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

CASE NO: 2025-056881

(1) REPORTABLE: **YES/NO**

(2) OF INTEREST TO OTHER JUDGES: **YES/NO**

(3) REVISED:

DATE: 16/5/25

SIGNATURE

In the urgent application between:

PICK 'N PAY RETAILERS PROPRIETARY LIMITED

(Registration number: 1973/004739/07)

Applicant

And

LAKESIDE CITY TRADING 226 PROPRIETARY LIMITED

T/A PICK 'N PAY FAMILY STORE PROTEA NORTH

(Registration number: 2009/000657/07)

Respondent

ORDER AND JUDGEMENT

ROUX AJ

[1] This matter came before the Court as an urgent application brought by the Applicant, Pick 'n Pay Retailers Proprietary Limited, seeking to perfect a general notarial covering bond registered over the movable assets of the Respondent, Lakeside City Trading 226 Proprietary Limited t/a Pick 'n Pay Family Store Protea North. The order will allow for Pic a Pay to act in accordance with the terms of the bond

[2] The Respondent opposed the application and brought a counterapplication for a stay of the proceedings pending the finalization of a Promotion of Access to Information Act (PAIA) application.

[3] Having considered the extensive arguments presented by counsel in their heads of Argument (which assisted the court to focus on the crux of the issues at stake and for which I thank counsel), the evidence contained in the filed affidavits, and eloquently articulated oral submissions, this Court granted an order in favour of the Applicant on 13 May 2025. The order was as follows, with reasons to follow: -

1. *The applicant is authorised and empowered through its duly authorised representative and/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 2 April 2009 under registration number B[...] ("the Bond").*
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:*
 - a. *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;*
 - b. *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, the Pick n Pay Family Store Protea North, situated at shop number 1[...], 2[...] N[...] Drive, Protea North Tshiawelo, 1[...]; and the Pick n Pay Liquor Store, situated at shop number 1[...], 2[...] N[...] Drive, Protea North, Tshiawelo, 1[...].

- c. 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: to engage and dismiss staff in its absolute discretion and on such terms as it may determine; to purchase goods of every description provided that the applicant shall be restricted to the normal course of the respondent's business; subject to the landlord's consent, to hire, cancel and vary the terms of the leases of the premises of the respondent; to lock, and change the locks, on the premises of the respondent; to receive, uplift, open and keep in its custody post whether addressed to the business or to the respondent; to operate any banking account conducted by the respondent; to discharge the debts of the respondent and other liabilities, including its liabilities to the applicant in terms thereof; to sue for and recover from any debtor of the respondent all and any debts owing and arising from whatsoever cause; to draw and endorse checks, bills of exchange, promissory notes and other negotiable instruments;*
- d. discharge each of the respondent's liabilities to the applicant in terms thereof/of the Bond 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 7 (seven) days, by private treaty;*

- e. *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;*
 - f. *apply for and procure the transfer of all licenses, quotas, permits, registration certificates and the like that may have been issued to the respondent;*
 - g. *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;*
 - h. *sublet, cede and/or assign such rights and/or obligations in respect of any lease and/or sub-lease of the premises of the respondent;*
 - i. *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; and/or*
 - j. *employ such other remedies and to take such other steps against the respondent as are in law allowed.*
3. *The respondent is ordered to pay the costs of this application on an attorney and own client scale, in terms of clause 16.2 and 16.4 of the Bond, including the costs of senior counsel.*

THESE ARE MY REASONS:

[4] The Applicant's case for the urgent perfection of the Bond was predicated on the Respondent's admitted substantial indebtedness, which arose from goods ordered and delivered on credit, as well as rental. It was common cause that the Respondent was defaulting on its payments to the Applicant by failing to pay for stock ordered in full. The common cause indebtedness, on any version, amounts to at least R 6 000 000.00. Despite a formal written demand for payment, the Respondent failed or refused to satisfy its debt obligations. The Applicant argued that the immediate perfection of the Bond was critical to prevent irreparable harm and to preserve the continuous devaluing value of its security, as the Respondent's financial position was precarious and deteriorating daily.

[5] The Applicant relied on established legal principles regarding the perfection of general notarial covering bonds. A franchise structure inherently provides benefits to the franchisee, which are protected under the franchise agreement and notarial bond. The court in *Juglal NO and Another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) at paragraph [15] described the nature of these relationships as follows:

"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 favorable 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."

[6] This franchise structure, as seen in ***Juglal***, is similar to the current relationship between Pick 'n Pay and Protea North. Pick 'n Pay's direct payment to suppliers and subsequent invoicing of Protea North solidifies its claim to perfect its security, as the stock forms part of the movable assets. This not only secures Pick 'n Pay's financial interests but also justifies the urgency of perfection to prevent further financial erosion and Pick a Pay's ranking order in case of liquidation. Without perfecting the bond, it will

be a mere concurrent creditor. It goes without saying that the Pick a Pay brand and reputation will suffer immense prejudice, if Protea North be left to become a sinking ship. This will inevitably happen very fast, once stock levels fall and creditors pounce. On Respondent's own version, it has traded to "...bankruptcy..."

[7] In *Juglal* in paragraph [27], the Supreme Court of Appeal rejected the contention that a franchisor's enforcement of contractual rights (including operating the business or enforcing a security interest) was oppressive. The Court confirmed that such rights (when exercised in terms of clear contract provisions) do not become oppressive simply because they may result in the loss of the franchisee's business, especially where the franchisee voluntarily accepted the risk of entering into the agreement.

[8] The same reasoning applies in this case. Protea North knowingly entered into a franchise agreement and the Bond with Pick 'n Pay, both of which provide for enforcement upon default. The alleged extreme and draconian consequences (such as control of the business or cessation of trading) are not unfairly imposed but arise from contractual rights that Protea North willingly assumed. As the Court held in *Juglal*, such consequences do not exceed the commercial risks that a franchisee accepts in exchange for access to a national supply chain, bulk discounts, and credit facilities.

[9] In *Pick n Pay Retailers Proprietary Limited v Kemptongate Foodlane Proprietary Limited and others*, 2024 JDR 0952(GJ) at par 37 Cassim AJ held that the perfection of a bond with similar terms as those in the present matter, is an urgent remedy available to an applicant and is not contrary to public policy and enforceable in our law.

[10] Cassim AJ cited *IDC and Bokona Group of Companies case number 2022/027186*, wherein Korf AJ stated the following principles:

- 1.1 In *Contract Forwarding Contract Forwarding Pty Ltd v Chesterfin Pty Ltd and Others* 2003 (2) SA 253 (SCA) it was reiterated that a pledge under a notarial bond is a real right established by taking possession, not

merely by agreement. Harms J emphasized the Latin maxim: *vigilantibus non dormientibus iura subveniunt* “the law aids those who are vigilant, not those who sleep”. This underscores the need for proactive steps by Pick ‘n Pay to perfect security interests without further delay.

- 1.2 As to the judicial discretion of a court to refuse the perfection of a general covering notarial bond, Korf AJ pointed out that the Supreme Court of Appeal has held that, in the enforcement of a notarial bond, the court has limited discretion to refuse an order. Unless there is a conflict with the Bill of rights or another legal prohibition, the court cannot override the bondholder’s substantive right to possession merely because it may seem unfair or inequitable (as stated in *Kemptongate* par 9).

[10] The bondholder’s right to take possession is not subject to equitable considerations unless fundamental legal principles are breached. No case is made for such breach. Vague noises of inequitable bargaining powers and gentlemen’s agreements are uttered, with no proper facts proffered. Respondent labored under the mistaken impression that Pick a Pay is in actual fact “*expropriating*” them. This is a misreading and misunderstanding of the clear terms of the bond.

[11] In *Pick ‘n Pay Retailers Proprietary Limited v Northern Suburbs Supermarket Proprietary Limited* 2024 JDR 3362 (GJ), the court confirmed that perfection applications of general notarial bonds are inherently urgent due to the bondholder’s real right to secure its assets upon default. Senyatsi J stated:

“The perfection application under the circumstances of this case is by its nature, urgent and may, in appropriate circumstances, be granted on an ex parte application basis.”

[12] Senyatsi J further affirmed in *Northern Suburbs*, that the prescription sought by Pick ‘n Pay would not only safeguard its business sustainability and protect its goodwill but

would also serve the interests of all parties involved, including Protea North and other stakeholders.

[13] In the matter of *Pick 'n Pay Retailers (Pty) Ltd v Cascade Avenue Trading 158 (Pty) Ltd* 2024 JDR 1296 (NCK) Phatshoane DJP decisively affirmed the urgency of perfection applications, even where there may have been a short delay in launching the application. In that case, the urgent application was issued 13 days after the notice of breach, and Cascade sought to challenge urgency on this basis. Notwithstanding this delay, the court found that the urgency remained intact due to the ongoing weekly losses of R1.4 million suffered by Pick 'n Pay. Phatshoane DJP held in paragraph [6]: -

“The respondent is of the view that the applicant’s concerns are not legitimate because it failed to act soon upon the notice of breach. In my view, a sustained commercial loss would require that the matter be disposed of on a truncated basis. The applicant would not be afforded substantial redress at a hearing in due course.” [own emphasis]

[14] Furthermore, Cascade argued that bond perfection is a “*radical measure*” that should only be granted in “*exceptional circumstances*”. This argument was rejected by Phatshoane DJP, who stated:

“I could find no authority for the proposition that perfection of security is available only in exceptional circumstances. Equity and empathy cannot override contractual arrangements between parties.”

[15] The judgment underscores the principle that a bondholder's contractual right to security is paramount and enforceable in the ordinary course, not just in “*exceptional circumstances*”. Any delay in enforcement, particularly where there is ongoing commercial loss, would unjustly prejudice the bondholder's real right to protection and recovery. In this case, no delay was excessive, instead, the Applicant did not act overhastily, neither did it drag its feet.

[16] The Applicant emphasised that the court's discretion to refuse an order for perfection of a general covering notarial bond, subject of course to the jurisdictional requirements of urgency being met, is limited and cannot override the bondholder's substantive right to possession merely because it may seem unfair or inequitable, unless there is a conflict with the Constitution or another legal prohibition. No such prohibition exists here, whether in fact or law.

[17] The Court carefully considered the Respondent's grounds of opposition. Regarding the alleged "gentleman's agreement," the Applicant denied its existence and argued that any variation of the written franchise agreement would be invalid due to the express non-variation clause requiring variations to be in writing and signed by both parties. This is a sound argument and concurs with the principle established in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43, confirmed in *Affirmative Portfolios Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) AT [13], where a contract has been reduced to writing, the written document is generally regarded as the exclusive memorial of the transaction, and parole evidence is inadmissible to contradict, alter, add to, or vary its terms, absent proven fraud. The Respondent's reliance on an informal agreement could therefore not stand against the clear terms of the written agreements.

[18] As for the stay application based on the PAIA request, the Applicant argued that the request sought sensitive commercial information not permissible under PAIA and irrelevant to the right to perfect the Bond. The Applicant contended that it had already fulfilled its disclosure obligations under the Consumer Protection Act and Regulations and that the requested information was classified as highly sensitive and commercially confidential, falling within the protection afforded by section 68 of PAIA.

[19] The Applicant correctly argued, relying on *Manuel v Sahara Computers (Pty) Ltd and Another* 2020(2) SA 269 at 44, that PAIA cannot be used as a form of pre-litigation discovery to examine the merits of an already formulated claim or to test prospects of success. The Court agreed with the Applicant's submissions in this regard. The

Respondent's stated intention for the information was to determine the extent to which the Applicant might be profiting from its operations or abusing them to the Respondent's detriment and to bring proceedings under the Consumer Protection Act thereafter. This clearly indicated an attempt to use PAIA as a substitute for the discovery process, which is legally impermissible. Respondent may of course pursue its claims in future, though the merits are, to my mind, doubtful, at best.

[20] The Respondent's reliance on an alleged R9 million damages claim as a basis to resist perfection was equally unpersuasive. It was common cause that the Respondent's debt to the Applicant significantly exceeded the R6 million secured by the Bond. The alleged damages claim was unrelated to the enforcement of the Applicant's security rights under the Bond. The perfection of a notarial bond is a contractual right triggered upon default, irrespective of any ancillary disputes over damages.

[21] In *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others*, Harms JA stated: -

Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others 2003 (2) SA 253 (SCA) at 260 B to D Harms JA stated:

"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."

[22] Thus, the bondholder's right to possession is enforceable upon default, irrespective of counterclaims or allegations of damages. Protea North's reliance on a speculative damages claim cannot displace Pick 'n Pay's entrenched contractual right to perfect its security a court cannot refuse an order to an applicant who has a right to possession of a pledged article to take possession, and a claim for damages cannot replace a claim for real security. The Respondent's attempt to link its alleged damages claim to the perfection process is found to be an attempt to frustrate the Applicant's clear rights

under the Bond. The express prohibition of set-off in the franchise agreement further rendered this argument untenable.

[23] The Respondent's arguments regarding urgency and the Applicant's alleged delay were also considered. While the Respondent contended that the Applicant had delayed in seeking perfection, the Applicant argued that the urgency was due to the Respondent's worsening financial position and growing debt. The Court accepted the Applicant's argument that ongoing commercial loss justifies proceeding on a truncated basis, as the Applicant would not be afforded substantial redress at a hearing in due course. The mere fact that the Applicant continued to supply stock did not negate the urgency or indicate the Respondent's solvency, but rather a protective mechanism by the Applicant to safeguard its own commercial interests and brand integrity.

[24] In conclusion, the Court found that the Applicant had demonstrated a clear contractual right to perfect the Bond based on the Respondent's admitted default and substantial indebtedness. The Respondent's grounds of opposition, including the alleged informal agreement, the pending PAIA application, and the alleged damages claim, are without merit and insufficient to resist the Applicant's right to perfect its security. The urgency of the application was established by the precarious financial position of the Respondent and the need to protect the Applicant's security interest.

[25] It was for these reasons that the Court granted the order as set out in paragraph [3] above, including the order for costs on an attorney and own client scale as provided for in the Bond.

[26] The counter application was struck, though the court listened to arguments in relation thereto. The striking resulted from the fact that the counter application was not causally urgent and interconnected with the scope of the perfection order. This had to comply of its own with the requirements for urgency and compliance with the practice directives of this court. It did not, and instead of dismissing it, the striking allows for

Respondent to pursue it, in the normal course of the motion court. This too, is to my mind, without any definitive finding, doubtful.

J ROUX AJ
16 May 2025