trading stock supplied by the appellant and the equipment and assets leased from the appellant vested in the appellant. Consequently, so it is implied, no perfection of the notarial bond is possible on those movable assets. This is, without doubt, a correct position on the law. It is not possible to claim perfection on assets that one owns as a credit grantor. This however is not the entire position as it will appear hereunder.

[20] If regard is had to how the notarial bond is structured it is evident that the bond hypothecates generally all of the respondent's "movable property which is defined as "corporeal movable property and incorporeal movable property of every description wheresoever same may be situate". It follows that these assets may include, but are not limited to, furniture, computers, motor vehicles, electrical appliances, bank accounts, book debts and any other item that the Sheriff may put on his inventory that belongs to the respondent, in the process of preparing a list of assets that are to be attached. The point raised by the respondent on the perfection of the appellant's equipment and stock, will therefore not apply to the movable property the examples of which is given in this judgment. It follows therefore that perfection of the bond may be granted for those movable properties as well as incorporeal property such as the goodwill of the business that belongs to the respondent.

[21] This is so especially given the fact that in terms of the bond, in case of a breach, the appellant is entitled to take possession of and retain incorporeal property such as

rights under the sub-lease, its right to trade the business and the use of SPAR brand names and its rights under the business lease.

[22] Clauses 10.8.1 and 10.8.2 of the bond permit the appellant to take possession of and retain the corporeal and incorporeal property in case of a breach and carry on the business of the respondent relating to the property in the name of and at the expense of the respondent. The defense raised by the respondent on this aspect is therefore without merit.

[23] In so far as the debt owed to it, the appellant's case was that R10 964 381.71 (ten million nine hundred and sixty four thousand three hundred and eighty one rand and seventy one cent) was due and payable on the respondent's outstanding trading debt. The bond provides that the certificate of indebtedness would be prima facie proof of what is owed and payable.

[24] The respondent has not countered the certificate of debt on the quantum of its trading debt consisting of warehouse and drop shipment, but took issue with some other debts such as its rental and utilities arrears, monthly interest on capital expenditure and accounting fees. Regard being had to the certificate of debt, its defense regarding the R2.5 million allegedly deferred, ought to have been rejected by court *a quo*.

[25] The respondent also contends that clause 10.4 of the bond, which deals with foreclosure based upon a belief of imperilment of the appellant's interests, and clauses 10.8.2 – 10.8.5 which deals with the power to carry on respondent's business, are unfair unjust and inequitable and enforcement thereof will be against public policy.

[26] The principles governing the determination on whether or not a provision in a contract is against public policy are trite. In *NBS Boland Ltd and Another v One Berg River Drive CC and others*[1] the court had to determine whether a contractual discretionary power was intended to be completely unfettered. Van Heerden DCJ said the following at para 25:

[1] 1999 (4) SA 928 (SCA) at para 25

"[25] All this does not mean that an exercise of such a contractual discretion is necessarily unassailable. It may be voidable at the instance of the other party. It is, I think, a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made arbitrio bono viri."

[27] It is only in cases where the discretionary power conferred on one party by the contract is exercised unreasonably that the court should intervene.[2] The party alleging unreasonableness of the clause in the contract bears the onus to set out facts upon which it is alleged that the clause is against public policy.

[28] It is also a principle of our law that the common law of contract does not allow parate execution in a manner which infringes the right of recourse to the courts entrenched in section 34 of the Constitution.[3] In the instant case the bond clause alleged to be contrary to public policy does not give the appellant unfettered powers. It is for exactly this reason that the appellant approached the court *a quo* for redress. I therefore find no basis that this clause 10.4 is contrary to public policy. The perfection of a notarial bond under circumstances such as the instant case is the feature of our law of contracts giving effect thereto and having been recognized by our courts.[4] Our courts have held that contractual provisions will be found to be contrary to public policy only when that is their clear effect. It follows that the tendency of a proposed transaction towards such a conflict can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. In the instant case no immorality and illegality were alleged and proved by the respondent.

[29] If however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent.[5] In the present case, no evidence was adduced before the court a quo or

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[2] See *Absa Bank Ltd v Lombard* (178 of 2004) [2005] ZASCA 27 (30 March 2005)
[3] See *Bock and others v Duburoro Investments (Pty) Ltd* [2003] 4 All SA 103 (SCA)
[4] See *N Juglal NO Jumbo Trust t/a O.K. Foods Port Shepstone v Shoprite Checkers (Pty) Ltd t/a O.K. Franchise Division*
[5] See *N Juglal NO Jumbo Trust t/a O.K Foods Port Shepstone v Shoprite Checkers (Pty) Ltd* (supra)

before us that the clause allowing perfection, once a determination is made by the appellant that its interests are imperiled, is against public policy. It follows that the contention cannot succeed.

[30] In the instant case, it is clear that the relationship between the parties was regulated by both the notarial bond which clearly and lawfully secures the position of the appellant and the business lease agreement which sets out the manner in which the operational side of the business is carried out.

[31] It is in the interest of the respondent during the duration of the agreement to be supported as a Spar retailer making use of the SPAR brand and having access to the favourable terms when the trading stock is sold to it, on credit to.....seems like this sentence is not finished? This is so because in anticipation of the credit a notarial general notarial bond was registered in favour of the appellant for the sum well in excess of R37 million out of which more than R10 million had been extended on credit.

[32] In my view, once the respondent defaulted with its payments to the sum of over R10 million, the appellant correctly felt that its interests were imperiled and was therefore justified in approaching a court for perfection of the bond.

[33] In the law of contract, the principle of *facta sunt servanda* is an important. Although our courts have the power to declare the terms of a contract invalid on the ground that they are against public policy, it has been held that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammeled by restrictions on that freedom.[6] The powers to declare a contract or clause in a contract contrary to public policy must not simply be exercised merely because the terms of such a contract offend one's individual sense of propriety and fairness.[7]

[34] The appeal record does not evidence an alleged absence of good faith on behalf of the appellant. The parties who are engaged in a legitimate business transaction have

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[6] See Beadica 231 CC v Trustees, Oregon Trust, 2020 (5) SA 247 (cc) and *Sasfin (Pty) Ltd v Beukes* (149/87) [1988] ZASCA 94 at para 13.

[7] See *Olsen v Standaloft* 1983 (2) SA 668 (ZS) at 673G.

agreed upon the disputed clauses. It therefore follows on that ground that this contention cannot be sustained and stands to be rejected.

[35] The respondent also contends that the perfection application should be transferred to the Magistrate's Court, alternatively, if a perfection order is granted only costs on the Magistrate's Court scale should be awarded. This contention cannot be supported by any facts or law. The perfection application is based on specific performance of a contract.

[36] Section 46 (2)(c) of the Magistrates Court Act No: 32 of 1944 provides as follows:

"*Matters beyond the jurisdiction*

(2) A court shall have no jurisdiction in matters-

(c) in which it is sought specific performance without an alternative of payment of damages except in –

(i) the rendering of an account in respect of which the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette;

(ii) the delivery of transfer of the property movable or immovable not exceeding the amount determined by the Minister from time to time by notice in the Gazette."

In the instant case, the appellant sought to enforce the notarial bond terms and consequently this falls outside of the Magistrates' Court jurisdiction because this case concerns specific performance and, in any event, the amount due exceeds R10 million. Consequently, the defense raised by the respondent should fail.

[37] Furthermore, the respondent has relied on authorities that are distinguishable as those authorities deal with matters under the National Credit Act 34 of 2005.[8] The authorities relied upon (were later overruled where it was held that both the High Court and the Magistrates' Court have concurrent jurisdiction.[9] A court has no power to refuse

[8] See *Nedbank Ltd v Thobejane* 2019 (1) SA 594 (GP) and Nedbank Ltd v Gqurana 2019 (6) SA 139 (ECG).
[9] See *Standard Bank v Mpongo* [2021] ZASCA 92 (25 June 2021).

to hear a matter within its jurisdiction. The SCA rejected the idea that it was an abuse of the process to choose to sue in the High Court when the Magistrate's Court also had jurisdiction. It was held that a choice could not be an abuse because the law gave a plaintiff or applicant exactly that right.

[38] It my view the court *a quo* erred in dismissing the application for perfection based on the general notarial covering bond. It therefore also follows that the reliance by the court *a quo* that the debt has been restructured based on the meeting held on 21 March 2021 was a misdirection as this infringed on the non-variation clause in the bond agreement which provides for the validity of any variation on condition that it is reduced to writing and signed by both parties. No evidence was adduced before the court a quo that the so – called agreement to restructure was in compliance with the non-variation clause.

ORDER

[39] The following order is made:

(a) The appeal is upheld with costs as between attorney and client.

(b) The order of the court *a quo* is replaced with the following order:

"Having read the documents filed of record, heard counsel and considered the matter, it is ordered that:

1. The applicant is authorized and empowered, by itself, the Sheriff or such nominees/s appointed by the applicant to: -

    1.1 enter upon the premises of the respondent at its principal place of business situated at Diepsloot SPAR and Tops at Chuma Mall, Cr R511 and 1st Avenue, Diepsloot, or any other place where any of the movable property, corporeal or incorporeal of the respondent is situate, of every description, and to take possession of all the movable property, corporeal or incorporeal, of the respondent, wherever such property may be situate for the purpose of perfecting applicant's security in terms of the General Notarial Covering

Bond No: BN000011484/2020 registered in Johannesburg and annexed to the applicant's founding affidavit marked 3 (the bond), and directing that the respondent give possession of such movable property to the applicant;

1.2 retain possession of the movable property referred to in 1.1 as security for the respondent's debts to the applicant for so long as the applicant deems fit.

1.3 in its sole discretion to carry on the business of the respondent relating to movable property in the name of and at the expense of the respondent and for that purpose to purchase goods and do whatever else the applicant deems necessary;

1.4 sign or subscribe on behalf of the respondent to all applications or agreements for transfer of licenses, quotas, permits, registration certificates and the like which relates to the movable property and to effect the session and delegation of the rights and / or obligations of the respondent as lessee or lessor or under any lease to which the respondent is a party;

1.5 operate and draw on the bank account of the respondent and to instruct that all funds in such accounts or which may be paid into such accounts, be paid to the applicant or not be withdrawn therefrom or to the order of the respondent.

1.6 in general to deal with the movable property of the respondent in terms of the powers conferred upon the applicant under and in terms of clause 10.8 of the bond and in particular: -

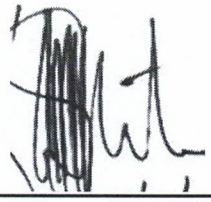
1.6.1 to sell and dispose of the movable property of the respondent or any portion thereof in such manner and on such terms as the applicant may decide and to convey valid title to the purchaser/s and / or transferee/s and to collect in all monies due to the respondent in respect thereof;

1.6.2 sign and complete all forms, declarations, agreements and the like as might be necessary or desirable to record the sale, disposal and / or transfer as the case may be of any of the movable property;

1.6.3 to realise by public auction or by private treaty or otherwise all or any of the movable property.

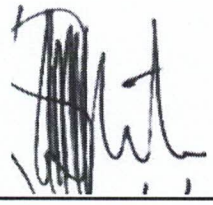
2. The applicant is granted the right to repossess all goods sold and delivered by the applicant to the respondent and which the respondent continues to hold in stock, up to an amount sufficient to discharge the respondent's indebtedness to the applicant, and to cancel the sales in respect of such repossessed goods.

3. The costs of this application shall be borne and paid for by the respondent as between attorney and client."



M.L. SENYATSI
JUDGE OF THE HIGH COURT

I agree ;



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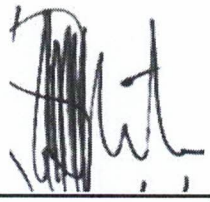
M TWALA
JUDGE OF THE HIGH COURT

I agree ;



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I OPPERMAN
JUDGE OF THE HIGH COURT

Heard:	31 January 2022
Judgment:	20 June 2022
Counsel for Applicants:	Adv F. Strydom
Instructed by:	Moss Marsh and Georgiev
Counsel for Respondent:	Adv R. du Plessis SC
Instructed by:	Geyser van Rooyen Attorneys