REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 2749/2025

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: **20 October 2025**

SIGNATURE:

In the matter between:

THE SPAR GROUP LIMITED	**APPLICANT**
And	
VOLEMO TRADING ENTERPRISE (PTY) LTD t/a NJHAKA NJHAKA BUILD IT and t/a ELIM BUILD IT	**FIRST RESPONDENT**
VONANI STANLEY MAKONDO	**SECOND RESPONDENT**
MOKOENA CHRISTINA MAKONDO	**THIRD RESPONDENT**

REASONS FOR JUDGMENT

DU PLESSIS AJ:

Introduction:

[1] The Applicant applied for an order authorizing the perfecting of its security in terms of general notarial covering bonds, and an order as set out in the Notice of Motion.

[2] In addition thereto ancillary orders were sought to give effect to the order set out above as well as a cost order against the respondents on an attorney and client scale.

[3] The Respondents opposed this application.

Background:

[4] The Applicant and the First Respondent entered into two written credit agreements.

[5] As security for facilitating the credit to the Respondents, the following General Notarial Covering Bonds were registered in favour of the Applicant: B[...], [...]2, B[...]3 and B[...] 4("the Bonds").

[6] The First Respondent breached the agreements between the parties and then failed to rectify the breach, which lead to the Applicant launching this application in terms whereof it requested this Court to authorize the perfecting of its security in terms of the bonds.

[7] The Respondents admitted being indebted to the Applicant.

Legal Framework:

[8] In **Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and others**[1] the Supreme Court of Appeal considered the perfecting of a notarial bond and held that:

[1] Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others (17/2002) [2002] ZASCA 143; [2003] 1 All SA 267 (SCA); 2003 (2) SA 253 (SCA) (27 November 2002) at [4] – [6].

"[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.[2] 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 fraud[3] or an intentional interference with contractual relationships.[4] However, constructive knowledge is not enough to bring the doctrine into play.[5] Though it can be said that the registration of a notarial bond amounts to notice to the world of the existence of the claim,[6] the world is not bound to take notice or deemed to have notice.[7] I mention this aspect because the Court below apparently held that the earlier notarial bondholders were entitled to some precedence above later bondholders.[8]

[6] Real rights are stronger than personal rights and in the case of conflicting real rights the principle prior tempore potior iure applies.[9] The right in question, <u>a pledge, is a real right, which is established by means of taking possession</u>[10] 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."

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[2] *Coaton v Alexander* 1879 Buch 17, *Cato v Alion and Helps* (1922) 43 NLR 469.
[3] *Grant and Another v Stonestreet and Others* 1968 (4) SA 1 (A) 20B-F.
[4] *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).
[5] *Grant and Another loc cit.*
[6] *Hare v Trustee of Heath* (1884-1885) 3 SC 32 at 34.
[7] *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) 583E-G.
[8] At 167B-D.
[9] CG van der Merwe *Sakereg* 2ed p 64.
[10] My emphasis.

[9] It is therefore confirmed that in order to perfect a notarial bond, which is a security instrument for movable assets, the creditor must obtain possession of the bonded property.

[10] Possession of the bonded property creates a limited real right which is enforceable against third parties. Registration of the bond alone does not create this right.

[11] The creditor must take possession of the movables to perfect the bond. This is typically achieved by a court order or a perfecting clause in the bond and it is enforced at the instance of the bondholder.

[12] The First Respondent has failed to adhere to the terms and conditions of the credit facility and the Bonds despite multiple indulgences and final demands that were made by the Applicant.

[13] This breach has triggered the Applicant’s right to perfect its security as provided for in the bonds.

[14] The Respondents admitted that they are indebted to the Applicant. The First Respondent owns and operates both Njhaka Njhaka Build It as well as Elim Build It.

[15] It is common cause between the parties that Njhaka Njhaka Build It was not receiving stock from the Applicant, which means that it was either no longer operating or had received credit facilities from other creditors.

[16] There thus exists a risk that other creditors of the First Respondent might proceed with legal steps against the First Respondent, supporting the Applicant’s right to perfect its security.

[17] If the notarial bond is not perfected the Applicant would only have a statutory preference over other concurrent creditors upon the debtor’s insolvency, but not a full security right against all third parties.

[18] In **Absa Bank Limited v Go On Supermarket (Pty) Limited**[11] the Court stated the following:

> *"With reference to the maxim vilantibus non dormientibus iura subveniunt (the law should favour the vigilant creditor) and the general principle that a right of pledge is established when a creditor under a general bond takes possession of the movables, the court concluded that Absa was entitled to the pledged movable property to perfect its security under the general notarial bond."*

[19] It is expected of a creditor to be "vigilant in the protection of its interests and rights," which was what the Applicant did by bringing the application and protecting its rights.

[20] The Respondents argued that payments were made, but also do not deny that the First Respondent is unable to make sufficient payments as and when they become due and payable.

[21] The Respondents further admitted that there were financial difficulties experienced due to the rain during the months of December 2024 to February 2025, but they failed to explain to this Court why their payments were outstanding since 10 October 2024.

[22] This acknowledgement by the Respondents of the debt which is due and payable to the Applicant further confirmed the Applicant's right to apply for the relief sought.

[23] The Respondents tried to separate the indebtedness in respect of the Njhaka Njhaka Build It and the Elim Build It, arguing that there is only an amount due in respect of the Njhaka Njhaka Build It. This does not change the fact that both facilities belong to the First Respondent.

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[11] Absa Bank Limited v Go On Supermarket (Pty) Limited (The Spar Group Limited Intervening) (9442/2022) [2022] ZAGPJHC 173 (24 March 2022).

[24] This is done in an attempt to exempt the property of the Elim Build It facility from the perfecting of the bonds over the assets of the Applicant.

[25] The Respondents further argued that there is an amount of R1,905,000.00 held under a Development Fund in favour of the Njhaka Njhaka Build – It and argued that these funds should be used to pay the outstanding balance due to the Applicant.

[26] In its address to this argument the Applicant explained that the Development Fund is for the development of the business, its purpose is not to pay the debt of the First Respondent and may not be used for such purposes.

[27] It must also be noted that the First Respondent is not entitled to the Development Funds, but must apply and be approved in order for it to be allocated for development of the First Respondent's business.

[28] The First Respondent has made such an application on a previous occasion and has been denied the allocation of the Development Funds.

[29] Even if the funds under the Development Fund is applied to the outstanding debt (which is not what it is meant for), it will still leave an amount outstanding, which is due and payable to the Applicant. Thus it will not solve the breach of the First Respondent.

Conclusion:

[30] In **Pick 'n Pay Retailers Proprietary Limited v Northern Suburbs Supermarket Proprietary Limited**[12] it was held that:

> *"[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*

[12] Pick 'n Pay Retailers Proprietary Limited v Northern Suburbs Supermarket Proprietary Limited (2024/083061) [2024] ZAGPJHC 765 (2 August 2024).

for not granting a perfection order in the exercise of the discretion by court.[13] *This is so because in doing so, once the bond is perfected, real rights are conferred on the assets perfected. The onus is on the applicant to discharge and meet the requirements relating to breach as agreed to with the respondent."*

[31] It is common cause that the First Respondent has breached the terms of the agreement and that it is not able to comply with the payment terms as set out in the agreements between the parties.

[32] The Applicant launched this application because it faces the risk of losing its security, as against third parties, if it is not perfected.

[33] The Respondents have not raised any defense to demonstrate to this Court that the Applicant is not entitled to the relief claimed.

[34] Having considered all the aforementioned factors, in my view, it is in the interest of justice that the Applicant be authorized to perfect the bonds in order to secure the debt.

Costs:

[35] The default practice in awarding costs is that costs ordinarily follow the result but that the issue of costs is in the discretion of the court.[14]

[36] The Court finds that there is no reason for the Applicant to be deprived of his costs.

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

[14] Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) at [224], [227] and [228]; Limpopo Legal Solutions v Eskom Holdings (Soc) Limited 2017 (12) BCLR 1497 (CC) at [20] ("Eskom").

[37] The parties have contractually agreed that in the event of a breach, all costs shall be on an attorney and client scale, thus the Court is inclined to grant costs accordingly.

Order:

[38] **It is for the above reason that the following order was made:**

1. Judgment is granted against the Respondents, the one paying , the others to be absolved, for:

   1.1 payment in the sum of R3,007,730.95 (three million seven thousand and thirty rand and ninety five cent); and

   1.2 interest on the aforesaid sum at a rate equal to 5% above the prime overdraft lending rate charged by the Applicant's principal bankers, calculated from the December 2024 to date of final payment;

2. The Applicant is authorised for the purposes of perfecting its security in terms of the following General Notarial Covering Bonds numbered B[…], B[…]2 and B[…]3; and B[…]4 ("the Bonds") to enter upon the First Respondent's premises or any other place where any of the First Respondent's movable property, corporeal or incorporeal, ("the movable property") is situated and:

   2.1. The Applicant's duly authorised representatives to take charge, possession and control of the movables at the First Respondent's business premises and the Applicant is allowed to control the movement of all the movables brought onto or removed from the business premises, at the direction of the Applicant. The Applicant's duly authorised representatives would hold the keys to (and ensure the security of) the business premises. It being recorded that the proceeds of all movables sold or disposed of by the First Respondent would be paid into a bank account designated by the Applicant;

   2.2. transfer and cede out and out, its right, title and interest in and to all amounts owing to it, including but not limited to its debtors, to the Applicant so arising from the Bonds and the cession of debtors;

2.3. to accept that the Bonds are perfected in accordance with the provisions thereof;

2.4. and undertake to allow the Applicant to operate and draw on the banking accounts of the First Respondent, and to instruct that all funds in such accounts, or which may be paid into such accounts, be paid to the to the Applicant or that any funds held to the credit of the First Respondent, in the said accounts, not be drawn on by the First, Second and Third Respondents and / or any third party acting on their behalf;

2.5. that the Applicant may take proceedings at law, in the name of the First Respondent as it deems fit for the recovery of any and all debts due to the First Respondent;

2.6. authorise and permit the Applicant to enter any premises where the First Respondent carries on its businesses and to:

2.6.1 take possession of and retain all or any of the movable property belonging to the First 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 Firs Respondent in respect thereof;

2.6.2 carry on the business of the First Respondent relating to the movable property in the name of and at the expense of the First Respondent and for that purpose to purchase goods and do whatever else the Applicant deems necessary.

2.6.3 operate and draw on the banking account of the First Respondent and to instruct that all funds in such accounts or which may be paid into such accounts, be paid to the Applicant or be not withdrawn therefrom or to the order of the First Respondent;

2.6.4 sign or subscribe on behalf of the First 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 affect the cession and delegation of the rights and / or obligations of the First Respondent as lessee or lessor under any lease to which the First Respondent is a party;

2.6.5 take proceedings at law in the name of either the First Respondent or the Applicant as the Applicant thinks fit for the recovery of any debts due to the First Respondent.

2.6.6 sign and complete all forms, declarations, agreement 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.

2.6.7 have the movable property excused by legal process; and

2.6.8 take possession of and realise by public auction or by private treaty or otherwise, all or any of the movable property.

3. That the Application is not obliged, in carrying on the business of the First Respondent, to use its own capital for the running of the First Respondent's business, and that all capital required in order to carry on the business of the First Respondent remains the responsibility of the First Respondent;

4. That the Respondents pays the costs of this application on the scale as between attorney and client jointly and severally.

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ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

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