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

Case Numbers: **2024-083061**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
02 AUGUST 2024	
DATE	SIGNATURE

In the matter between:

**PICK 'N PAY RETAILERS PROPRIETARY
LIMITED**

Applicant

and

**NORTHERN SUBURBS SUPERMARKET
PROPRIETARY LIMITED**

Respondent

JUDGMENT

SENYATSI, J

Introduction

[1] This is an urgent application to perfect the general covering notarial bond number BN: 5[...] passed by the respondent, Northern Suburbs Supermarket (Pty) Ltd, in favour of the applicant, Pick N Pay Retailers (Pty) Ltd ("Pick N Pay") as security for its credit facilities to the respondent. The application is opposed by the respondent. The respondent has filed a counter application on 31 July 2024 to which no answering affidavit by Pick n Pay has been filed and seeks the leave of this court to have the counter application heard at the same time as the main application and on an urgent basis.

Background

[2] The respondent conducts a family retail supermarket business in terms of the Franchise Agreement concluded with Pick n Pay. Pick n Pay concluded a Franchise Agreement with the respondent. In terms of the agreement, Pick n Pay supplies stock to the respondent on credit subject to a 28 days payment cycle. The respondent does not pay for the stock that it receives on credit from Pick n Pay and is trading in a distressed position. The distress position of the respondent is conceded and according to it, it will take about three years for it to turn around and be able to pay its debts when they fall due. The parties have been engaging for some time to find a solution. Pick n Pay continues to support the business of the respondent by supplying the stock. Despite the efforts by Pick n Pay, the respondent sells the stock and simply does not pay for it.

[3] Annexure F to the Franchise Agreement provides, amongst others, for registration of general notarial covering bond for the sum of R6 million and a maximum additional sum of R1,2 million provision for accruing interest thereon. In keeping with the agreement, a general notarial covering bond as set out above was registered.

[4] Clause 6 states as follows:-

"If this bond becomes executable under clause 8, the CREDITOR shall be entitled (but not obliged), without notice to the MORTGAGOR and without first obtaining any order or judgment-

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; and /or

6.1.3 to conduct the business of the MORTGAGOR in the name, place and stead of the Mortgagor and to do all such things in respect or incidental to the business as the MORTGAGOR would itself have been able to do including, but without limiting the generality of the a foregoing-..”

[5] Clause 8 of the bond makes reference to events which render the bond executable and states *inter alia* as follows:-

“8. Notwithstanding anything to the contrary herein contained, this bond will become executable against the MORTGAGOR if-

8.2.

8.2.1. the MORTGAGOR commits any breach of any of the terms and conditions of this bond;”

[6] It is important to contextualise the relationship between the parties in the transactions of this nature. I will borrow the words used by Heher JA in *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*¹ where the court analysed the relationship and said the following:-

“[15] A retailer who wishes to take advantage of the respondent’s access to bulk purchases must become a member of the franchise operated by the respondent. By purchasing stock through the respondent, a franchisee obtains favourable credit terms, as well as the benefit of participation in a well-known national chain. The supplier invoices the respondent directly and the respondent pays the supplier directly and is in turn paid by the member.”

[7] There is no doubt that this is the position in the instant case. In fact it is apparent why Pick n Pay would continue to support the business of the respondent because firstly, it wants to ensure the sustainability of the business and secondly to

¹ 634/02) [2004] ZASCA 33; [2004] 2 All SA 268 (SCA); 2004 (5) SA 248 (SCA) (31 March 2004)

protect its goodwill which logically, is to the benefit of all parties involved including other stakeholders in the business. Mr Smit SC, submitted during argument that Pick n Pay, whose security is imperilled by the non-payment, will continue to support the business by providing the trading stock and the perfection will ensure that its rights are protected. I am in agreement with the submission.

Contentions

[8] At the hearing of the application, Ms Wilson contended on behalf of the respondent that the perfection order should be dismissed because the applicant failed to show the grounds of urgency and that there is dispute of facts raised in the papers regarding the pending Pick N Pay's decision on the right of first refusal has? in regard to the offer to purchase the respondent for R35 million made during November 2023, that there is no basis to grant the perfection relief sought. Furthermore, so contended Ms Wilson, Pick N Pay is engaged in the obstruction of the sale of the business to a Third Party, namely Shoprite Checkers. She submits that the perfection is brought in bad faith with the intent to obstruct the sale of the business to Shoprite Checkers as Pick N Pay has not replied to the offer.

Issues

[9] The issues for determination are whether a case has been made for perfection and if not whether the defences raised by the respondent can be sustained. Furthermore, whether the respondent in the counter application has met the requirement for leave to be granted for the counter-application to be considered on an urgent basis.

Legal Principles

[10] The perfection application under the circumstances of this case is by its nature, urgent and may, in appropriate circumstances be granted on *ex parte*

application basis.² In *Contract Forwarding Pty Ltd v Chesterfin Pty Ltd and Others*,³ Harms JA said the following:-

“[4] A perfection clause entitles the holder of the bond to take possession of the movables over which the bond has been registered. Such a clause amounts to an agreement to constitute a pledge and will be enforced at the instance of the bondholder, whereupon the creditor obtains a real right of security.

[5] A bondholder enjoys the protection of the doctrine of notice.⁴ For instance, a later bondholder who has knowledge of the existence of a prior bond will not be entitled to perfect the bond in disregard of the prior bond, this being regarded as a species of fraud⁵ or an intentional interference with contractual relationships.⁶ ...

[6] Real rights are stronger than personal rights and in the case of conflicting real rights the principle *prior tempore potior iure* applies.⁷ 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...”

The finding by Harms JA is still good law in our Republic.

[11] When seized with the application for perfection, the court has a discretion to exercise. In this regard, our courts have held that where there is an agreement permitting perfection in certain eventualities, there is no reason for not granting a perfection order in the exercise of the discretion by court.⁸ This is so because in doing so, once the bond is perfected, real rights are conferred on the assets

² *Pick and Pay Retailers Proprietary Limited v Kempton gate Foodlane Proprietary Limited and Others* (2024-012775) [2024] ZAGPJHC 208 (23 February 2024)

³ 2003(2) SA 253(SCA)

⁴ *Coaton v Alexander* 1879 Buch 17, *Cato v Alion and Helps* [1942] LKCA 61; (1922) 43 NLR 469.

⁵ *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20B-F.

⁶ *New Kleinfontein Company Ltd v Superintendent of Labourers* 1906 TS 241 at 254. NJ van der Merwe *Die Beskerming van Vorderingsregte uit Kontrak teen Aantasting deur Derdes* (1959).

⁷ Foot note omitted

⁸ Para [10] in *Contract Forwarding* footnote 1 above.

perfected. The onus is on the applicant to discharge and meet the requirements relating to breach as agreed to with the respondent

Reasons

[12] One the defences raised by the respondent was that the application is not urgent, I hold the view that the application is indeed urgent. This is because if the court does not hear the application urgently, the distress position of the respondent renders Pick n Pay bond imperiled. It may well be that some of the other trade creditors of the respondent are having the same challenge with being owed. It is for that reason that this matter is indeed urgent. I have perused some of the cases I was referred to by Ms Wilson but I find they are distinguishable from the instant case and do not find application on the facts of the instant case.

[13] The respondent contends that the application should not granted because the applicant can obtain substantial redress in due course and instead of continuing to supply trading stock to the respondent, the applicant can simply stop supplying. This is a bizarre submission because the respondent loses sight of the fact that its business, which one would accept that it is in its interest to preserve, will simply collapse if credit lines are terminated. One undeniable fact is that Pick n Pay is keeping the business afloat to ensure its goodwill and value is preserved.

[14] As stated at the beginning of this judgment, the respondent enjoys discounted prices due to bulk purchases done by Pick n Pay on behalf of all its franchisees of which the respondent is a member. The risk Pick n Pay takes in keeping the business afloat is clear for everyone to see. It would fly against the face of the bond if the court were to refuse the perfection as the refusal will, no doubt, increase the exposure of Pick n Pay in the respondent without real security. In my considered view, it would prejudice Pick n Pay were it continue to support the respondent. It is evident from the terms of the bond that by perfecting the bond, Pick n Pay is not taking ownership of the business of the respondent but trade to preserve its value and mitigate its exposure. This is what the parties agreed to in terms of the bond and there is nothing unusual for the court to give effect thereto. To argue as counsel for

the respondent would have the court accept, that the perfection is done in bad faith is simply not supported by any evidence and is therefore rejected.

[15] I now deal with the submission that the perfection application is brought to interfere with the offer from Shoprite. The respondent relies on the email sent by its director to Pick n Pay which refers to an offer of between R35 to R40 million. I have difficulty in understanding the relevance of such offer to the perfection. This is so because nothing changes if the offer is indeed serious, there should be no reason why it cannot continue to be considered even after perfection. In any event, the offer referred to in the email penned by one of the officials of the respondent is not supported by the facts it tells Pick n Pay. The offer, which is irrelevant in the instant application, has not been made known to this court. One would have expected such offer from Shoprite/Checkers to be disclosed to Pick n Pay and not simply a referenced in an email. I find it hard to fathom why perfection of rights would serve as interference with the business of the respondent as submitted on behalf of the respondent. The submission cannot be supported by the facts in the papers. Accordingly, the defense on this ground must therefore fail.

[16] It is not denied that the respondent was given a breach notice on 12 June 2024. Subsequently, several meetings took place between the representatives of the parties and the respondent admitted that it is distressed. I have already stated that by its own admission, the distress situation of the respondent will take about three years to turn around. If regard is had to this risk, there is no doubt that the security of Pick n Pay will be threatened if perfection is refused or not done urgently.

[17] I have not been provided with any authority for the proposition that under these circumstances, it would be appropriate not to give effect to the terms of the bond and perfect it. When regard is had to the fact that Pick n Pay continues to supply stock to the respondent who continues to trade daily but does not pay on time or at all, it is my view that Pick n Pay is within its right to perfect the bond. It follows therefore that a case has been made for perfection. This is so because by perfecting its bond, Pick n Pay becomes an agent and trades on behalf of the respondent and has full control over the stock it supplies on credit as envisaged in the bond.

Leave to file a counter application

[18] The respondent filed a counter application on 31 July 2024 in terms of which it seeks leave of this court to file the counter-application and supplement its answering affidavit. It contends that it needs to ask for specific performance in terms of clause 25 of the Franchise Agreement relating to the right of first refusal and also interdicting Pick n Pay from pursuing any legal proceedings against the respondent. I must, at the outset, state that I do not see any relevance between the perfection of bond and the enforcement of any right which any of the parties may wish to enforce in terms their Franchise Agreement. I say so because perfection of the bond by Pick n Pay is not the catch all process in terms of vindication of its rights. The same goes for the respondent.

[19] The leave to file a counter-application and file the supplementary affidavit is misguided. It does not comply with the Practice Manual on Urgent applications which inter alia, requires that the presiding judge seized with the matter should be approached for enrolment of the matter. No approach was made and in fact having read the papers prior to the 31 July 2024, the this court was not aware of the impending counter-application. Needless to say the applicant has not responded thereto because in any event, it was required to file its answer to the counter-application by 5 August 2024. Having regard to the irrelevance to the counter-application to present perfection application, I hold the view that there is no merit for leave to be favourably considered for the counter-application and the supplementary affidavit thereto. It follows therefore that the counter-application is not before me and it is therefore struck from the roll with cost.

Order

[20] Having considered the matter and having heard counsel, the following order is made:

[20.1] The applicant is authorised and empowered through its duly authorised representative or the sheriff of this honourable court, to take into possession the respondent's movable assets for the purpose of perfecting a general notarial covering bond registered in favour of the applicant in the

Johannesburg Deeds Registry on 17 September 2004 under registration number BN59918/04 ("**the Bond**").

[20.2] The applicant is authorised to exercise the rights as contemplated in clauses 6.1.1 to 6.1.10 of the Bond and in particular to:

[20.2.1] claim and recover from the respondent forthwith all and any sums for the time being secured by the Bond, whether due for payment or not;

[20.2.2] enter upon the premises of the respondent or any other place where any of the respondent's assets are situated for the purpose of perfecting the applicant's security, and to take possession of the respondent's assets including, without limitation:

(a) the premises of the respondent at Shop A1, B1C,2,3A,5 and 6Cornwall View Shopping Centre, Corner Piering Road and Boeing Street, Rietvalleirand, Pretoria, Gauteng Province.

[20.2.3] conduct the business of the respondent in the name, place and stead of the respondent and to do all such things in respect of or incidental to the business as the respondent itself has been able to do including, but without limiting the generality of the foregoing:

[20.2.3.1] to engage and dismiss staff in its absolute discretion and on such terms as it may determine;

[20.2.3.2] to purchase goods of every description provided that the applicant shall be restricted to the normal course of the respondent's business;

[20.2.3.3] subject to the landlord's consent, to hire, cancel and vary the terms of leases of the premises of the respondent;

[20.2.3.4] to lock and change the locks on the premises of the respondent;

[20.2.3.5] to receive, uplift, open and keep in its custody post whether addressed to the business or to the respondent;

[20.2.3.6] to operate on any banking account conducted by the respondent;

[20.2.3.7] to discharge the debts of the respondent and other liabilities, including its liabilities to the applicant in terms thereof;

[20.2.3.8] to sue for and recover from any debtor of the respondent all and any debts owing and arising from whatsoever cause;

[20.2.3.9] to draw and endorse checks, bills of exchange, promissory notes and other negotiable instruments;

[20.2.3.10] to discharge each of the respondent's liabilities to the applicant in terms thereof by selling the business of the respondent and any of its assets either as a going concern or piecemeal and whether as principal or agent as the applicant in its absolute discretion determines, by public auction or, on reasonable notice to the respondent not exceeding seven days, by private treaty;

[20.2.3.11] to take over the respondent's business as a going concern or the respondent's assets, at a valuation placed thereon by an independent chartered accountant or other independent expert appointed by the applicant's auditors;

[20.2.3.12] to apply for and procure the transfer of all licenses, quotas, permits, registration certificates and the like that may have been issued to the respondent;

[20.2.3.13] to sign or subscribe on behalf of the respondent to all applications or agreements for or transfer of licenses, quotas, permits, registration certificates and the like that relate to the assets mortgaged in terms of the Bond;

[20.2.3.14] to sublet, cede and/or assign such rights and/or obligations in respect of any lease or sub-lease of the premises of the respondent;

[20.2.3.15] to do all such other acts as may be necessary or desirable to record the sale, disposal and/or transfer, as the case may be, of any assets mortgaged in terms of the Bond;

[20. 2.3.16] to employ such other remedies and to take such other steps against the respondent as are in law allowed.

[20. 3] The respondent is directed to pay the costs of this application on an attorney and own scale.

[20.4] The counter-application is struck from the roll with costs.

ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **02 August 2024**.

Appearances:

For the applicant: Adv JE Smit
Instructed by Cliffe Dekker Hofmeyer Inc

For the respondent: Adv Wilson
Instructed by DMO Attorneys

Date of Hearing: 01 August 2024
Date of Judgment: 02 August 2024