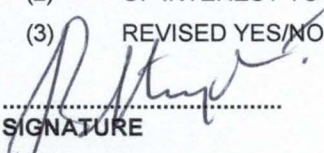


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

Case No: 2022/013036

|                                                                                   |                                     |
|-----------------------------------------------------------------------------------|-------------------------------------|
| (1)                                                                               | REPORTABLE: YES/NO                  |
| (2)                                                                               | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3)                                                                               | REVISED YES/NO                      |
|  |                                     |
| SIGNATURE                                                                         | DATE                                |
|                                                                                   | 5/09/2022                           |

In the matter between :

**THE SPAR GROUP LIMITED**

Plaintiff/Applicant/Appellant

and

**MEADOWVIEW TRADING 147 CC  
t/a MEYERTON SPAR AND TOPS**

Defendant/Respondent

---

**JUDGMENT**

---

**STRYDOM J**

- [1] This is an urgent application in which the applicant seeks leave to perfect its security in terms of two General Notarial Bonds ("the Bonds") registered in favour of the applicant during 2014 and 2017 respectively.

- [2] The court already ruled that the application was sufficiently urgent to be heard in urgent court and nothing further needs to be stated in this regard.
- [3] The only issue that remains for decision is whether the court should exercise its discretion in favour of the applicant by granting it leave to perfect the Bonds.
- [4] Being an urgent application, I do not intend to give a full judgment but will, in brief terms, state the reasons for my decision.
- [5] It is common cause that the respondent was indebted to the applicant in an amount well over R2 million and that the applicant in terms of an acceleration clause claimed the full outstanding debt which included arrear and current debts.
- [6] It is also further not disputed that since the calling up of the debt the respondent has paid the arrear amount of approximately R1 million as well as further amounts. The respondent however remains indebted to the applicant in an amount of more than R1 million.
- [7] It is further common cause that the respondent is indebted to its landlord in an amount of approximately R700,000. The landlord undertook not to exercise a hypothec securing the arrears.
- [8] On behalf of the applicant it was argued that the respondent was trading under insolvent circumstances and the possibility exists that a liquidation application can be brought by a creditor. If granted it would mean that the security of the applicant in terms of the two bonds would be lost. The applicant would become a concurrent creditor in the liquidated estate.



- [9] On behalf of the applicant it was also pointed out that the current lease which the respondent has with its landlord expired on 30 November 2019 and that, since then, it has occupied the leased premises on a month-by-month basis.
- [10] On behalf of the applicant it was argued that the applicant is entitled to an order granting it leave to perfect upon the Bonds by virtue of the operation of the perfection provisions thereof, having been triggered by the respondent's conduct. This is what the parties agreed to and this should be enforced.
- [11] The respondent argued that the enforcement of the Bonds would amount to an order for specific performance of the Bonds and this court should exercise its discretion against making such an order of specific performance. For this submission, the respondent relied on the fact that substantial payments were made since the total debt was called up, that the landlord would not exercise its hypothec and that ordering specific performance will be unduly harsh under the circumstances of the case.
- [12] It was further argued on behalf of the respondent that the terms of the Bonds were unconscionable and *contra bonos mores* and should not be enforced for this reason.
- [13] The court has been referred to various cases dealing with the discretion which could be exercised in matters pertaining to the perfection of notarial bonds. The respondent referred the court to *Dev Bank of South Africa Ltd v Van Rensburg* NNO 2002 (5) SA 425 (SCA) where it was acknowledged that a bond holder who applies for leave to attach the hypothecated goods in terms of a perfection clause is in effect asking for specific performance. It was found that as in other cases

where specific performance is sought the court had a discretion whether or not to grant the order.

- [14] This view that it was a discretionary issue was also stated by Grosskopf J (as he then was) in *Intl Shipping Co (Pty) Ltd v Affinity (Pty) Ltd* 1983 (1) SA 79C. In this case reference was made to an unreported judgment delivered on 15 April 1982 by Didcott J in *Barclays National Bank Ltd and Another v Natal Fire Extinguishers Manufacturing Co (Pty) Ltd and others (D)*. With reference to this judgment the court commented as follows:

“In the last mentioned case Didcott J stressed, however, that the Court retain a discretion to grant an order of this type, which is an order for specific performance. I venture to suggest that, in ordinary circumstances, the Court would require cogent considerations to exercise its discretion adverse to the mortgagee. There is, after all, no other remedy, such as a claim for damages available to him. And whereas the Court may well consider it is desirable to enforce every detailed provision of the notarial bond like the present one, the Court would in my view be reluctant to deny the mortgagee all claims to security under the bond if it is sought to be enforced prior to the mortgagee’s insolvency.”

- [15] The very same issue became the subject matter of a decision by Harms JA in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and others* [2003] 1 All SA 267 (SCA) where at paragraph 10 it was found as follows:

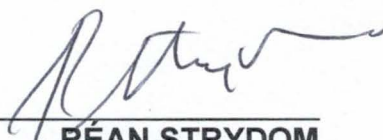
“... I also do not understand the reference to the court’s discretion. Although aware of dicta by Didcott J to the effect that there is a discretion, I cannot see how a court, in the exercise of its discretion, can refuse an order to an applicant who has a right to possession of a pledged article to take possession. The principles relating to the limited discretion to refuse specific performance apply only where the creditor has another remedy, such as a claim for damages, at its disposal. A claim for damages cannot replace a claim for real security. 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 a discretion have regard to what is fair and equitable in that particular court's view and so dispossess someone of a substantive right."

- [16] As was stated by Harms JA, the applicant in this matter does not have an alternative remedy for damages and, even if it did, such a claim cannot replace its claim for real security over the respondent's movable property as was agreed between the parties.
- [17] I am in agreement with this *ratio* that the discretion should only be exercised in a case of specific performance where another remedy exists.
- [18] It was argued on behalf of the respondent that such alternative remedy in fact does exist in ordering lesser performance than is provided for in the Bonds. On the facts of this matter I am not satisfied that such alternative remedy does exist. No evidence was placed before the court to make a finding on the extent of the value of the movable property over which the Notarial Bond was registered. A lesser remedy than that what was asked for is accordingly not available to the applicant and therefore not an alternative remedy.
- [19] I am further of the view that the respondent did not show that the terms of the Bonds are contrary to public policy. In coming to this conclusion the court followed the *ratio* in *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA). In this judgment Heher JA's findings made it abundantly clear that perfection provisions in notarial bonds are indeed lawful and enforceable.
- [20] In my view the respondent has failed to convince this court that the Bonds should not be perfected. The respondent has not demonstrated that the probabilities

show that the enforcement provisions will be implemented in an unconscionable, immoral manner and/or constitute illegal conduct.

[21] In my view the applicant has made out a case for the relief which it seeks and the court makes an order in terms of the draft order which was provided to court by the applicant, this order will be marked with an "X".



---

**RÉAN STRYDOM**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

Date of hearing: 30 August 2022

Date of Judgment: 05 September 2022

**Appearances**

For the Applicant: Adv. D. Van Niekerk

For the Respondent: Adv. L Hollander

u X u  
R. Strydom  
5/09/2022

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

**CASE NO.: 2022-013036**

On this the 30<sup>th</sup> day of August 2022 before the Honourable Justice Rean Strydom

In the matter between:

**THE SPAR GROUP LIMITED**

and

**MEADOW VIEW TRADING 147 CC T/A MEYERTON**

**SPAR AND TOPS**

**Applicant**

**Respondent**

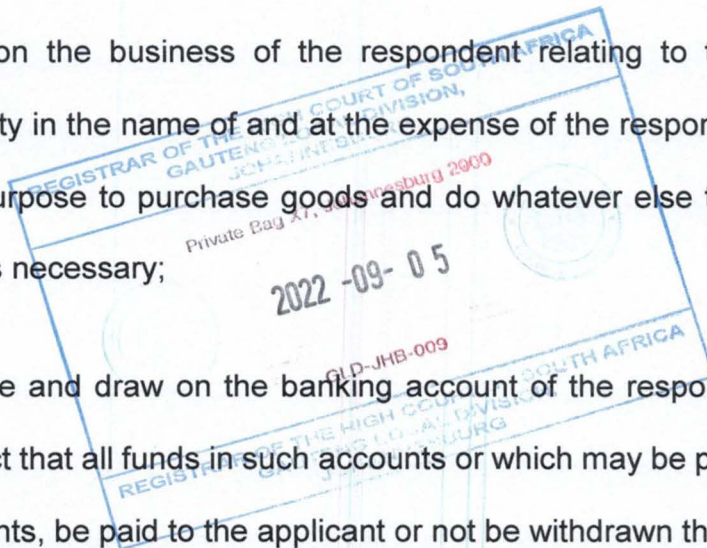
~~DRAFT ORDER~~

**HAVING** read the documents filed on record, having heard counsel and having considered the matter, the following order is granted:

1. The forms and procedures provided for in the Uniform Rules of Court are dispensed with and this matter is heard as one of urgency in terms of Rule 6(12)(a);
2. The applicant is authorised for the purposes of perfecting its security in terms of the General Notarial Bond with Number BN 14/59897 and the General Notarial Covering Bond with Number BN 17/14983, to enter upon the respondent's premises or any other place where any of the

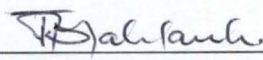
respondent's movable property, corporeal or incorporeal, ("**the movable property**") is situated and:

- 2.1. take possession of and retain all or any of the movable property belonging to the respondent and to retain such possession for so long as the applicant may deem fit and/or to sell and dispose thereof 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 or transferee/s and to collect in all monies due to the respondent in respect thereof;
- 2.2. carry on the business of the respondent relating to the 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;
- 2.3. operate and draw on the banking 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;
- 2.4. sign or subscribe on behalf of the respondent to all applications or agreements for transfer of licences, quotas, permits, registration certificates and the like which relate to the movable property and to effect the cession and delegation of the rights and/or obligations of the respondent as lessee or lessor under any lease to which the respondent is a party;



- 2.5. take proceedings at law in the name of either the respondent or the applicant as the applicant thinks fit for the recovery of any debts due to the respondent;
- 2.6. sign and complete all forms, declarations, agreements and the like as may be necessary or desirable to record the sale, disposal and/or transfer, as the case may be of any of the movable property;
- 2.7. have the movable property excused by legal process; and
- 2.8. take possession of and realise by public auction or by private treaty or otherwise, all or any of the movable property.
3. The costs of this application shall be paid by the respondent on the scale as between attorney and client.

**BY ORDER OF THE COURT**

  
**COURT REGISTRAR**



**APPLICANT'S COUNSEL**

Adv. Dean van Niekerk  
Group 21, Sandown  
082 886 8307  
dvn@law.co.za